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Comparison of U.S. And Foreign Antidumping Practices

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The Honorable Bob Packwood
Ranking Minority Member
Committee on Finance
United States Senate

The Honorable Daniel Patrick Moynihan
United States Senate

As requested, we are providing a comparison of the antidumping policies and practices of the United States and its major trading partners. This report follows our July 1990 fact sheet on the use of the GATT Antidumping Code (GAO/NSIAD-90-238FS).

We are sending copies of this report to the Secretary of Commerce, the Office of the U.S. Trade Representative, and the International Trade Commission. Copies will also be made available to other parties upon request.

Please contact me on (202) 275-4812 if you or your staff have any questions concerning this report. The major contributors to this report are listed in appendix II.

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Executive Summary

Purpose

During the current Uruguay Round of the General Agreement on Tariffs and Trade negotiations, some signatories to its 1979 Antidumping Code are seeking to limit the use of antidumping measures and to more clearly define what constitutes dumping and its injurious effect on domestic industries.

Senators Daniel Patrick Moynihan and Bob Packwood asked GAO to compare the antidumping policies and practices of certain major trading partners with those of the United States, focusing primarily on the following areas: (1) how much evidence is needed to initiate investigations, (2) how open, or "transparent," antidumping practices are to the parties involved and to the public, and (3) what rights of appeal on antidumping decisions are available.

Background

The Antidumping Code establishes guidelines for measures to counter the ill effects of dumping—defined as the sale of exported products at a price lower than that charged for the same or a like product in the home market of the exporter. To initiate an investigation, the code requires that signatories have "sufficient" evidence of dumping and resulting injury and that petitions be made by or on behalf of the industry affected. The code also calls for using procedures that will result in an equitable and open antidumping process. The code sets guidelines for the use of antidumping measures and related practices, but member countries are responsible for implementing the code under their own laws and regulations.

GAO examined the practices of traditional users of antidumping laws (Australia, the United States, Canada, and the European Community) and a new user, Mexico. Other U.S. trading partners have had little practical experience with antidumping actions.

Results in Brief

Sufficiency of evidence is not fully defined by the Antidumping Code. As a result, signatories can exercise a great deal of discretion in reviewing antidumping petitions and their supporting evidence when determining whether formal proceedings are necessary. Industry representatives and trade specialists have expressed specific concerns that the level of evidence required to initiate an investigation is low in the United States, the European Community, and Mexico. Fewer complaints were directed at Canada and Australia.

Although the code does not explicitly require that a party have "standing" to bring a petition (which refers to determining whether petitioning parties represent a major proportion of their industry), industry representatives and trade specialists have also expressed concern about the perceived laxness in practices for determining standing.

The degree of transparency varies among the signatories reviewed. In general, the United States appears to have the most open antidumping system, while the Mexican and European Community systems seem the least open in providing information on their decision-making process.

Each of the signatories included in GAO's review provides appeal rights to affected parties through administrative and judicial review. Signatories' administrative review of antidumping determinations differs in impact, frequency of use, and practice. Whether or not antidumping duties automatically terminate after a certain period of time greatly affects the importance and use of administrative review. The scope of judicial review is broader in the United States than in the other signatories.

GAO's Analysis

Sufficiency of Evidence

Trade experts and representatives of industries accused of dumping have raised concerns about the large amount of discretion signatories have in deciding whether evidence to initiate antidumping investigations is sufficient. The decision to initiate is important because of the potentially disruptive effects antidumping investigations can have on trade.

U.S. initial reviews of antidumping allegations and supporting evidence are viewed by many as less rigorous than those of other signatories primarily because (1) the Department of Commerce is precluded from considering information from respondents at the initial stage; (2) the U.S. antidumping system fosters the initiation of investigations by focusing almost exclusively on dumping, rather than on injury and causation; (3) Commerce strictly adheres to set time frames; and (4) Commerce assumes that the petitioner has standing unless proven otherwise.

GAO's review indicated that only 6 out of an estimated 171 petitions received by Commerce from 1986 through 1989 were dismissed without

investigation. However, a Commerce official explained that many potential petitions are eliminated through informal discussions.

The European Community and Mexican initial reviews are also thought to be less rigorous, although for different reasons. For example, GAO's review indicated that the Community's screening process focused primarily on the determination of injury and was less strict regarding evidence of dumping.

The laxness with which signatories determine whether a petitioner has "standing" has raised concerns that petitioners without standing may cause initiation of an investigation without sufficient evidence of injury. Such weakly supported investigations place a heavy administrative burden on the accused parties and can disrupt trade.

Transparency

Although the transparency of procedures followed by all major signatories has increased appreciably in recent years, U.S. procedures are still widely believed to be more transparent than those of Australia, Canada, the European Community, and Mexico. This openness is a function of several factors, including U.S. public hearings, its comprehensive and publicly available antidumping decisions, and its thorough disclosures of the bases of its decisions. Australia and Canada also have fairly transparent procedures, although both lack some of the features of the U.S. system.

Conversely, antidumping participants have criticized the procedures of the European Community and Mexico for their lack of transparency, although they have noted that procedures have improved in the European Community.

Rights of Appeal

While the Antidumping Code does not provide for appeal rights, administrative and judicial review is available in the signatories GAO examined. Administrative review generally involves modifying or revoking antidumping measures, based on changed prices or conditions. GAO found that the use of such review differs among the signatories. For example, the United States performs a large number of administrative reviews because it relies on these reviews to determine actual dumping amounts. In addition, affected parties use administrative review in attempting to end the imposition of antidumping duties. These actions

occur because U.S. law, as well as Mexican law, lacks a "sunset provision," which automatically terminates antidumping duties after a fixed period of time.

Judicial review, which involves appeals of antidumping decisions made to courts, is rather limited in most countries because the scope of the courts' review is primarily confined to issues of law. However, the U.S. Court of International Trade has interpreted its scope and jurisdiction broadly, to include review of factual issues not strictly related to the law. As a result, judicial review in the United States is thought to be more extensive and effective than that of others included in GAO's review. Affected parties are more likely to bring appeals in the United States than elsewhere. Parties in Australia, Canada, the European Community, and Mexico have been less inclined to appeal antidumping decisions to the courts for a variety of reasons.

Recommendations

This report provides GAO's analysis of U.S. and foreign antidumping practices; it contains no recommendations.

Agency Comments

As requested, GAO did not obtain official agency comments on this report. However, responsible officials were consulted during the review, and their views were incorporated where appropriate.

Contents

Abbreviations

CIT	Court of International Trade
EC	European Community
GAO	General Accounting Office
GATT	General Agreement on Tariffs and Trade
ITC	International Trade Commission

Introduction

Dumping is the sale of products for export at a price less than that charged for the same or a like product in the "home" market of the exporter. Such international price differences, or discrimination, may occur as a result of business strategies that exporters use, including: (1) increasing an overseas market share; (2) temporarily distributing products in overseas markets to offset slack demand in the home market; (3) lowering unit costs by exploiting large-scale production or learning by doing; and (4) maintaining stable prices during periods of exchange rate fluctuations. These business strategies could lead to dumping, as defined by international trade agreements.

Views on the harm caused by dumping differ. Economists generally view dumping as harmful only when it involves "predation," that is, intent by the dumping party to eliminate competition and gain monopoly power in a market. In practice, such predatory dumping has rarely been documented. International trade rules, which take political as well as economic concerns into account, view dumping and its potential harm more broadly. These rules define dumping as an unfair trade practice when it "materially"[1] injures a competing industry in the importing country. The rules provide for the imposition of antidumping duties, or fees, to neutralize the injurious effect of unfair pricing practices.

How Governments Deal With Dumping

The problem of dumping is not a recent phenomenon. Early in the 20th century, the United States and Canada enacted laws to deal with this practice. During and after World War I, the U.S. Congress adopted several antidumping statutes. The first U.S. antidumping legislation, the Antidumping Duty Act of 1916, required that "predatory intent" be shown. However, soon after its enactment, the act was considered insufficient to protect U.S. producers from dumped imports because of the predatory intent requirement. To supplement the 1916 act, the Congress enacted the Antidumping Duty Act of 1921, which forms the basis of current U.S. antidumping laws. This act provided for the application of antidumping duties to offset a margin of dumping.[2]

The General Agreement on Tariffs and Trade (GATT), which came into effect in 1948, defines the responsibilities and operating rules agreed upon by contracting governments to guide their conduct of international

[1]The term "material" is subject to interpretation. The Tariff Act of 1930, as amended, defines material injury as "harm that is not inconsequential, immaterial, or unimportant."

[2]The dumping margin is the percent by which the price charged for the same or a like product in the home market of the exporter exceeds the export price.

trade relations. The agreement includes a special provision on dumping; the provision does not prohibit dumping, but, rather, allows for a permitted response to dumping in certain circumstances. Article VI of the agreement allows GATT contracting parties to use antidumping duties to offset the margin of dumping, provided that dumped imports can be demonstrated to cause or threaten to cause "material injury" to competing domestic firms.

Over time, some GATT members began to view other countries' use of antidumping laws as creating a new barrier to trade. Therefore, during the Kennedy Round of GATT negotiations (1962-1967), the GATT contracting parties negotiated an Antidumping Code that provided a series of rules elaborating on the procedures and methodologies to be used in applying antidumping duties.

Negotiators took up the antidumping issue again in the Tokyo Round of GATT negotiations (1973-1979), partly to provide symmetry with a new agreement dealing with subsidies. The Tokyo Round produced six major agreements, or "codes," designed to reduce nontariff barriers to trade, including a new Antidumping Code. GATT members are not required to accept these codes and, in fact, not all have chosen to do so. As of September 1990, there were 24 signatories to the 1979 GATT Antidumping Code, representing only 35 of the 97 GATT member countries.[3]

The present code requires determinations of dumping and material injury, as well as a demonstration that dumped imports are causing the injury ("causation").[4] The code provides rules that (1) define dumping and injury, (2) describe the procedures by which signatory governments verify dumping allegations and apply antidumping measures, and (3) provide for dispute settlement. The code also requires signatories to submit semiannual reports of any dumping actions taken during the preceding half year.

Our July 1990 report on the use of the 1979 Antidumping Code showed that between 1980 and 1989, Australia, the United States, Canada, and the European Community (EC) initiated 95 percent of the 1,456 new

[3]Signatories of the 1979 Antidumping Code are Australia, Austria, Brazil, Canada, Czechoslovakia, the European Community (Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom), Egypt, Finland, Hong Kong, Hungary, India, Japan, South Korea, Mexico, New Zealand, Norway, Pakistan, Poland, Romania, Singapore, Sweden, Switzerland, the United States, and Yugoslavia.

[4]The Antidumping Code does not require that dumping be shown to be the primary cause of injury.

cases reported.[5] In addition, Mexico has been relatively active in initiating antidumping cases since it joined the code in 1987, while South Korea and Brazil have initiated considerably fewer cases.

Antidumping Systems Vary

The United States, Canada, the EC, and Australia have the most developed antidumping systems and practices, while other signatories lack practical experience with applying antidumping measures. A number of foreign government officials and experienced attorneys in countries actively using antidumping laws, fearing possible abuse of these laws, have expressed concern over their adoption and use by newly industrializing countries such as Mexico, South Korea, and Brazil. Others, however, believe such fears are exaggerated; they note that the antidumping laws should be seen as an improvement over the systems of onerous trade barriers that they replaced.

Information on antidumping procedures in countries other than the United States, Canada, the EC, and Australia is limited. Of the 11 code signatories[6] designated for our review, 2—Hong Kong and Singapore—have no national antidumping laws or systems. Due to their free-trade orientation, these countries do not support the use of antidumping laws and have not initiated any actions. South Korea, Brazil, Japan, and India have all developed national statutes to deal with dumping. However, Japan and India have reported no case initiations to the GATT, and South Korea and Brazil have reported only five and two initiations, respectively, between 1980 and 1989. As a result, these countries' actual antidumping systems and procedures are not well known. Therefore, our analysis focuses on the traditional users of antidumping laws (the United States, the EC, Canada, and Australia) and the new user with the largest number of cases initiated, Mexico. Appendix I contains a limited discussion of the laws and practices of South Korea, Brazil, Japan, and India.

The United States maintains a bifurcated system, established in 1954, whereby separate agencies determine whether the imports are being dumped and whether the dumped imports cause injury. Currently, the U.S. Department of Commerce is responsible for making preliminary and final determinations of dumping, while the U.S. International Trade Commission (ITC) makes preliminary and final injury determinations.

[5] International Trade: Use of the GATT Antidumping Code (GAO/NSIAD-90-238FS, July 25, 1990).

[6] The United States (for comparison), the EC, Canada, Mexico, Japan, South Korea, Hong Kong, Brazil, Singapore, Australia, and India.

The Canadian system is similarly bifurcated; however, Revenue Canada, which makes the preliminary and final dumping determinations, is also responsible for making the preliminary injury determination. The Canadian International Trade Tribunal only makes the final injury determination. One other major difference is that the Tribunal plays an adjudicatory role, whereas the ITC's efforts are not only adjudicatory but also investigative in nature.

The EC has jurisdiction over the use of antidumping measures in all member states. The EC charges one agency, the European Commission, with responsibility for conducting both dumping and injury investigations and making recommendations to the EC Council of Ministers, which has sole authority to impose and collect antidumping duties. EC member states also play a role in making antidumping decisions, through participation in the Advisory Committee, which advises the Commission at various stages during the proceedings.

Although the Australian Customs Service handled all phases of decision-making in past cases, far-reaching 1988 changes to Australia's legislation established the Antidumping Authority. The Authority now makes final recommendations concerning both dumping and injury (the Customs Service continues to make preliminary determinations of dumping and injury). The Authority is an administrative fact-finding body only; it lacks the adjudicatory powers of a tribunal.

Finally, Mexico's antidumping laws, enacted in 1986, give its Secretariat of Commerce and Industrial Development responsibility for making both dumping and injury determinations.

Dissension Limits Progress in GATT Antidumping Negotiations

Antidumping became an issue late in the Uruguay Round of GATT negotiations, which began in 1986. In 1989, countries targeted by antidumping measures, led by Hong Kong, raised the issue of renegotiating the 1979 Antidumping Code during the Uruguay Round of GATT negotiations. These countries sought to limit the use of antidumping measures and wanted clearer definitions of what constitutes dumping and injury.

Signatories started to present proposals in late 1989, and negotiations began early in 1990. Countries agreed that the vagueness of the code's terminology has led to different interpretations of the code and to the development of separate, divergent systems and practices by the major signatories. Proposals have been geared toward harmonizing and imposing more discipline on antidumping practices.

However, progress in the negotiations has been extremely limited, and negotiators remain divided on many issues. As of August 1990, parties were unable to reach agreement on a text to be used as the basis for negotiation. One GATT insider has expressed pessimism over prospects for successful conclusion of the negotiations. Others have stressed that the negotiations are extremely complicated and difficult. Although many parties agree on the need for procedural reforms to provide increased transparency (open procedures) and adequate judicial review, a few procedural issues, such as determining a complainant's standing to bring a case, remain divisive.

The most important and contentious issues in the negotiations involve not procedural but substantive matters: determination of dumping, injury, and causation. Representatives of some countries targeted in antidumping investigations believe that although improved procedures are important, the fundamental issue is methodology: the rules for determining dumping and injury. If these rules remain unfair, then improved procedures have little value, one official stressed.

U.S. industry views of the GATT antidumping negotiations mainly focus on issues of dumping methodology and are quite polarized. Traditional users of antidumping measures, such as steel producers and semiconductor manufacturers, together with the U.S. Chamber of Commerce, oppose any changes that will weaken current antidumping rules. In contrast, U.S. exporters and importers, multinational corporations, and computer manufacturers support revisions of antidumping rules, particularly the methods for calculating dumping, to reflect actual pricing practices. In spite of the lobbying efforts of groups seeking changes to the antidumping laws, U.S. officials support the position of the traditional users of antidumping law in the GATT negotiations, and they have strongly resisted proposed changes to the dumping calculation methods.

Objectives, Scope, and Methodology

Senators Daniel Patrick Moynihan and Bob Packwood requested that we compare certain antidumping procedures of the 1979 GATT Antidumping Code signatories who are major U.S. trading partners with those of the United States.

The objective of our review was to assess the antidumping procedures and practices of the United States, the EC, Canada, Australia, Mexico,

and, to a lesser extent, South Korea, Brazil, Japan, India, Hong Kong, and Singapore,[7] in the following areas:

- sufficiency of evidence to initiate investigations and to make preliminary and final determinations,
- transparency to the parties involved and to the public, and
- available rights of appeal.

To determine the legal requirements for applying antidumping measures, we reviewed the 1979 GATT Antidumping Code and discussed legal requirements with responsible government officials in the United States and its major trading partners. We also reviewed the antidumping legislation of these countries. To identify countries' antidumping procedures, we obtained and reviewed relevant regulations and procedural guidelines, when available. We also reviewed law journal articles and recent textbooks discussing the legislation and practices of these countries.

To assess actual antidumping practices, we interviewed government officials from agencies responsible for administering antidumping laws, other knowledgeable officials involved with making antidumping policy decisions, and numerous lawyers, consultants, and industry representatives who have had experience with antidumping investigations in the United States, the EC, Canada, Mexico, and Australia.[8] The industry representatives we contacted included both those who have filed antidumping petitions and those who have been named in petitions. We also met with representatives from Hong Kong, Singapore, Brazil, and the GATT Secretariat to obtain affected exporters' and GATT officials' perspectives on antidumping practices of code signatories and to receive a status report on the GATT Uruguay Round negotiations concerning the Antidumping Code.

Our information on antidumping practices is primarily based on research of available studies and discussions with knowledgeable practitioners. We did not perform any case-specific analysis of antidumping procedures.

As requested, we did not obtain written agency comments on a draft of this report. However, we discussed the information in this report with

[7]Appendix I contains a limited discussion of the laws and practices of South Korea, Brazil, Japan, and India. Hong Kong and Singapore have no antidumping legislation and are not discussed further.

[8]Throughout the rest of this report, we refer to these experts, who are involved with the application of antidumping laws, as antidumping "practitioners."

Department of Commerce and other agency officials during the course of our review and have incorporated their comments where appropriate. Our work was performed from July 1990 through September 1990 in accordance with generally accepted government auditing standards.

Sufficiency of Evidence for Initiating Investigations

The 1979 Antidumping Code and various national regulations allow the five signatories we reviewed a great deal of discretion in determining whether preliminary evidence is sufficient to initiate investigations. This discretion has permitted signatories to establish differing methods for reviewing antidumping petitions and supporting evidence to determine whether formal proceedings are necessary. While industry representatives and trade specialists expressed specific concerns that the level of evidence required to initiate an investigation is low in the United States, the EC, and Mexico, fewer complaints were directed at Canada and Australia. We also found that the rate at which antidumping petitions are accepted for investigation varies by signatory.

Although the code does not explicitly require that a petitioner have "standing" in order for an investigation to be initiated (i.e., determining whether petitioning parties represent a major proportion of their industry), practitioners expressed concern about the perceived laxness in how a signatory determines standing. Determining a complainant's standing to bring a case is viewed as one of several important issues being discussed during the Uruguay Round; however, it remains divisive.

Concerns Focus on Decisions to Investigate

The determination to initiate an antidumping case involves making three key decisions which rely, in varying degrees, on the extent of evidence available. These decisions are based on answering the following questions:

- Should an antidumping investigation be initiated?
- Is an affirmative preliminary determination of dumping and resultant injury warranted?
- Is an affirmative final determination of dumping and resultant injury warranted?

Sufficiency of evidence seems to be the most controversial factor in making the first decision—whether to initiate an antidumping investigation. For preliminary and final determinations, methodology issues (e.g., perceived inequities in calculating the dumping margin) rather than evidentiary issues seem to represent a stronger area of concern.

The decision to open a case is critical because of the potentially disruptive effects antidumping actions can have on trade and because of the heavy burden investigations place on respondents and other parties.

Antidumping investigations commonly involve requests that foreign exporters and domestic importers fill out detailed questionnaires, which can be as long as 200 pages. Questionnaires must be completed, translated as necessary, and returned to the investigating authority within about 35 days. Such requests can be particularly burdensome for small companies that lack sophisticated bookkeeping records or the resources to engage the services of attorneys or consultants to represent their interests.

Parties that elect not to complete questionnaires can be put at a disadvantage with respect to case outcomes. The code states that when parties do not provide requested information within a reasonable period, authorities may base findings on the best information available, which may simply be information supplied by the petitioner and the injured industry in support of the dumping allegation. In a recent study, one practitioner noted that the EC, when faced with an uncooperative party, based its findings on the least favorable information available, stating that there should be "no bonus for non-cooperation."

When subject to an antidumping action, some small businesses may simply "surrender" to the system by ceasing exports of the allegedly dumped product to the country initiating the action and pursuing other markets where trading policies are more open. A representative of the GATT Secretariat acknowledged that an antidumping investigation involves very comprehensive and burdensome requests for information. He further suggested, however, that dealing with such an antidumping investigation can be viewed as a potential cost of participating in another country's market.

Sufficiency of Evidence Provisions Open to Interpretation

The Antidumping Code requires that an investigation be initiated upon a written request that includes evidence of (1) dumping, (2) injury, and (3) a causal link between the dumped imports and the alleged injury. Rather than specifying what information is needed, the code simply says that there must be "sufficient evidence" to support the allegations. However, proposals that attempt to better define the concept of sufficient evidence have been considered during the Uruguay Round.

In the meantime, the legislative language used by some of the signatories we reviewed essentially leaves the issue of deciding what evidence is needed to support an antidumping petition up to the appropriate authorities. Although the provisions for each signatory address the need to substantiate the dumping, injury, and causation elements of an

antidumping action, what is needed to establish sufficient evidence for these elements varies by country.

Also, some signatories' legislation incorporates the provision that the antidumping complaint need only include evidence that is "reasonably available" to the petitioner. Government officials pointed out that there is no quantifiable, objective standard of how much evidence is "reasonably available" as well as how much is "sufficient." Rather, the amount of evidence needed differs from case to case and depends upon the nature of the product involved as well as on a myriad of other related factors. These factors include the size of the petitioning company and the accessibility of meaningful product and industry data.

We found that the discretion allowed by the code has permitted the signatories to use varying practices to review submitted antidumping complaints and decide whether to initiate formal investigations. Some key difference are noted in table 2.1.

Table 2.1: Differences in Initial Screening of Antidumping Petitions and Supporting Evidence

	United States	Canada	Australia	European Community	Mexico
Primary focus of review	Dumping	Dumping, injury, and cause	Dumping, injury, and cause	Injury	Dumping, injury, and cause
Minimum dumping margin standard[a] (in percent)	0.5	5	None used	1-2	None used
Precluded from considering information other than that submitted by the petitioner and facts in the public domain	Yes	No	Yes	No	No
Days allowed for initial review of petitions[b]	20	30	55	Open[c]	5[d]

[a]Standard used for identifying cases which may be deemed as too small or frivolous to pursue in light of the time and resources needed to process an antidumping case. The dumping margin is the percent by which the price charged for the same or a like product in the home market of the exporter exceeds the export price.

[b]This figure represents the number of days between the filing of an antidumping complaint and the decision to initiate a case. Some signatories also allow time for a review of the complaint to assure that it has been properly documented. For example, Canada allows an additional 21 days.

[c]The EC does not have a statutory deadline. Estimates of the time it takes the Commission to decide whether an investigation is warranted range from 6 weeks to several months.

[d]Although regulations indicate 5 days, officials estimated that the average period between the filing of a complaint and a formal initiation of an antidumping duty proceeding is approximately 3 months.

Source: Data provided by officials from the five signatories.

U.S., EC, and Mexican Screening of Petitions Criticized

The interpretive nature of the Antidumping Code and implementing regulations has also allowed for variations in the proportion of filed petitions for which investigations are undertaken, as shown in table 2.2. During our review, practitioners expressed concerns regarding the minimal thresholds of evidence the United States applies in its decisions to initiate formal antidumping investigations. While similar concerns were expressed regarding the EC and Mexico, fewer complaints were directed at Canada and Australia.

Table 2.2: Antidumping Petitions Filed and Investigations Initiated

	United States[a]	Canada[b]	Australia	European Community[c]	Mexico
Period	Calendar year 1989	Fiscal year 1989	Calendar year 1989	NA	March 1990-August 1990
Number of petitions filed	28	11	63	NA	8
Number of investigations initiated	28	10	24	NA	3
Estimated percent of formal petitions which result in investigations	100[a]	91[b]	38	50	38

Note: NA indicates that the information was either not available or not applicable.

[a]A Commerce official estimated that only 33 percent to 50 percent of potential antidumping cases informally brought to the agency's attention are actually filed.

[b]Canadian data include petitions received during its fiscal year—April 1, 1989, through March 31, 1990. During this time, Revenue Canada also received 41 "enquiries," which included telephone calls and letters without supporting documents as well as substantive submissions. The 11 cases noted above represent complaints deemed properly documented.

[c]According to a Commission official, the EC does not maintain official records of the total number of antidumping petitions submitted. He estimated, however, that about 50 percent of the petitions received result in the initiation of an investigation.

Sources: U.S. Department of Commerce, Revenue Canada, Australian Customs Service, European Commission, and Mexico's Secretariat of Commerce and Industrial Development.

U.S. Screening Seen as Least Stringent

Initial U.S. reviews of antidumping allegations and supporting evidence are viewed as less stringent than those of other signatories because (1) the Department of Commerce is precluded from considering information from respondents, (2) the U.S. system focuses during the pre-initiation phase on whether dumping occurred rather than on the elements of injury and causation, and (3) the Department of Commerce adheres to set time frames for making a decision on initiating an investigation, thus limiting the depth of screening.

Information Considered During Initial Screening

During its initial review of an antidumping complaint, Commerce is precluded from considering information from respondents. When deciding to initiate an investigation, Commerce essentially judges each petition only on its own merit, without considering information other than that included in the petition, supporting data submitted by the petitioner, and facts within the public domain.

Although this limitation in Commerce's review of evidence may seem to result in inadequate screening, it appears that Congress intended that initial reviews be kept simple to avoid burdening petitioners. In an opinion,[1] the Court of International Trade (CIT) has stated that the Congress purposely restricted the type of information Commerce considers in order "to alleviate the burden of petitioners in initiating antidumping proceedings." Some industry and foreign government representatives believe that the standard of proof required to compel initiation of a proceeding in the United States is too low.

U.S. System Fosters Initiation

Commerce's approach to screening complaints is to some degree the result of the bifurcation of the U.S. system. Under this system, petitions are filed simultaneously with Commerce, which has primary responsibility for assessing the extent of dumping, and with the ITC, which has primary responsibility for assessing injury. The statute directs Commerce to determine within 20 days whether the allegations in the petition have all the elements necessary to impose a duty and, if so, whether to commence an investigation.

Commerce is thus responsible for deciding whether information reasonably available to the petitioner concerning material injury is contained in the petition. However, ITC, rather than Commerce, has jurisdiction over and expertise regarding matters dealing with material injury. Commerce officials explained that although the decision to initiate an investigation is essentially made by Commerce, Commerce will usually obtain informal assurance from ITC (which acts in an advisory capacity during this initial phase of the process) that there is reasonable evidence of injury.

A common criticism of the bifurcated system in the United States involves the limited consideration of whether there is a causal link

[1] 3 Court of International Trade 110, 538 F. Supp. 418 (1982), affirmed in part and reviewed in part 1 CA FC 39, 706 F.2d 1563 (1983).

between the dumped imports and the alleged injury. One foreign government official expressed concern that since dumping and injury are handled by two separate agencies and, in effect, assessed in isolation, causality tends to be assumed rather than subjected to scrutiny. A foreign trade expert expressed similar concerns. He suggested that dumping and injury matters be viewed together. Otherwise, it is less likely that the dual decisionmakers will have a sufficient overview and appreciation of the injury context within which to make a fully informed and objective decision, particularly on the key issue of causation.

The relatively short time frame allowed for making decisions to initiate formal investigations in the United States, and Commerce's strict adherence to this deadline, is also thought to hamper the degree of screening that may be given to submitted petitions.

A Commerce official stated that some screening of potential petitions takes place even before petitions are filed. He estimated that for every two or three cases that may be brought to Commerce's attention, only one is ultimately filed. Once a case is formally filed, however, a vast majority are accepted by Commerce for investigation, according to the official. Another Commerce official further noted that, in general, the United States may not go into as much depth as other countries in its review of evidence for initiating an investigation.

ITC similarly finds very few, if any, of the petitions to be insufficient at the initiation stage. According to statistics from Commerce, an estimated 144 antidumping petitions were received from 1986 through 1989, and only 6 cases were dismissed during this 4-year period.

EC Screening Also Viewed as Less Stringent

The EC is also considered less stringent than some of the other signatories in its initiation of antidumping investigations, although for different reasons than those cited for the United States. The EC is viewed as focusing almost exclusively on the extent of evidence of injury during the initial screening process, as requiring a low regulatory threshold of evidence for substantiating dumping, and as having an administering authority that exercises a great deal of discretion in deciding whether to initiate formal proceedings.

In the EC, the purpose of screening antidumping petitions before initiating an investigation is to ensure that the complaint is (1) admissible,

(2) made on behalf of the EC industry affected, and (3) complete, providing sufficient evidence to justify the initiation of a full proceeding.

Initial EC screening of petitions focuses primarily on determining injury and, according to industry representatives, the level of data required to establish injury is extensive. A government official explained that more rigorous standards are applied in this area since complainants can be expected to supply full details of the injury suffered by the industry, especially with the assistance of trade and/or industry associations. Trade association representatives, in turn, estimated that it may take about 6 to 9 months to develop the proposal to initiate an antidumping investigation; data for up to 4 years are requested to be compiled.

On the other hand, the EC's threshold regarding evidence of dumping tends to be low. Government officials explained that they do not place as much emphasis during the pre-initiation phase on determining dumping since petitioners usually do not have access to information needed to fully establish and document the extent of dumping; this information includes, for example, knowledge of a competitor's pricing policy in a foreign country or of his production costs. The EC looks more closely at the calculations of and verification for dumping during the investigation phase. During the initial screening, the EC also tends to be less strict about the need for providing evidence of causality between dumping and injury. Often, simply demonstrating that dumping and injury occur simultaneously is sufficient.

Unlike the Department of Commerce, the EC Commission is not prohibited from obtaining and reviewing information from affected parties other than the petitioner during the initial review of the filed complaint. One practitioner noted that the EC representatives will sometimes solicit information from the affected domestic industry. Another practitioner believed that the EC Commission is at least willing during the pre-initiation phase to listen to representations of case respondents and is not as concerned with preventing the appearance of conducting improper "backroom deals" as is the United States.

The Commission is believed to exercise a great deal of discretion regarding various aspects of the antidumping process. For example, one member state had recommended against holding formal proceedings for about six cases which the Commission still opened for investigation. All were subsequently closed without measures being taken.

Foreign government representatives raised concerns regarding the limited extent of review and scrutiny that the EC gives to antidumping petitions and suggested that ill-founded allegations can readily pass such a cursory review. In one case, for example, the EC initiated an antidumping investigation against a country which did not produce or even have the capability to produce the raw material in question. In another case, an antidumping investigation was initiated based on a petition which contained multiple mathematical errors in the complainant's calculation of the dumping margin.

Mexican Initiation of Formal Investigations Leads to Concern

Mexico initiated its first antidumping case in 1987 and since then has initiated a total of about 30 cases. In general, Mexico's antidumping regulations are viewed by some practitioners as being vague and open to use as a protectionist device. U.S. industry representatives described Mexico's corresponding antidumping practices (including those directed at deciding whether or not an antidumping investigation is warranted) as loose and inconsistent.

Factors that may have contributed to this critical view of Mexico's earlier antidumping practices include the newness of the system, the lack of implementing guidelines regarding the review of antidumping cases, and the Mexican administration's earlier trade philosophy of protecting its infant industries. A Mexican government official stated the current administration has introduced more "toughness" into its review of dumping allegations and the level of evidence provided to support the unfair trading practices. Accordingly, the number of antidumping cases initiated in Mexico has declined. During 1989, Mexico initiated only 6 antidumping cases, in contrast to 17 cases initiated in 1987.

Concerns About Determining "Standing"

The Antidumping Code does not explicitly require "standing" to file a complaint and initiate an investigation. Instead, the code stipulates that requests to initiate antidumping investigations be made by or "on behalf of the industry affected." During our review, however, practitioners expressed concerns regarding the general laxness with which signatories determine whether the complainant represents a sufficient proportion of the industry and thus has "standing" to file a complaint and initiate an investigation. They contend that cases in which the petitioner does not represent a major proportion of its industry can be argued to contain insufficient evidence of injury.

A GATT official referred to standing as one of several "substantive" issues of discussion during the Uruguay Round. One proposal being considered, for example, attempts to define the term a "major proportion" of the industry to represent a specified percentage of the total domestic production of the product comparable to the dumped item.

Although Mexico is the only signatory we reviewed that has established a formal minimum threshold, or percentage, of industry production in order to determine standing, this threshold has been criticized as being too low. Mexico's laws essentially require that the petitioners be responsible for producing at least 25 percent of the domestic production of the product comparable to the one allegedly dumped.

The United States, on the other hand, assumes that standing exists for any petition filed unless a majority of the industry shows opposition. A U.S. Commerce official explained that when the remainder of the industry (aside from the direct petitioner) has knowledge of a petition and does not oppose it, the petition is considered satisfactory and in compliance with the requirements of GATT. Petitioners usually provide information to show what proportion of the industry they represent, and Commerce will generally accept the data presented. Also, Commerce has not established any formal or informal standards for what constitutes a major proportion of the industry.

What constitutes a "major proportion" of the industry has also not been precisely defined in the EC, Canada, or Australia. An EC Commission official estimated that, in practice, the minimum threshold in the EC was about 40 percent. Canadian officials recalled that they have initiated several antidumping cases which involved even less than 40 percent of the industry. In contrast to the U.S.' approach of assuming standing, we were told that both the EC and Canada actively verify (by, for example, obtaining input from industry specialists and using available trade statistics) that the majority of the domestic industry supports the petition.

Conclusions

Two areas of particular concern regarding the 1979 Antidumping Code involve the sufficiency of the threshold of evidence used to determine whether to initiate an investigation and the laxness in practices for determining whether petitioning parties represent a major proportion of their industry. Proposals being considered during the Uruguay Round that attempt to better define the concepts of sufficient evidence and

standing will not alleviate these concerns but will help provide more guidance to new users of the Antidumping Code as well as to the traditional users.

Improving Transparency of the Antidumping Process

The 1979 Antidumping Code requires that signatories adopt procedures that are equitable and open, or transparent, regarding the process of investigating antidumping cases. Despite some improvement, procedures used to make determinations are still secretive, according to informed sources in most of the signatories. These sources also express concerns about the authorities' reluctance to fully disclose the bases for making antidumping decisions. Concerns about the secretiveness of the process are heightened by the lack of access interested parties have to confidential information used to develop antidumping cases, especially cases initiated by the EC, Australia, and Mexico. These countries do not allow even limited disclosure of confidential information, as do the United States and Canada. The United States has made a number of proposals in the Uruguay Round of GATT negotiations intended to increase the transparency of the process by improving the quality, amount, and timeliness of information made available to parties during an antidumping investigation.

Antidumping Transparency Requirements

When authorities decide to initiate an investigation, the Antidumping Code requires that a public notice be published and that notice also be given to various interested parties, including the firms subject to the investigation, the petitioner, and any other affected importers or exporters. The code also requires that opportunities be given to the petitioner, importers, exporters, and the governments of exporting countries to see all nonconfidential information that is relevant to the petition and to make presentations to the authorities on the basis of this information.

In addition, the Antidumping Code requires that all foreign suppliers and other interested parties be allowed to present evidence and have opportunities to confront and rebut parties with adverse interests during antidumping investigations. Also, public notice is to be given of any preliminary or final finding. In the case of affirmative findings, such notices are expected to set forth the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities, and the reasons and bases for the decision.

Implementation of Procedures Varies

U.S. procedures are widely believed to be more transparent than those of the other four signatories. This transparency is a function of several factors, including the U.S.' public hearings, comprehensive and publicly available antidumping decisions, and adequate disclosures of the bases of decisions. Australia and Canada also have fairly transparent procedures.

Conversely, antidumping case participants criticized the procedures of the EC and Mexico for their lack of transparency, although they noted that procedures have improved in the EC. Much criticism was directed toward the lack of transparency of Mexico's antidumping procedures, although to some degree this lack may be related to the fact that Mexico only recently became a signatory to the Antidumping Code; therefore it has not had an opportunity to fully develop the necessary mechanisms for a transparent system.

In their attempts to comply with the requirements of the Antidumping Code, the signatories we examined have tried to set up various mechanisms to make their antidumping procedures more transparent. The mechanisms have not always been uniformly implemented, however, resulting in varying degrees of transparency. The mechanisms include

- notifying parties to an investigation,
- disclosing antidumping determinations,
- exchanging information between parties, and
- holding meetings of parties to an investigation.

Notification of Parties

In conformance with the Antidumping Code, the signatories we examined have established policies to notify parties about when an investigation will be undertaken. In addition to being notified, the parties (i.e., affected importers, exporters, and domestic producers) are asked, usually by means of a questionnaire, to supply information related to the investigation and are given the opportunity to provide submissions in their defense. The government of the affected exporters is also notified.

Four of the five signatories reviewed require that at least a preliminary finding of dumping be established before any antidumping duties are levied. In cases subject to procedures administered by these four signatories, respondent firms do have an opportunity to defend themselves before any antidumping duties are levied against them.

Mexico's laws do not reflect this approach, however, since its regulations allow provisional duties to be levied within 5 working days after a petition is accepted and an investigation is initiated. Although on several occasions Mexico has levied duties before exporters have been given a chance to defend themselves, Mexican officials have stated that they have stopped this practice.

Disclosure of Antidumping Determinations

Both Canadian and U.S. investigating authorities provide details about their calculations and determinations in disclosure meetings with involved parties. Antidumping case participants appear to be generally satisfied with the information on determinations provided by U.S. authorities and the Canadian International Trade Tribunal.

In contrast, EC procedures for disclosing determinations were cited numerous times for their lack of transparency, despite recent improvements. Under procedures that the EC adopted in 1988, the Commission publishes relatively comprehensive statements of the underlying reasoning for its decisions in the Official Journal of the European Communities. The Commission also discloses further information regarding the rationale for its decisions upon request. However, to obtain further information, interested parties must submit written requests and must specify the particular issues on which information is sought. According to two attorneys involved with EC antidumping cases, while the underlying rationale for determinations is much better known now than in the past, concern still exists that not enough information is provided. This continuing concern may be related to the fact that access to certain information regarding the basis of a decision, such as the methodology used, is sometimes limited.

Criticism was also directed toward the lack of transparency in Mexico's procedures for disclosing the bases of determinations. Mexican regulations provide that parties affected by an antidumping complaint are entitled to information made available to the government. A Mexican government official noted that the administering authority must also show that it has the proper elements to justify making a positive determination of dumping, including elements evidencing dumping, injury, and a causal link.

Mexican authorities, however, have not always contacted parties in a timely fashion or provided an adequate explanation of their decisions. Moreover, according to a Mexican government official, authorities will only discuss their methodology in general terms. Internal documents and computations are not shared with parties.

A U.S. proposal in the Uruguay Round seeks to ensure that signatories routinely disclose the rationale for their antidumping decisions. One proposed change would require that published decisions set forth the facts and conclusions of law on which a decision is based in sufficient detail so that the reasoning is clear. Another proposed change would require, in the case of a preliminary or final determination of dumping, that the

include public hearings, meetings between parties to an investigation, and individual meetings between one party and the investigating authority. Mexico is the only signatory that does not provide for meetings between parties. However, at the time of our review, Mexico reportedly was in the process of implementing public hearings.

In the EC and Australia, meetings of parties, which provide opportunities for parties to state their case and make rebuttal arguments, can be requested. These meetings are closed in the EC but open to the public in Australia. In both signatories, however, such meetings have rarely been held. According to an attorney in the EC, such "confrontational" meetings tend to be counterproductive, since no real dialogue occurs and the respondent is generally forced to assume a defensive stance.

During an investigation, meetings can also be held between the antidumping authorities and individual parties in some countries. The purpose of these meetings is to give parties the opportunity to provide evidence on their behalf. For example, in the EC at least one such meeting takes place during the course of an investigation. The meeting is conducted in an informal atmosphere, and no official records are kept.

In contrast to the EC, the United States routinely prepares official records of meetings. Both the Commerce Department and the ITC are required to put in the public record information such as the identity and affiliation of all persons present and a summary of the factual information submitted.

Protection of Confidential Information Complicates Transparency Goals

The Antidumping Code recognizes that some information supplied by parties to an investigation may, by its nature, be considered confidential; therefore the code provides that such information will not be disclosed without prior authorization. What constitutes confidential information, however, is vague and open to interpretation. Many complaints about the lack of transparency in signatories' procedures revolve around interested parties' inability to see confidential information in their adversaries' submissions and in antidumping decisions. This lack of access makes it difficult for parties to adequately understand and rebut the facts of the original complaint and the rationale for the resulting decision. Furthermore, while parties may be required to provide nonconfidential versions of confidential submissions, antidumping case participants have expressed concerns about the usefulness of these "nonconfidential summaries."

Complaints about the lack of procedural transparency appear to be fewer in the United States and Canada, where steps have been taken to permit legal representatives of involved parties to share confidential information. The U.S.' negotiating position before the Uruguay Round includes proposals that signatories recognize in the code the desirability of establishing administrative protective order procedures and accept certain amendments to the code that would lead to providing more useful nonconfidential summaries.

Protection of Confidential Information Obscures Basis for Antidumping Decisions

A comprehensive definition of what constitutes "confidential information" is not included in the code. It only states that an example of confidential information is information that, if it were disclosed, would be of significant competitive advantage to a competitor or would have a significantly adverse effect upon the supplier or the source of the information. Agreements not to divulge such information have a negative effect on the level of transparency in antidumping determinations and result in a lack of adequate disclosure of the bases on which decisions are made.

Antidumping case participants told us that the transparency of the antidumping decisionmaking processes has improved in most of the signatories reviewed during the past few years. However, with the exception of the United States and the Tribunal in Canada, complaints continue to be made regarding the availability of sufficient information for parties to adequately understand the bases of antidumping decisions.

For example, an attorney told us that while the transparency of the decisionmaking process has recently increased in Australia, published determinations continue to be inadequate to understand the bases of a decision. These determinations are based on confidential information, such as pricing data and calculations, which is not divulged. A respondent to a current antidumping proceeding in Australia also expressed similar concerns about the adequacy of information.

A Canadian attorney told us that nonconfidential versions of antidumping determinations carried out by Revenue Canada are useless. Another antidumping case participant stated that while the authority feels that it must provide better nonconfidential information in decisions, in actual practice disclosure of information underlying determinations continues to be inadequate.

Use of Nonconfidential Summaries

According to the code, parties providing confidential information may be requested to submit nonconfidential summaries of this information to the appropriate authorities. These nonconfidential summaries are then made available for adversarial review. Antidumping case participants, however, regularly criticized nonconfidential summaries as a poor substitute for supplying the underlying information. With few exceptions, antidumping case participants in Canada, Australia, and the EC characterized these summaries as marginally useful at best and, at times, worthless.

Although Mexico has a legislative requirement for supplying nonconfidential summaries, a Mexican government official told us that in practice nonconfidential summaries are not prepared. The absence of such summaries tends to further reduce the level of transparency in Mexico.

The Use of Administrative Protective Orders to Protect Confidential Information

Both the United States and Canada appear to have made some progress in reconciling the need for transparent procedures with the need to adequately protect confidential information. The system in the United States, which uses administrative protective orders, allows confidential information to be disclosed to an attorney or other representative of a party to the case. These disclosures are backed up by pledges of confidentiality and by the threat of imposing sanctions in case of violations. However, some practical difficulties, including questions of cost and administrative workability, may make it difficult for other countries to institute a similar system.

Antidumping case participants and government officials in all signatories we examined expressed fewer complaints regarding the transparency of the U.S. and Canadian systems. There have been complaints, however, about Revenue Canada, which, unlike its sister agency, the Canadian International Trade Tribunal, does not routinely provide access to confidential information.

The United States adopted the use of administrative protective orders following passage of the Trade Agreements Act of 1979. Before 1980, when confidential information was first made available to adversaries' legal representatives, proceedings were secret. This secrecy led to what one published source characterized as "proceedings where parties were frequently shooting in the dark." In 1988, access to confidential information was broadened with respect to information submitted to the ITC.

Attorneys representing both complainants and respondents in U.S. antidumping cases consider the investigation process to be relatively transparent. According to one attorney, access to information in the antidumping process is key for participants, and, in his opinion, the administrative protective order system is the "single largest advance" for getting fair results. According to another attorney, the system in the United States works well: Any problems with the system usually stem from the difficulty of controlling such large quantities of information.

Complaints concerning the Canadian antidumping system's lack of transparency largely involve the activities of Revenue Canada, which is responsible for making dumping determinations. Although Revenue Canada is legally authorized to release confidential information to involved parties even if nonconfidential summaries prove inadequate, it rarely does. In contrast, the Canadian International Trade Tribunal, the agency responsible for the injury determination, provides access to confidential information through a system similar to the one in the United States. Attorneys active in the Canadian market give the Tribunal high marks for the transparency of its procedures.

Other Signatories' Difficulties in Implementing an Administrative Protective Order System

While developing an administrative protective order system in the EC, Mexico, and Australia may be one way to increase the transparency of those signatories' overall antidumping procedures, it is not clear that their respective processes will readily incorporate such a system. Practical difficulties may stand in the way.

One difficulty concerns the inability of the EC to provide effective sanctions against parties in case of unauthorized disclosure of confidential information. The importance of providing effective sanctions is highlighted in the United States, where the Commerce Department generally will allow disclosure only to attorneys, who are subject to disbarment from practice in the event of a violation. According to European government officials, in the EC 12 national laws and 12 separate legal systems exist, with no centralized infrastructure to effectively enforce and monitor the preservation of confidentiality of information.

According to an EC representative, a second difficulty in establishing the use of administrative protective orders is that individual EC firms tend to be more secretive and, therefore, are uncomfortable about sharing such sensitive information with outsiders. The firms are concerned that an administrative protective order system may be abused, may lead to

unauthorized disclosure of confidential information, and may become legally burdensome.

As for Mexico, given its current level of development and economic problems, it may have difficulty justifying and implementing what is considered to be an expensive system. Mexican officials further added that the concept of allowing administrative protective orders is foreign. They believe it would take considerable change and effort to have such a concept incorporated into its system. Attorneys in the United States agree that the administrative protective order system has increased the transparency of the U.S.' overall antidumping process, but at a very high cost for all parties involved. In fact, even in the United States one government official was not convinced that the benefits outweighed the costs.

Although an Australian attorney noted that Australia has no apparent constraints against implementing an administrative protective order system, Australian officials told us that they have not considered adopting one.

U.S. Proposals in the Uruguay Round Concerning Nonconfidential Summaries

The United States is proposing several amendments to the Antidumping Code to strengthen the obligation on investigating authorities to provide parties with adequate access to information. The amendments propose that (1) a person claiming confidential treatment for information be required to show "good cause" for such treatment, not merely "cause"; (2) the obligation on investigating authorities to provide a nonconfidential summary be mandatory, not discretionary; and (3) the code specify that the summary have sufficient detail so as to permit a reasonable understanding of the substance of the confidential information. The proposal does not state that the code should require countries to adopt such systems in order to increase the transparency of their antidumping procedures. It does, however, recommend that a footnote to the code be amended to recognize the desirability of establishing administrative protective order systems.

Conclusions

Although the transparency of antidumping procedures followed by the major signatories has increased in recent years, practitioners say the antidumping systems of most of the signatories still lack sufficient procedural openness. The greatest amount of criticism is directed toward the failure of signatories to adequately disclose information related to

industry submissions and the rationale for making antidumping determinations. To some degree, the authorities are constrained from adopting procedures that are completely open and transparent because of the need to protect confidential information. Despite this constraint, there appears to be room to increase the amount and quality of information made available to parties to an investigation without compromising confidentiality requirements.

U.S. proposals in the Uruguay Round of negotiations address many of the concerns over procedural openness and due process identified in this chapter. If accepted, the proposed changes should help to increase the transparency of the antidumping procedures followed by the five major signatories.

Appeal Rights Are Limited But Still Evolving

Although the Antidumping Code does not require signatories to provide appeal rights to affected parties, the antidumping systems of the signatories we examined allow for both administrative and judicial review. Administrative review in this report means (1) examining whether antidumping determinations should be modified or revoked on the basis of changed prices or circumstances and (2) considering questions about specific importations. We found that administrative review systems in the countries we examined vary in importance, frequency, and practice. Judicial review, which involves appeals of antidumping issues before courts, also varies in prevalence and importance. Although U.S. judicial review is considered to be more extensive than that of other countries, some signatories are considering changes to their systems that will possibly expand the scope of their judicial review.

Administrative Reviews Vary by Country

The United States, the EC, Australia, Canada, and Mexico all provide for administrative reviews of both dumping and injury determinations. Administrative reviews are typically carried out by the agency that conducted the original determination. Procedures for initiating and executing these reviews vary by country. For example, while all the signatories we examined undertake reviews on request by interested parties, Canada and Australia also provide for automatic reviews of dumping determinations by the authorities.[1]

Differing Importance of Reviews

The importance of administrative reviews of antidumping determinations also varies in different countries. Administrative reviews are particularly important in the United States for two reasons: (1) They are needed to determine the actual amount of duty owed[2] and (2) the U.S. system lacks a "sunset provision," which would end antidumping measures after a fixed amount of time. Although the existence of sunset provisions may lessen the significance of administrative review in Canada and the EC, reviews of specific importations can be important because duties are determined on a case-by-case basis in both countries. Administrative reviews are probably least important in Australia, where antidumping measures expire, with no possibility of extension, after 3 years.

[1]Revenue Canada automatically recalculates the value on which the duty is based approximately once a year, while the Australian Customs Service regularly performs "midterm" reviews of dumping calculations 18 months after a measure has been imposed.

[2]Importers make cash deposits based on the duty rates estimated in the initial investigations, and the Department of Commerce directs U.S. Customs to refund the amount of duty overpaid or assess any additional duties due, as determined in the administrative review.

Frequency of Administrative Reviews

As shown in table 4.1, the United States and Canada carry out a large number of administrative reviews, while the EC and Australia undertake far fewer reviews. This disparity is likely the result of a number of factors, including the importance of reviews in the United States, Canada's automatic review of antidumping duties, and the existence of sunset provisions in the EC and Australia.

Table 4.1: Number of Antidumping Cases and Reviews Conducted, 1986-1989

	New cases	Reviews	Total
United States	141	355	**496**
Canada	76	255	**331**
European Community[a]	87	42	**129**
Australia	120	8	**128**
Mexico[b]	30	0	**30**

[a]Numbers may be understated because reports do not include cases against nonsignatories.

[b]Mexico's report for the last half of 1989 was not available.

Source: Signatories' semiannual reports to the GATT Committee on Antidumping Practices, 1986-1989.

In the United States, requests for Commerce reviews of dumping determinations are fairly common. According to a recent study, for example, reviews were requested for approximately half of the antidumping orders eligible for review in 1987.[3] However, practitioners complain that reviews of dumping determinations are not completed in a timely fashion and that the resulting backlogs are a problem since reviews are needed to establish actual duty amounts. A Commerce official acknowledged that delays are a significant problem. However, he noted that part of Commerce's backlog was inherited when responsibility for handling dumping determinations was transferred from the Treasury Department to Commerce in 1980.

Foreign government representatives also have voiced concern that Commerce administrative reviews place a renewed burden on the respondents to provide more information. Practitioners have expressed more concern about the information requirements of the United States than about those of other countries.

Canada's administrative review process is similar to that of the United States, with a few exceptions. For example, in contrast to Commerce's practice, Revenue Canada automatically recalculates the value on which the duty is based approximately once a year.

[3]In contrast, requests for International Trade Commission administrative reviews of injury are not as common, and revocations based on changed circumstances are even less common.

The EC has a smaller number of administrative reviews than the United States for several reasons: (1) The EC's regulations contain a sunset provision; (2) adjustments to duty rates resulting from reviews are applicable only to future, not past, duties; (3) the EC Commission enjoys a margin of discretion in conducting reviews, in deciding whether to accept an application for review, and in determining whether to use information provided by parties, according to EC practitioners; and (4) the EC Commission takes a long time to conduct reviews.[4] Because of these practices, affected parties in the EC do not often seek administrative review.

Effects of Sunset Provisions

Countries that incorporate sunset provisions in their antidumping laws receive fewer requests for administrative reviews, since antidumping measures automatically expire after a fixed amount of time. The routine expiration of antidumping measures appears to eliminate the need for many reviews.

Australia's sunset provision is particularly strict. It not only eliminates antidumping measures after 3 years, but it also provides no possibility for extension. If Australian firms want continued protection against dumped goods, they must reapply for a new inquiry.

Sunset clauses in Canada and the EC both provide for the expiration of antidumping measures 5 years after their imposition but also allow for "sunset reviews" on request. In such instances, if interested parties submit information indicating the continued need for duties, measures can be maintained. Sunset reviews are requested for only a small proportion of the measures that expire, according to Canadian and EC sources.

The lack of a U.S. sunset provision has concerned some foreign representatives. Antidumping attorneys have suggested that the United States should adopt a sunset provision (1) to eliminate the problem of backlogs in Commerce administrative reviews and (2) to allocate the costs of respondents and petitioners more equitably. The present system is thought to put a heavy burden on respondents, who must bear the expense of annual Commerce reviews.

[4]The review proceeding may be as time-consuming as the initial investigation, which is normally not less than 6 months.

However, an attorney who represents U.S. petitioners argues that the high cost of initiating an antidumping case in the United States would make establishing a sunset provision unfair to petitioners. Although this argument might be supportable when antidumping measures automatically expire, as is the case in Australia, the argument seems weaker if there is a provision for a sunset review, which allows for the extension of measures, if justified. The experience of Canada and the EC demonstrates that under the sunset provision, a majority of measures are allowed to lapse.

Several signatories have proposed in the GATT Uruguay Round negotiations that a sunset provision be added to the Antidumping Code. Specifically, it has been recommended that antidumping measures expire after 5 years, with a provision for reviews and extensions.

Additional Level of Review in Canada and Australia

Both the Canadian and Australian antidumping systems provide for another level of review of decisions made by Revenue Canada and the Australian Customs Service. These reviews are not carried out by the agency that made the initial determination or by the courts.

Under the two countries' procedures, appeals of decisions to forgo an investigation and appeals of negative preliminary determinations are made to the Canadian International Trade Tribunal and the Australian Antidumping Authority, respectively.[5] Their decisions are binding on the agency that made the initial decision.

The Tribunal and the Authority function somewhat differently. The Tribunal is asked only to review whether or not the evidence before Revenue Canada discloses a reasonable indication of material injury. The Authority's role is somewhat broader: It ascertains whether the Australian Customs Service arrived at a lawful finding based on the material provided for the inquiry. The Tribunal and Authority may only consider the information used by the agencies to make their decision; other information or arguments may not be presented for consideration.[6]

[5]In Canada, review by the Tribunal can occur at another phase of the investigation: After Revenue Canada has decided to initiate an investigation, the Deputy Minister, exporter, importer, or government of the country of export may refer the question of a reasonable indication of material injury to the Tribunal.

[6]Some representatives of respondents in Canada who are unable to provide information countering the allegations of injury prior to the decision to initiate an investigation have expressed concern over this limitation.

Parties have not sought Tribunal or Authority review very often. In Canada, there were four such referrals to the Tribunal in 1988, six in 1987, and four in 1986. In Australia, the Authority received three requests to review decisions not to initiate investigations during 1988, its first year in operation.

Judicial Review Could Be More Effective

The antidumping systems of the United States, the EC, Canada, Australia, and Mexico all provide for some form of review by a higher-level, "federal" court. However, judicial review appears to be rather limited in most countries. It is limited because (1) the scope of review is restricted, thus reducing the number of appeals to the courts; (2) the courts tend to defer to the decisions of administrative agencies; and (3) some parties (in the EC) are directly prohibited from making appeals.

Judicial review by an independent entity is considered important because it provides an additional means of checking the actions and limiting the discretion of administering authorities regarding antidumping investigations. Judicial review may be particularly significant in countries where decisionmaking in antidumping procedures is less transparent.

Experts believe that U.S. judicial review is more effective than that of other countries because U.S. courts seem to have interpreted broadly both their jurisdiction and their scope of review. In addition, parties are more likely to bring appeals of antidumping to the courts for review in the United States than elsewhere. Other systems of judicial review continue to evolve, and some countries are considering changes that could allow for more effective review by the courts.

Although judicial review of antidumping decisions has become more widespread in the major user countries, it is a relatively new development. In the United States, for example, a judicial review process for antidumping cases was not well established until 1980.[7]

In the current Uruguay Round negotiations, both the EC and the United States have made proposals dealing with judicial review, but these have been rather broad. The U.S. proposal, for example, calls on signatories to "maintain judicial, arbitral or administrative tribunals or procedures for the purpose...of the prompt review and correction of administrative actions relating to final findings...and reviews."

[7]See Judicial Review of Antidumping and Countervailing Decisions, (GAO/NSIAD-84-29, June 1984).

In most countries we examined, courts have interpreted their scope of review to be primarily limited to issues of law and not factual determinations. The U.S. Court of International Trade is an exception.

U.S. Court Better Able to Consider Cases

The U.S. Court of International Trade is unique because it specializes in handling international trade cases. Therefore, the CIT is better equipped to become more involved in the details and facts of an antidumping case. The CIT's ability to remand a case back to the administering authority to reassess specific points enables it to be more involved with the factual details of an investigation. The ability of a court to consider factual determinations in a case is important in antidumping investigations, since controversies largely focus on factual issues. U.S. practitioners believe that, as a result of its expertise and its approach, the CIT is less deferential to administering authorities than other appellate courts and more likely to challenge their decisions. However, Commerce officials also noted that the CIT infrequently overturns an agency's decisions completely.

The CIT has been criticized for unevenness in its deference to administering agencies. Another apparent shortcoming of judicial review by the CIT is the length of time the court takes to make decisions on antidumping appeals, according to foreign sources.

Although other countries we reviewed currently lack courts that are able to perform detailed review, this situation may change. Many EC lawyers, dissatisfied with the present system of judicial review, support giving the newly created Court of First Instance jurisdiction over antidumping appeals. This court hears appeals in antitrust cases and may be better able to deal with the facts of a case. However, a proposal to give the Court of First Instance competence in antidumping appeals was not accepted by the EC Council, which chose to reconsider the issue after the new court has been in operation for 2 years.

The Australian Administrative Review Council has also recommended that the Administrative Appeal Tribunal be empowered to review on their merits all final dumping determinations. According to an Australian Customs Service official, as of August 1990 no decision had been made on the Tribunal's authority.

Limited Scope of Judicial Review

Parties in Canada, the EC, Australia, and Mexico may bring appeals to the Federal Court of Canada, the European Court of Justice, the Australian Federal Court, and the Federal District Court of Mexico, respectively. Practitioners told us that the scope of review by these courts is primarily limited to issues of law. As a result it has been observed that the courts may be reluctant to challenge antidumping decisions made by administering authorities. In the EC in particular, the Court's approach has given the Commission broad discretion in making its determinations. Consequently, many EC practitioners told us, the Court often tends to uphold the Commission's decisions.

Judicial review by the U.S. Court of Appeals for the Federal Circuit is comparable to judicial review by the courts described above. CIT decisions are appealable to the Court of Appeals for the Federal Circuit and ultimately may be appealed to the Supreme Court. Some practitioners believe that this appellate court lacks the expertise of the CIT and tends to defer to the decisions of the administering authorities. In particular, a U.S. attorney stressed that because the factors for determining injury are not so concrete and are subject to interpretation, the appellate court may be reluctant to challenge the ITC's decisions.

Accessibility and Coverage of Judicial Review

All interested parties are able to request judicial review in most countries. However, in the EC, the European Court of Justice has interpreted the provisions of the Treaty of Rome[8] so as to prohibit independent importers from appealing cases directly to the Court. Instead, these importers are entitled to challenge a specific importation in EC member state courts, and these courts may then refer the issue to the European Court of Justice. This indirect access to the European Court of Justice has several limitations: (1) Arguments may become distorted, because the cases are filtered through national courts; (2) time limits within which the case must be referred to the Court are not established; and, most notably, (3) cases will not always be referred to the Court.

In most countries, judicial review is limited mainly to determinations that are considered final, except in the case of Australia.[9] The Australian system allows for appeal of both positive and negative decisions on initiation as well as preliminary and final determinations.

[8]Although EC antidumping laws do not contain provisions for judicial review, the Treaty of Rome (which established the EC) includes provisions for judicial review.

[9]A party in Mexico, however, recently appealed a preliminary determination on constitutional grounds.

Judicial Review Prevalence and Importance

Parties in Canada, Mexico, the EC, and Australia have been less likely than U.S. parties to bring appeals cases to the Court for several reasons. Practitioners in Canada and the EC have noted that the limited scope of judicial review keeps them from bringing appeals cases. In Canada, parties are also not likely to appeal for other reasons, such as (1) the expense of bringing appeals, combined with Canada's small market size, which reduces the perceived benefits of appealing, (2) the lack of consultants who understand the law well, and (3) the lack of necessary information to appeal Revenue Canada decisions, according to lawyers and officials. Similarly, exporters to Mexico may be reluctant to appeal because they sell only small amounts in the Mexican market.

In addition, experienced practitioners consider judicial review in the EC to be ineffective because the Court (1) has infrequently overturned the Commission and (2) has taken an extremely long time—often 2, and as many as 4, years—to make decisions.

Although the slow pace of reviews and the small market size may deter Australian parties from bringing appeals, another factor may encourage them to make more appeals. In Australian appeals cases, parties are able to obtain confidential information that was not available to them during the course of the investigation. As a result, some Australian experts believe that appeals to the Court, which historically have not been common, will increase.

It is difficult to assess the impact that judicial review has had on antidumping practices. In the United States, judicial review has contributed to the interpretation of U.S. antidumping laws and regulations. It appears that CIT's scrutiny has had significant effect on Commerce and the ITC. U.S. officials and practitioners claim that judicial review decisions affect the way that the agencies conduct their work. For example, if the courts tell the ITC to consider a particular factor in making its injury determination, it will do so for all subsequent investigations, to avoid another challenge in the courts.

The impact of judicial review has been less definite in other countries. Some practitioners note that judicial review has established legal precedents and improved procedures. But others, particularly in the EC, are skeptical about the effect of review by the courts, since decisions so often uphold the determinations of the administering authority.

Other Possible Avenues of Appeal

Other opportunities for appeal do not provide a practical alternative for most parties. Appeals to the GATT cannot be brought by private parties, and the binational panel created by the United States-Canada Free Trade Agreement deals only with cases involving parties from the two countries.

Although the Antidumping Code provides for review, signatories have not used this process very often. In 1988, two cases (one from Japan and the other from Sweden) were referred for conciliation and settlement to the GATT Antidumping Committee.

Some practitioners believe that use of the GATT dispute settlement mechanism will increase in the future. An experienced EC lawyer believes that Japan may appeal to the GATT more frequently as a result of the ineffective EC appeals process. Also, an EC official noted that provisional changes to GATT procedures have made the dispute settlement process faster. He also observed that the composition of the dispute settlement panel is likely to work in favor of exporters, since most GATT members are neither users nor supporters of antidumping measures.[10]

Nevertheless, others believe that small countries may be reluctant to request review from GATT. One representative from a smaller exporting country voiced concern over possible negative political repercussions that could result from such an action.

The United States-Canada Free Trade Agreement provides for another review option for American and Canadian parties to appeal antidumping cases involving the two countries.[11] The agreement provides for reviews by a panel consisting of knowledgeable practitioners from the two nations with expertise in the antidumping area. The panel is supposed to apply the same standard of review and the same legal principles as domestic courts, and its decisions are binding on both governments.

It is difficult to assess the panel's impact because it has considered only a few cases. However, several practitioners said that panel members have tended to interpret the panel's mandate broadly, suggesting that the panel will examine antidumping issues in much greater detail than a typical appellate court would.

[10]However, the parties in a dispute settlement case approve the composition of the panels.

[11]The Free Trade Agreement also aims to establish a new regime for both the United States and Canada, replacing antidumping laws with competition laws. Negotiators have been given 7 years to reach this goal.

Conclusions

Administrative reviews are less important in other signatories than in the United States, where they are needed to set the actual amount of duty owed. The United States has been criticized for its lack of a sunset provision in its antidumping law, as well as for its slowness in carrying out annual reviews of dumping determinations. Signatories have proposed that the Antidumping Code be changed to address both these issues.

In most countries, judicial review is limited to issues of law. The U.S. Court of International Trade is an exception because its specialized function makes it better able to address the details of a case. Although judicial review in other countries may be less thorough, the systems of the other signatories we examined continue to develop. Recent proposals aimed at more complete judicial review in the EC and Australia indicate that substantial changes are possible.

In the GATT Uruguay Round negotiations, both the United States and the EC have made broad proposals introducing judicial review to the Antidumping Code. However, it may be difficult to effect changes through the Antidumping Code, because judicial review does not fall within the traditional scope of antidumping rules.

Antidumping Laws and Practices of South Korea, Brazil, Japan, and India

While South Korea, Brazil, Japan, and India have antidumping legislation, few cases have been initiated and processed by these countries. South Korea has initiated five investigations, none of which has resulted in the imposition of a duty. Brazil has initiated two investigations, both resulting in the application of a duty.[1] Neither Japan nor India has reported any formal antidumping investigations. India and Japan have, however, received one and three antidumping petitions, respectively.

We compared the antidumping legislation of these four countries with the GATT Antidumping Code, specifically with respect to provisions for sufficiency of evidence, transparency, and available rights of appeal. In light of what we believe to be the very broad and interpretive nature of the code, the implementing regulations seem, in general, to conform with the GATT Code and address the basic tenets of issues under review. Each country's regulations, for example, address the need to ensure that there is "sufficient evidence" to support the dumping, injury, and causation elements of an alleged antidumping action. Each also acknowledges the need, in varying degrees, to establish transparency in their antidumping systems and to provide for a means of reviewing decisions made by the administering authorities.

In the absence of sufficient case experience, it is difficult, if not impossible, to determine what procedures and policies these countries would adopt given an increase in the number of antidumping complaints filed. Similarly, the degree to which a country's antidumping processes are consistent, transparent, and not subject to manipulation can only be evaluated in the light of actual experience.

According to an attorney currently representing a U.S. company involved in a South Korean antidumping action, South Korea's pre-initiation stage appears to be informal. However, parties seem to enjoy considerable access to information during the investigation as well as the pre-initiation phases of the antidumping process. The attorney did express concern about South Korea's seemingly low threshold of evidence for initiating an investigation. In his particular case, the South Korean government decided to initiate an investigation despite the fact that imports were decreasing, domestic production of the imported article was rising dramatically, and domestic production was significantly undercutting the price of imports, he explained.

[1] International Trade: Use of the GATT Antidumping Code (GAO/NSIAD-90-238FS, July 25, 1990).

In Brazil, the Customs Policy Commission has responsibility for making both dumping and injury determinations. Once an investigation has been initiated, the Commission sends out questionnaires to potentially affected parties. However, according to a Brazilian government official, resource constraints make it very difficult to conduct subsequent on-site verification of submitted data. He also noted that Brazil generally prefers and encourages resolving cases through price undertakings[2] because of their administrative convenience.

The very limited experience under the Japanese antidumping provisions suggests that the pre-initiation stage may be more important in Japan than it is in the United States and may be viewed as an important opportunity for parties to negotiate an agreement. For each of the three antidumping petitions filed in Japan, actions were terminated in the pre-initiation stage after the Japanese industry obtained (1) a "voluntary export restraint" agreement from the exporters limiting the amount of the allegedly dumped product sold to Japan or (2) other assurances by the appropriate exporting industry to take corrective action. Implementing guidelines in Japan specifically state that an investigation may not be initiated when measures to eliminate an alleged injurious effect to an industry in Japan have been taken.

Indian legislation provides that before deciding to initiate an investigation, the government must satisfy itself that it has "prima facie" evidence of dumping, injury and, where applicable, causality. However, with no cases to serve as a context, this standard gives no indication of whether the threshold for initiating an investigation would be any more or any less strict than that in the United States.

[2]A price undertaking is basically a voluntary measure by an exporter to increase prices or to cease exports at dumped prices to eliminate the injurious effect of dumping.

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