

# CRS Report for Congress

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## **WTO: Antidumping Issues in the Doha Development Agenda**

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# WTO: Antidumping in the Doha Development Agenda

## Summary

At the November 2001 Ministerial meeting of the World Trade Organization (WTO) in Doha, Qatar, WTO member countries launched a new round of trade talks known as the Doha Development Agenda (DDA). One of the negotiating objectives called for “clarifying and improving disciplines” under the WTO Antidumping and Subsidies Agreements. Since antidumping is the most frequently used trade remedy action worldwide, most of the discussion focused on changing ways that WTO members administer antidumping (AD) actions.

WTO negotiations in the DDA directly involve Congress since any trade agreement made by the United States must be implemented by legislation. In addition, Congress has an important oversight role in trade negotiations as provided in legislation granting presidential Trade Promotion Authority in the Trade Act of 2002 (P.L. 107-210).

The frequent use of antidumping actions by the United States and other developed nations has come under criticism by other WTO members as being protectionist. Many Members of Congress defend the use of U.S. antidumping actions brought as necessary to protect U.S. firms and workers from unfair competition. However, because the United States is also a leading target of antidumping actions by other countries, some U.S. export-oriented firms may support changes to the Antidumping Agreement.

The positions of major players in trade remedy talks are well-documented by position papers circulated through the WTO Negotiating Group on Rules, and some countries have recently called for accelerating the pace of negotiations in this area. Most of the proposals on trade remedies focus on changing the Antidumping Agreement, currently a somewhat ambiguous document that gives broad guidelines for conducting AD investigations, in order to provide more specific definitions and stricter procedures. The goal of many of the WTO members seems to be to lower the level of antidumping duties provided per investigation and/or to provide more restrictions on the ability of officials to grant relief to domestic industries.

The gap between the U.S. position, where there is strong support in Congress to preserve the rights of WTO members to provide AD relief to domestic industries, and the viewpoints of other countries appears to be wide and may be difficult to narrow, but some countries see revision of the Antidumping Agreement and other WTO disciplines on trade remedies as a “make or break” issue if the DDA is to succeed.

This report examines antidumping issues in DDA negotiations by analyzing the issue in three parts. The first provides background information and contextual analysis for understanding why the issue is so controversial. The second section focuses on how antidumping issues fit into the DDA, and the third section provides a more specific overview of major reform proposals that are being considered. This report will be updated as events warrant.

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# WTO: Antidumping in the Doha Development Agenda

## Introduction

At the November 2001 Ministerial meeting of the World Trade Organization (WTO) in Doha, Qatar, WTO member countries launched a new round of trade talks known as the Doha Development Agenda (DDA). One of the negotiating objectives members agreed to address, in spite of opposition from U.S. negotiators, called for “clarifying and improving disciplines” on trade remedies.

Trade remedies are laws used by countries to mitigate the adverse impact of various trade practices on domestic industries and workers. Antidumping (AD) laws provide relief to domestic industries that have suffered material injury or are threatened with material injury resulting from imports originating in any country that are sold in the importing market at prices shown to be less than their fair market value (LTFV). AD laws and actions are often controversial because many trade experts view them as protectionist. Others believe that they are an essential means of mitigating the adverse impact of unfair trade on domestic companies, workers, and the communities in which they are located.

Historically, multilateral negotiations on antidumping have been extremely contentious; in fact, some analysts claim that a failure to reach consensus on the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement) was largely responsible for delaying the completion of the Uruguay Round negotiations by as long as two years.<sup>1</sup> In the DDA, a coalition of developed and developing nations known as the “Friends of Antidumping” are pushing for reforms that many in Congress oppose and U.S. negotiators are resisting. However, many WTO members regard trade remedy — especially antidumping — reform as a “make or break” issue in terms of their acceptance of any final DDA agreement. The gap between the U.S. position and that of other countries is large and may be difficult to bridge.

Present negotiations on antidumping in the DDA are taking place within the framework of the WTO Negotiating Group on Rules. In the initial phase of Rules negotiations, the major issues on antidumping and the positions of interested parties were established through position papers written by WTO members.<sup>2</sup> Recently, some

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<sup>1</sup> Dunn, Alan M. “Antidumping.” In Stewart, Terence P., ed., *The World Trade Organization: The Multilateral Trade Framework for the 21st Century and U.S. Implementing Legislation*, Washington, DC: American Bar Association, 1996, p. 246.

<sup>2</sup> See World Trade Organization, Negotiating Group on Rules, *Compilation of Issues and* (continued...)

countries have indicated that they want to accelerate the pace of negotiations on Rules and are ready to begin text-based negotiations.

This report analyzes the issue in three parts. Section one provides background information and contextual analysis for understanding why the issue is regarded as controversial. It briefly discusses the Antidumping Agreement, U.S. antidumping laws and how they have worked in practice. Some U.S. stakeholders, including many U.S. industries and workers, believe that U.S. laws are effective and should not be changed or weakened. Others, including many foreign exporters to the U.S. market, U.S. exporters to international markets, U.S. manufacturers dependent on lower-cost inputs for their products, and other domestic importers of goods subject to AD actions, want to change the allegedly arbitrary way in which they are implemented.

The second section focuses on how antidumping issues fit into the DDA. The mandate to negotiate is explained and negotiating activity to date summarized. The nature of the reforms being considered is described in general terms.

Section three provides a more specific overview of major reform proposals that are being considered. Many proposals attempt to regulate the manner by which countries assess dumping margins. Other submissions call for tightening rules or providing more specific definitions for terminology used in the WTO Antidumping Agreement. These proposals, if implemented, could significantly reduce the number of permissible AD investigations and/or the amount of duty margins assessed, thus reducing significantly the protective impact of the remedies.

## Background and Analysis

“Dumping” is defined in U.S. law as the actual or likely sale of merchandise imported into the United States at “less than its fair value” (LTFV) when these sales cause or threaten material injury to a U.S. industry manufacturing similar goods, or materially retard the establishment of a U.S. industry.<sup>3</sup> This practice is condemned in WTO rules as an unfair trade practice that can cause market disruption and injure producers of like products in the receiving market.<sup>4</sup> Antidumping laws are used by the United States and many U.S. trading partners in an effort to lessen the adverse impact of unfairly traded imports on domestic industries, producers and workers.

Trade remedy actions, particularly AD actions, continue to be a subject of intense debate within Congress, the WTO, and the international business community. Stakeholders in favor of preserving and strengthening AD laws include many U.S. import-competing industries vulnerable to the effects of increased trade liberalization. The steel and chemical industries have used antidumping measures

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<sup>2</sup> (...continued)

*Proposals Identified by Participants in the Negotiating Group on Rules*, Note by the Chairman, TN/RL/W/143, August 22, 2003.

<sup>3</sup> 19 U.S.C. 1673.

<sup>4</sup> General Agreement on Tariffs and Trade (GATT) 1994, Article VI (1).

frequently, but smaller industries (such as honey and crawfish) have also initiated successful AD petitions. Many in Congress have expressed a compelling interest in ensuring that the firms and workers they represent are able to compete on a “level playing field” in the face of increased global competition from firms that use unfair trade practices to gain greater U.S. market share, and believe that AD laws and actions are essential tools to that end.

Stakeholders in favor of eliminating or scaling back these actions include domestic retailers and U.S. consuming sectors, such as the automobile or construction industries, that import raw materials or other inputs to include in their downstream products. U.S. exporters have also expressed support for relaxing AD laws because they face similar actions in other countries, and could bear the immediate effects of any trade retaliation if any U.S. laws are determined not to conform to WTO disciplines. Many multinational corporations also favor AD reform because they might have greater freedom to ship products at various stages of development across national boundaries for further transformation. These stakeholders, concerned about selling or producing goods at the lowest cost so that their end-use goods are also competitive, often accuse users of AD action of being protectionist and administrative officials of making arbitrary and politically motivated decisions.

## **WTO Antidumping Agreement**

The General Agreement on Tariffs and Trade 1994 (GATT 1994) and the Antidumping Agreement set forth general governing principles applicable between WTO members, including the “most-favored-nation” principle and guidelines for market access and treatment of imported goods. 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 Antidumping Agreement clarifies and expands Article VI by laying out guidelines for determining if dumping has occurred, identifying the “normal value” of the targeted product, and assessing the dumping margin. The Agreement also provides specific rules for administrative authorities responsible for 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 negligible (less than 3% of total product imports 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 Antidumping Agreement, all WTO Member countries must inform the Committee on Antidumping Practices about anti-dumping actions, promptly and in detail, and must also report on all ongoing investigations.<sup>5</sup>

## U.S. AD Laws

Although U.S. laws generally conform to the current WTO Antidumping Agreement, some U.S. laws and investigations have been successfully challenged through the WTO dispute settlement process. Recently, in response to an adverse WTO ruling, Congress repealed the Antidumping Act of 1916, which provided for criminal and civil penalties for any person importing goods in the U.S. market with the intent of destroying a domestic industry in the United States.<sup>6</sup> WTO dispute settlement panels and the WTO Appellate Body have also ruled against the Continued Dumping and Subsidy Offset Act (CDSOA), or “Byrd Amendment,” which requires that all duties collected pursuant to antidumping and countervailing investigations must be redistributed to qualified petitioners and interested parties that have been injured by the subject imports.<sup>7</sup> Due to strong congressional support for the law, there is resistance to repealing it. It is also possible that a U.S. administrative practice known as “zeroing” will face a WTO challenge in the near future. This practice is discussed in a later section.

In the United States, AD investigations generally begin with the filing of a petition by a domestic industry or representative (e.g. 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.<sup>8</sup> 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 (LTFV); and the International Trade Commission (ITC), which investigates injury allegations. These agencies conduct preliminary and final investigations in a detailed administrative process with specific time lines.<sup>9</sup>

If affirmative final determinations are made by both agencies, an “AD duty order” imposing a duty equivalent to the “dumping margin”<sup>10</sup> is issued for the targeted product. This duty is intended to offset the effects of dumping by creating a “level

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<sup>5</sup> World Trade Organization. “Introduction to Antidumping in the WTO,” [<http://www.wto.org>].

<sup>6</sup> 15 U.S.C. 72. The Antidumping Act of 1916 was repealed in the Miscellaneous Tariff and Technical Corrections Act of 2004 (P.L. 108-429). Cases currently pending under the act were permitted to go forward.

<sup>7</sup> 19 U.S.C. 1675c.

<sup>8</sup> 19 U.S.C. 1673. The ITA may also self-initiate an investigation (19 U.S.C. 1673a(a)).

<sup>9</sup> For a more thorough discussion of U.S. antidumping laws and administrative procedures, please see CRS Report RL32371, *Trade Remedies: A Primer*.

<sup>10</sup> 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.

playing field” for the domestic producer. According to current U.S. law, all duties collected as a result of AD duty orders are distributed to the petitioners and interested parties as provided by the CDSOA.<sup>11</sup>

U.S. law also allows the ITA to suspend an investigation 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.<sup>12</sup> In each case, the ITA must be satisfied that the agreement is in the public interest and that effective monitoring by the United States is practicable.<sup>13</sup>

All AD 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.<sup>14</sup> “Changed circumstances” reviews may also be requested at any time, but the ITA must determine whether there is sufficient cause to conduct the review.<sup>15</sup> 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). In a changed circumstances review, the ITC also reviews whether a revocation of the order is likely to lead to continuation or recurrence of material injury, or whether a suspension agreement continues to eliminate completely the injurious effects of the imports of subject merchandise.<sup>16</sup>

“Sunset” reviews must be conducted on each AD order no later than once every five years.<sup>17</sup> 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 be likely to continue or resume. If both determinations are affirmative, the duty or suspension agreement remains in place. If either determination is negative, the order is revoked, or the suspension agreement is terminated.<sup>18</sup> In practice, sunset reviews of AD orders resulted in continuations about 53% of the time, according to

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<sup>11</sup> 19 U.S.C. 1675c.

<sup>12</sup> 19 U.S.C. 1673c(b) and (c).

<sup>13</sup> 19 U.S.C. 1673c(a)(2) applies to quantitative restrictions. 19 U.S.C. 1673c(d) applies to other alternative agreements.

<sup>14</sup> 19 U.S.C. 1675(a).

<sup>15</sup> 19 U.S.C. 1675(b).

<sup>16</sup> 19 U.S.C. 1675(b)(2).

<sup>17</sup> 19 U.S.C. 1675(c).

<sup>18</sup> 19 U.S.C. 1675(d).

ITA statistics, and several U.S. AD orders have been in effect since the mid-to-late 1970s.<sup>19</sup>

## International AD Activity

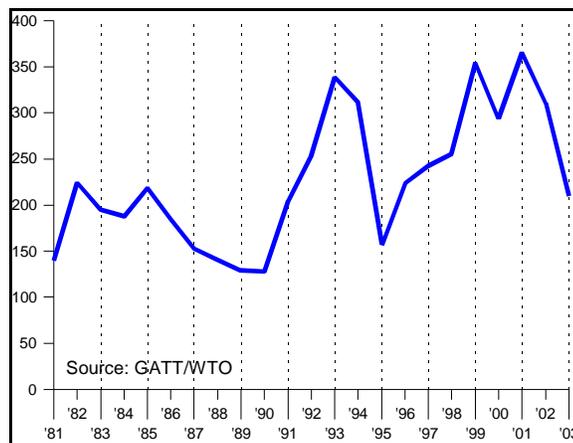
Many WTO members are concerned about an apparent escalation of AD activity worldwide, especially since the implementation of the Antidumping Agreement in 1995. This is one of the reasons that led to the pressure for including WTO disciplines on antidumping in DDA negotiations.

Supporters of antidumping measures acknowledge that AD activity has increased (at least prior to 2003), 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 unfair trading practices, such as dumping, will also have a natural tendency to increase.<sup>20</sup>

WTO statistics on worldwide AD activity may help illustrate the scope and magnitude of the problem. According to antidumping statistics for 1981-2003 (see **Figure 1**), the total number of AD initiations rose steadily from 1990 to 1993, decreased sharply in 1994 and 1995 and peaked again in 1999, before reaching an all-time high of 366 in 2001.<sup>21</sup> However, AD activity has been declining since then. In fact, on November 1, 2004, the WTO Secretariat announced that from the period of January 1, 2004 to June 30, 2004 there were 52 final AD measures implemented

(duties imposed as well as suspension agreements), as opposed to 114 during the same period in 2003.<sup>22</sup> The rapid decline has led some more skeptical observers to speculate that countries are curbing their appetite for antidumping activity due to the

**Figure 1. Worldwide Antidumping Initiations, 1981-2003**



<sup>19</sup> ITA investigation statistics [<http://www.ia.ita.doc.gov/stats/>].

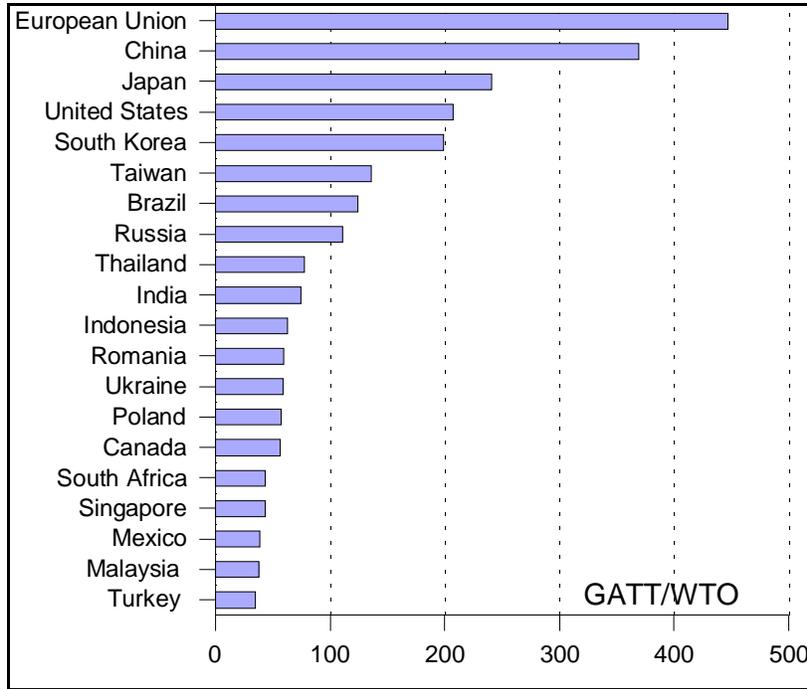
<sup>20</sup> World Trade Organization. "Basic Concepts and Principles of the Trade Remedy Rules," Submission of the United States TN/RL/W/27, October 22, 2002.

<sup>21</sup> All AD statistics in this section originate from the following sources, unless otherwise indicated: World Trade Organization. *Report of the Committee on Anti-Dumping Practices to the General Council, 2003*, and *Report of the Committee on Anti-Dumping Practices under Article 16.4 of the Agreement*, various years and countries. Tables reflecting AD activity since 1995 are available at [[http://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_e.htm](http://www.wto.org/english/tratop_e/adp_e/adp_e.htm)].

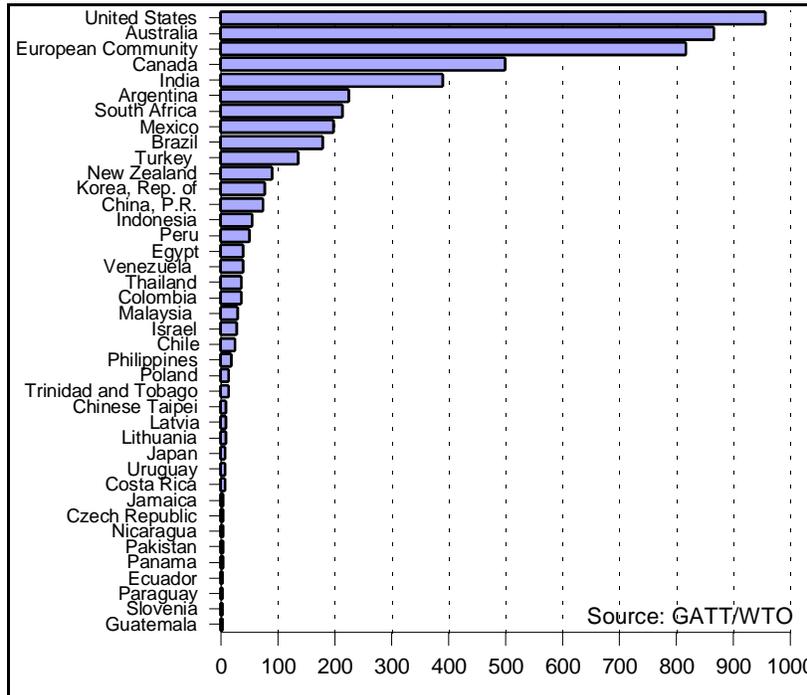
<sup>22</sup> World Trade Organization. "WTO Secretariat Reports Significant Decline in New Final Antidumping Measures." Press Release, November 1, 2004, PRESS/387, [[http://www.wto.org/english/news\\_e/pres04\\_e/pr387\\_e.htm](http://www.wto.org/english/news_e/pres04_e/pr387_e.htm)].

ongoing DDA negotiations. Since international activity seems to vary widely from year to year, it is unclear if the trend toward fewer measures will continue.

**Figure 2. Leading Targets of Worldwide AD Initiations, 1981 - 2003**



**Figure 3. Combined Antidumping Initiations by WTO Member, 1981-2003**



**Figure 2** shows the number of AD initiations by country for the same time period. According to WTO statistics, the United States initiated the most AD petitions (955), followed by other “traditional” users — Australia (865), European Communities (816), Canada (488). However, developing countries and newer users of AD action follow, including India (388), Argentina (224), South Africa (213), Mexico (196), Brazil (178), and Turkey (135). India, for example, has had antidumping laws in place only since 1992, when it initiated five AD investigations. Since then, it has made frequent use of its AD law, initiating 379 cases from 1995-2003. China, a WTO member since December 2001, had already initiated 72 AD investigations by the end of 2003. **Figure 3** illustrates the leading targets of AD initiations from 1981 - 2003. The European Union heads this list (446), followed by China (369), Japan (240), United States (207), South Korea (198), and Taiwan (135).

## Antidumping Negotiations in Doha

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 observers believed that a new trade round would give the world economy a much-needed stimulus. U.S. officials wanted to negotiate expanded market access for U.S. exporters, especially in the agriculture and service sectors.<sup>23</sup>

As a result of mounting international concern on expanding trade remedy activity in general; about antidumping in particular, a coalition of developed and developing WTO member countries called the “Friends of Antidumping” — 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 — believed that any new framework for negotiations should include talks on improving WTO trade remedy rules.

The European Union may have joined the coalition of developing countries, in part, because it is a leading target of antidumping measures. EU trade officials expressed concern at Doha, primarily concerning major differences among countries in their interpretation and application of WTO rules in their domestic trade remedy procedures.<sup>24</sup> Many of the developing nations in the “Friends of Antidumping” group argued that trade remedy action disproportionately affects their economies, and that the Antidumping Agreement should require that developed nations provide some form of “special and differential treatment” when investigating products originating in developing nations.<sup>25</sup>

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<sup>23</sup> See CRS Report RL32060, *The World Trade Organization: The Doha Development Agenda* by Lenore Sek.

<sup>24</sup> World Trade Organization. Negotiating Group on Rules. *Submission from the European Communities Concerning the Agreement on Implementation of Article VI of GATT 1994 (Anti-Dumping Agreement)*. TN/RL/W/13, July 8, 2002. [<http://docsonline.wto.org>].

<sup>25</sup> *Ibid.*, p. 3.

Then-U.S. Trade Representative (USTR) Robert B. Zoellick, aware of congressional interest in reserving the effectiveness of U.S. trade remedy laws, initially resisted efforts to open negotiations on the Antidumping Agreement.<sup>26</sup> However, U.S. negotiators relented when it seemed evident that the new round of talks would not go forward without some concessions on antidumping. They were able, however, to include language in the Doha negotiating documents that limited radical change, and were also successful in injecting a certain amount of ambiguity in terms of the mandate. The final language of the Doha Ministerial Declaration regarding trade remedies read as follows:

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. . .<sup>27</sup>

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 trade remedy measures by other WTO Member countries against U.S. exporters.<sup>28</sup> He also said 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.<sup>29</sup> Many congressional supporters of trade remedy laws believe that Zoellick did not try hard enough to leave them off the table, and subsequently are concerned about the ability of the USTR to negotiate in this area in a manner that is favorable to their manufacturing constituents.<sup>30</sup>

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<sup>26</sup> See CRS Report RS21610, *WTO: Trade Remedies in the Doha Round*, for a description of congressional activity.

<sup>27</sup> World Trade Organization. Ministerial Declaration. WT/MIN(01)/DEC/1, November 14, 2001, paragraph 28.

<sup>28</sup> “USTR Zoellick Says World Has Chosen Path of Hope, Openness, Development, and Growth.” Office of the U.S. Trade Representative. Press Release, November 14, 2001. [<http://www.ustr.gov/>].

<sup>29</sup> *Ibid*, p. 5.

<sup>30</sup> “Rockefeller Attacks Zoellick for Doha, Failure to Appear at Markup.” *Inside U.S. Trade*, December 13, 2001. [<http://www.insidetrade.com>].

## Major Issues in Negotiations

The Antidumping Agreement, 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 type of harmony in nations’ implementation of trade remedy laws. However, most of the proposals, if implemented, could also lessen the ability of petitioners to obtain relief. Because the Agreement, in essence, is designed to provide general rules for various administrative officials in WTO Member countries to follow when calculating dumping margins, determining injury, and granting relief, many of the proposals involve highly technical changes that are beyond the scope of this report. However, there are some specific discussion threads in presentations to date that can be explained in a very general way.

It is important to note that the DDA mandate specifies that negotiations on trade remedies are intended to “clarify and improve” the WTO Agreements rather than to eliminate them. With this in mind, many WTO members have identified key provisions they seek to address in future negotiations through proposals formally submitted to the WTO Negotiating Group on Rules.<sup>31</sup> No active negotiations have actually occurred on trade remedies to date, and many observers speculate that talks on these controversial issues will actually begin toward the end of the round.

Because the United States is a large user, but also a large target, of AD actions, there is a trade-off between the costs and benefits of modifications to the Antidumping Agreement. The United States could benefit from some of the suggested modifications, especially if they enhance the transparency of trade remedy procedures in other WTO Member countries. However, other proposals could raise the threshold for domestic petitioners’ ability to obtain relief, lower calculated dumping margin levels, or mandatorily limit the duration of antidumping orders.

Many of the suggested changes to the Antidumping Agreement are highly technical in nature; therefore, this discussion of DDA negotiations on antidumping focuses on suggested changes (1) for which there seems to be broad support among WTO members, and (2) which could potentially result in significant amendment to U.S. laws or administrative procedures. Several of these recommendations could affect ways in which authorities calculate dumping margins and determine injury. Another proposal seeks mandatory termination of AD orders after a specified period.

### Antidumping Duty Assessment

Many WTO members believe that the methodology used by some countries to calculate dumping margins leads to highly inflated duties that are disproportionate to the amount needed to mitigate the injury to the domestic industry, as well as the level of dumping practiced by the exporters. Some Members have particularly criticized U.S. methodology, where ITA-calculated dumping margins typically

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<sup>31</sup> World Trade Organization. Negotiating Group on Rules. *Compilation of Issues and Proposals Identified by Participants in the Negotiating Group on Rules*. Note by the Chairman. August 22, 2003, TN/RL/W/143, [<http://docsonline.wto.org>].

average between 60 and 70 percent.<sup>32</sup> Consequently, revisions in the Antidumping Agreement that could lower dumping margins are expected to be a major focus in the DDA.

Some proposals that have drawn broad support include a ban on “zeroing,” a mandatory “lesser duty” rule, and increased use of “price undertakings.” Some of the proposed changes would affect primarily ITA administrative rules for calculating dumping margins. However, other proposals in this area may require amendments to U.S. antidumping law.

**Ban on Zeroing.** In U.S. law, AD orders 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.”<sup>33</sup> The ITA 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 a subcategories, known as “averaging groups,” which are used to calculate the “weighted average export price.” The 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 the overall dumping margin of the targeted product.<sup>34</sup>

When authorities add up the dumping margins of each of the subgroups to establish an overall dumping margin for the subject merchandise, they sometimes encounter negative margins in a subgroup, an indicator that the items in that category are not being dumped. However, rather than including the negative margin in their calculations, which might result in a lower overall dumping margin, ITA officials factor in the results of that subgroup as a zero.<sup>35</sup> 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, when determining the weighted average dumping margin, the subgroup that has the negative dumping margin represents a substantial percentage of export sales.

The U.S. practice is currently being challenged in the WTO on a number of fronts. On February 6, 2004, the European Union formally requested the establishment of a dispute settlement panel on zeroing, citing 31 U.S. AD cases targeting products of the EU. The EU claims that in these cases the dumping margin

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<sup>32</sup> Prusa, Thomas J. “Anticompetitive Effects of Antidumping.” Presentation at American Enterprise Institute, March 18, 2004.

<sup>33</sup> 19 U.S.C. 1677 (35)(A).

<sup>34</sup> See Department of Commerce, Import Administration. *Antidumping Manual*, Chapter 6, “Fair Value Comparisons.” 1997 edition. [<http://ia.ita.doc.gov/admanual/index.html>].

<sup>35</sup> 19 U.S.C. 1677f-1(d)(A)(i) and (ii).

would have been minimal, or even negative, if U.S. officials had not used zeroing. A panel was established on March 19, 2004.<sup>36</sup>

On November 24, 2004, Japan requested consultations with the United States on zeroing, citing 15 cases that the practice was used when calculating dumping margins on Japanese merchandise.<sup>37</sup> Mexico requested consultations on zeroing on January 10, 2005, as it related specifically to a dumping determination on stainless steel products.<sup>38</sup> A dispute settlement panel has been established on one other complaint by Mexico, involving U.S. zeroing practices on oil country tubular goods from Mexico.<sup>39</sup> On December 10, 2004, Thailand also requested WTO consultations on zeroing, challenging use of U.S. practice when establishing provisional duties on shrimp exports.<sup>40</sup>

Since the European Union's practice of zeroing has already been found to violate the Antidumping Agreement in a dispute settlement case brought by India, many observers speculate that any dispute proceeding against the United States on the practice will produce a similar result.<sup>41</sup> Therefore, in order to come in compliance with U.S. obligations, the ITA may have to abandon the practice even before the DDA is concluded.

The U.S. practice of zeroing is neither required, nor prohibited, by U.S. law; therefore it is not clear if congressional action would be required if the United States loses one of these disputes or if the DDA changes the rules.<sup>42</sup>

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<sup>36</sup> World Trade Organization. Dispute Settlement Body. *United States — Laws, Regulations, and Methodology for Calculating Dumping Margins (“Zeroing”)*. Request for the establishment of a panel by the European Communities, WT/DS294/7, February 6, 2004. Available at [<http://docsonline.wto.org>].

<sup>37</sup> World Trade Organization. Dispute Settlement Body. *United States — Measures Relating to Zeroing and Sunset Reviews*. Request for Consultations by Japan, WT/DS322/1, G/L/720, G/ADP/D58/1, November 29, 2004.

<sup>38</sup> World Trade Organization. Dispute Settlement Body. *United States — Anti-dumping Determination Regarding Stainless Steel from Mexico*. Request for Consultations by Mexico, WT/DS325/1, G/L/727, G/ADP/D60/1, January 10, 2005.

<sup>39</sup> World Trade Organization. *United States — Anti-dumping Measures on Oil Country Tubular Goods from Mexico*. Request for the Establishment of a Panel by Mexico. WT/DS282/2, February 26, 2003. World Trade Organization. *United States — Anti-Dumping Determinations Regarding Stainless Steel from Mexico*. Request for Consultations by Mexico WT/DS325/1, January 10, 2005.

<sup>40</sup> World Trade Organization. Dispute Settlement Body. *United States — Provisional Anti-Dumping Measures on Shrimp from Thailand*. WT/DS324/1, G/L/726, G/ADP/D59/1, December 14, 2004.

<sup>41</sup> World Trade Organization. Appellate Body. *European Communities — Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, March 1, 2001.

<sup>42</sup> See *Serampore Industries Pvt. Ltd. v. U.S. Department of Commerce*, 696 F. Supp. 665 (1988).

**Mandatory Lesser Duty Rule.** Article 9.1 of the Antidumping Agreement encourages the imposition of an AD duty lower than the full dumping margin if investigating authorities determine that the lesser amount is sufficient to offset the injury suffered or threatened to the domestic industry. Many WTO members favor amending the Antidumping Agreement to require a *mandatory*, rather than discretionary, “lesser duty rule.” Developing countries are especially interested in seeing a mandatory rule applied to exports from their countries, and have proposed this measure as part of a “special and differential treatment” package of trade concessions offered by developed nations to developing countries.<sup>43</sup> There is currently no “lesser duty rule” in U.S. law or practice, and enactment of a mandatory rule might require congressional action.

**“Price Undertakings”.** Article 8 of the Antidumping Agreement allows the use of “voluntary undertakings from any exporter to revise its prices or to cease exports to the area in question at dumped prices” provided that investigating authorities are satisfied that the injurious effect of the dumping is eliminated. Many WTO members favor increased use of “price undertakings,” because they believe that the practice is less damaging to exporters, while also mitigating the injury to domestic producers.<sup>44</sup> Some developing countries favor mandatory use of price undertakings by developed country members in AD cases involving developing countries.

U.S. antidumping law allows for similar alternative arrangements, known in U.S. law as suspension agreements,<sup>45</sup> but in practice, the ITA does not use them very often. At present, there are only six U.S. suspension agreements and one quantitative restriction agreement in place, in comparison to more than 260 active AD orders.<sup>46</sup>

## Proposed Changes in Injury Determinations

Another major focus of proposals for amending the Antidumping Agreement is redefining and streamlining the methodology by which administrative authorities determine injury. Some WTO members believe that the guidelines and definitions in the Agreement are too subjective and that procedures lack transparency in many countries.<sup>47</sup> Some proposals in this area involve designing new rules that provide more precise guidance or objective criteria when making injury determinations, while others favor more precise definitions for the terms in Agreement such as “material injury,” “material retardation,” or “threat of material injury.” Some negotiators believe that factors other than dumping are often to blame for industry declines and

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<sup>43</sup> World Trade Organization. Negotiating Group on Rules. Note by the Chairman. *Compilation of Issues and Proposals Identified by Participants in the Negotiating Group on Rules*, TN/RL/W/143, August 22, 2003, p. 49.

<sup>44</sup> *Ibid.*, page 46.

<sup>45</sup> See 19 U.S.C. 1671c.

<sup>46</sup> ITA statistics [<http://www.ia.ita.doc.gov/stats/>]. Quantitative restriction agreement is on 15 steel products from Russia. See also CRS Report RL32371, *Trade Remedies: A Primer*.

<sup>47</sup> See World Trade Organization. Negotiating Group on Rules. *Compilation of Issues and Proposals Identified by Participants in the Negotiating Group on Rules*. Note by the Chairman. August 22, 2003, TN/RL/W/143, [<http://docsonline.wto.org>], pp. 15-20.

consequently favor objective criteria for establishing the existence of a clear and substantial link to dumping before determining injury.<sup>48</sup>

## Mandatory Sunset of AD Orders

The current Antidumping Agreement 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 use of sunset and administrative reviews that determine if relief is still needed. In particular, many have complained that U.S. authorities base sunset review determinations inordinately on submissions by the domestic industry. They claim that, consequently, U.S. AD orders are likely to remain in place as long as the domestic industry opposes their removal.<sup>49</sup>

There seems to be strong support among WTO members for a mandatory termination of AD orders within five years. Other Members favor a more moderate approach that would list specific circumstances or definitive factors that authorities must consider before extending AD orders. Others criticize the length of time that sunset review procedures take to complete and favor a mandatory twelve-month time limit.<sup>50</sup>

## Possible Effects of Changes

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

More specifically, proposals to change dumping margin calculations likely would require changes in the way in which the ITA calculates the level of relief that

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<sup>48</sup> World Trade Organization. Negotiating Group on Rules. *Antidumping: Illustrative Major Issues*. Submission by Brazil, Chile, Colombia, Costa Rica, Hong Kong, China, Israel, Japan, Korea, Mexico, Norway, Singapore, Switzerland, Thailand, and Turkey. April 26, 2002, p. 3.

<sup>49</sup> One representative example of this view is World Trade Organization. Negotiating Group on Rules. "Proposal on Reviews." Paper from Brazil; Chile; Colombia; Costa Rica; Hong Kong; China; Israel; Japan; Korea; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand. TN/RL/W/83, April 25, 2003 [<http://docsonline.wto.org>].

<sup>50</sup> World Trade Organization. Negotiating Group on Rules. *Compilation of Issues and Proposals Identified by Participants in the Negotiating Group on Rules*. Note by the Chairman. August 22, 2003, TN/RL/W/143, pp. 58, 143 [<http://docsonline.wto.org>].

domestic companies will gain from AD action. Most of these changes can be accomplished administratively, via regulations and procedural changes. However, legislation may be necessary to enact some of the proposals, at least for the sake of greater official transparency. Lower dumping margins would, in turn, reduce the amount of CDSOA disbursements that U.S. petitioners and interested parties receive as the result of AD action.

Suggestions for changes in procedures for determining injury could result in fewer changes to U.S. laws and administrative procedures (which already provide considerable quantitative guidance, narrow definitions, and specific timetables) than they would in other WTO members. U.S. exporters might benefit from enhanced transparency in AD investigations in receiving markets, while U.S. industries seeking AD action 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 modifications in this area could lead to changes that could diminish the use and effectiveness of AD actions.

Proposals for modifying the duration of AD orders, such as requiring mandatory sunset after five years, could have a significant effect on U.S. domestic industries. The United States currently has 192 AD orders<sup>51</sup> that have been in effect longer than five years (the oldest, 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.<sup>52</sup> 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.

## 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 a trade agreement under special legislative procedures that limit debate and allow no amendment. Therefore, any negotiated WTO agreement is subject to an “up or down” vote in both Houses.

However, 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

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<sup>51</sup> ITC statistics, [[http://www.usitc.gov/trade\\_remedy/731\\_ad\\_701\\_cvd/index.htm](http://www.usitc.gov/trade_remedy/731_ad_701_cvd/index.htm)].

<sup>52</sup> Ibid.

representatives from the House Ways and Means and Senate Finance committees.<sup>53</sup> Since many members were particularly concerned about modifications to the Antidumping Agreement, the TPA approval 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.<sup>54</sup> 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.<sup>55</sup> Although the disapproval resolution would not be binding on the President or on the USTR, such a resolution, if passed, would send a clear message that Congress resists any modifications to the WTO Agreements that would weaken U.S. trade remedy laws.

It should be noted that TPA expires on June 1, 2005, although an additional two-year extension is possible if the President submits such a request and the Congress does not disapprove. Although almost all observers expect the President to receive the extension, some believe that the TPA extension could be debated in one or both Houses some time this spring.<sup>56</sup> It is possible that DDA negotiations in general, and antidumping issues in particular, will be one focus of this discussion. This debate, along with debate on a resolution of disapproval on WTO membership that is also expected to come up in the 109th Congress, are opportunities for Members concerned with antidumping issues to voice those concerns on the floor.

The United States has already been found to be in violation of its WTO obligations with regard to the CDSOA, and it is anticipated that the WTO challenge on zeroing will result in a similar determination. Therefore, some observers claim 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 affect U.S. trade remedy laws.

Currently, the gap between the U.S. position on antidumping and that of our WTO trading partners appears to be very wide and may be difficult to narrow. However, trade negotiators from all countries must weigh concessions made against gains in other areas in the WTO negotiations.

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<sup>53</sup> 19 U.S.C. 3807. See CRS Report RL31974, *Trade Agreements: Requirements for Presidential Consultations, Notices, and Reports to Congress Regarding Negotiations*, by Vladimir Pregelj.

<sup>54</sup> 19 U.S.C. 3804 (d)(3)(A).

<sup>55</sup> 19 U.S.C. 3804(d)(3)(C).

<sup>56</sup> Meeting of the Washington International Trade Association."2005 Congressional Trade Agenda." Remarks of Everett Eissenstatt, Brian Pomper, Angela Ellard, and Tim Reif, January 26, 2005.