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All Quiet on the Antidumping Front? Take a Closer Look

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Introduction

So far this year the U.S. government has initiated only two antidumping cases on behalf of domestic industries. In all of 2005, only 12 cases were initiated, which was substantially fewer than the 26 initiations in 2004, and well below the most recent 11-year average of 33 initiations per year.[1] Antidumping use is clearly on the decline in the United States, and that trend is mirrored globally.

Before concluding that this trend will continue and that antidumping reform is no longer necessary, it is important to consider the causes of the decline. While some of the factors underlying the trend appear to be structural—and likely permanent—other factors are more transitory or cyclical. Looking forward, it is also important to consider the implications of recent developments in U.S. antidumping practice, including sustained efforts to make the law more user-friendly to potential U.S. petitioners. The confluence of these developments portends a resurgence of antidumping use in the years ahead.

Although the post–Doha Round commentaries have rightly focused on the forgone opportunities to reform agricultural policies and open markets for more trade in goods and services, prospects for meaningful reform of the World Trade Organization's Antidumping Agreement (ADA)—and the national antidumping laws it presumes to discipline—have been even more severely undermined.

While trade liberalization is likely to continue through bilateral and unilateral channels, there are no other credible negotiations or venues—multilateral or otherwise—aimed at reforming antidumping laws. But greater discipline of the use of antidumping measures is vital to securing the market openings achieved in previous and prospective trade agreements.

Factors Curtailing Antidumping Initiations

The recent decline in antidumping initiations can be attributed to a few positive developments. First, the U.S. economy has been growing steadily since the recession of 2001. In a healthy economic environment, it is more difficult to make the case that a domestic industry is materially injured—one of the technical requirements of winning antidumping protection. Although injury is based on economic conditions particular to the petitioning industry, which do not necessarily move in lockstep with the performance of the overall economy, there exists a fairly strong relationship between broad economic indicators and the number of initiations.

That relates to the second reason for the decline in antidumping use: today, the U.S. steel industry, which has accounted for the preponderance of antidumping activity in the past, is arguably healthier than it has ever been. Demand for steel products is highly procyclical. When the economy is expanding, more people buy more vehicles, construction activity increases, and demand for new housing and appliances rises. Steel industry fortunes are a strong determinant of the number of antidumping intiations in the United States (and abroad). Of the 366 antidumping cases intitiated by the United States over the past 11 years, 208 (or 58 percent) were launched on behalf of steel producers.[2] But since 2003, only 10 of the 77 antidumping initiations (or 13 percent) covered steel industry products—and in 5 of those cases the U.S. International Trade Commission found that the domestic industry was not suffering material injury.[3]

Certainly, the business cycle affects steel industry fortunes. But the industry has undergone a major restructuring that has involved the rationalization and consolidation of production capacity within the control of fewer firms. According to the *Financial Times*, the top three U.S. producers today account for about 70 percent of U.S. flat-rolled steel production capacity, whereas in 2003 the top three accounted for only 25 percent.[4] Under this more optimal structure, steel producers have greater control over aggregate output and can respond to declining demand by withholding production and maintaining prices. Although profitability could decline during the next downturn, the likelihood that the U.S. steel industry will experience material injury from dumped imports is remote. The industry is much more capable of handling economic downturns today, and the appeal of the U.S. market to foreign steel producers has waned considerably as surging demand in developing countries experiencing catch-up growth has created large alternative markets for steel. And that is reflective of a broader trend, which consitutes the third explanation for declining antidumping use.

As the world economy has expanded and new markets have developed, producers have many more sales opportunities in many different markets relative to even the recent past. Emerging demand in previously small or flat markets has caused managers to rethink their sales strategies: fewer are pursuing a strategy of competing on price in the United States, while more are looking to be early entrants and to cultivate their presence in developing markets.

As international trade flows continue to rise and add pressure to rising shipping costs already elevated by high energy costs, producers will have greater incentive to serve regional markets. With rapidly growing consumer and infrastructure demand in China and India—to name just a couple emerging economies—local and regional producers are likely to be less willing to sell to customers in the United States unless they are able to get a premium for their products, which includes coverage of large transportation costs. In other words, underpricing in the United States to win market share is a less attractive strategy than it may have been in the past, given the costs of maintaining that strategy relative to the alternative of serving growing regional demand.

A related, and fourth, reason for the decline in antidumping activity is that as globalization has progressed, foreign direct investment has flourished and supply chains have gone international. The once clear definition of a domestic industry has been blurred by the fact that production of a final product often takes place in multiple countries. Bringing antidumping suits has a greater downside now, as domestic petitioners are more likely to ensnare an entity in their own supply chains or related to them in some other way.

That situation was evident in a recent antidumping case concerning *Wooden Bedroom Furniture from China*. Although the case was ultimately initiated, domestic petitioners had a difficult time securing enough industry support for the case because many U.S. furniture producers had investments in—or owned outright—furniture manufacturing facilities in China.

Most of the explanations for declining antidumping use appear to be structural. The steel industry is now optimally positioned to withstand import competition should imports ever surge again, which is unlikely since the steel industries in most other countries have undergone restructurings similar to that in the United States. Foreign firms are now also less inclined to overproduce and will thus have little need to seek markets for their excess production. The conditions that gave rise to that behavior in the past have largely disappeared from the steel industry.

The emergence of demand in China, India, the former Soviet Republics, and many other places that were not viable markets just a few years ago gives international suppliers many more sales opportunities, so the importance of the United States to their marketing plans is diminishing. Likewise, the process of globalization and the integration and collaboration between U.S. and foreign firms have raised and will continue to raise the cost of bringing antidumping petitions.

Despite past proclamations regarding the death of the business cycle, there will inevitably be future economic downturns. Under those conditions, businesses are likely to do whatever it takes—including filing trade petitions—to hold or win market share. And in anticipation of declining fortunes, U.S. supporters of the antidumping law have been working to make the antidumping option more attractive and accessible to U.S. industries.

Lowering the Legal Thresholds

While supporters argue that a strong antidumping law is necessary to protect U.S. companies from foreign producers who are artificially advantaged by the market-distorting policies of their governments, the fact is that no U.S. antidumping investigation ever even considers whether such market-distorting policies exist. Petitions for antidumping protection are not even required to include evidence of the existence, let alone the effects, of such policies. Rather, the Commerce Department simply assumes that lower prices in the United States than in the producer's home market or sales made at prices below the full cost of production prove incontrovertibly the existence of foreign market-distorting policies. That conclusion plainly ignores the multitude of legitimate, rational, profit-maximizing reasons a company might sell at different prices in different markets or at prices below the full cost of production.[5]

Furthermore, even a finding of dumping by the Commerce Department cannot be considered evidence of price discrimination or sales below cost. The methodologies employed to calculate dumping are so slanted in favor of an affirmative finding that the result can be considered nothing more than an artifact of those flawed methods.[6] U.S. courts, NAFTA panels, and the WTO dispute settlement system have all found various aspects of the Commerce Department's calculation methodologies to violate U.S. law or U.S. WTO commitments.

Yet, in Congress, the antidumping law enjoys broad bipartisan support. Most lawmakers consider antidumping rules a legitimate response to unfair trade, and many cannot conceive that the administration of the rules might be at times overzealous and in violation of U.S. law or U.S. WTO obligations. In Congress, WTO or NAFTA rulings finding fault with U.S. administration of the law are often perceived as judicial overreaching on behalf of predatory foreign interests intent on weakening the law. Few lawmakers concern themselves with the fact that companies penalized by spurious administration of the law are never found to be engaging in unfair trade. Nor do many care much that antidumping measures calculated pursuant to those biased and distorted methodologies severely and unfairly handicap U.S. companies that rely on the affected imports.

It is against this backdrop that Rep. Phil English (R-PA) introduced in May the Trade Law Reform Act of 2006 (H.R.

5529), which would, among other things, lower the already minimal evidentiary requirements necessary to impose antidumping measures.

Under current law, an affirmative finding requires the U.S. International Trade Commission to conclude that dumped imports are a cause of material injury to the domestic industry. In reaching that conclusion, the U.S. courts have interpreted the law as requiring the ITC to find that material injury is "by reason" of the subject imports, and that the mere presence of "less than fair value" imports when an industry is found to be injured does not imply causation. In other words, the antidumping law requires a "showing of causal—not merely temporal—connection between the less than fair value goods and the material injury."[7] The requirement to show a causal connection implies an analysis that at least isolates from other factors the effects of imports on the condition of the industry, which is an explicit requirement of the ADA.

English's legislation would change the law to include the following language: "The Commission need not determine the significance of imports of the subject merchandise relative to other economic factors." Not only would that change lower the threshold by allowing a "merely temporal" connection to lead to an affirmative finding of causation, but it would baldly violate U.S. WTO obligations.

H.R. 5529 would also mandate a change in current procedures whereby the ITC exempts from the case countries from which imports are a small percentage of total import volume. The logic behind the current practice to exempt is that small volumes cannot have an important impact on price and therefore cannot realistically be causing material injury to a domestic industry. H.R. 5529 would buck the logic and require the ITC to consider the effects of imports from small-volume countries, making it easier to ensnare exporters from countries that are not injuring U.S. industries.

The legislation would also require that, in calculating dumping margins, the Commerce Department deduct from U.S. price any antidumping duties paid by the importer, which would have the effect of reducing the net U.S. price before comparing it to normal value, thus increasing calculated dumping margins. This modification would be akin to a dog chasing its tail. An antidumping duty is supposed to convey to a foreign exporter that his U.S. price is too low. The rate of duty roughly translates to the amount by which he should raise his U.S. price to avoid future dumping. If the antidumping duty paid is deducted from the U.S. price, then the exporter gets no credit for his efforts to avoid dumping because—all else being equal—the new antidumping rate is the same.

The legislation contains several other modifications to the antidumping law, each of which serves the purpose of chipping away at the already lax requirements for winning antidumping relief. For those who might believe that U.S. obligations under the ADA will ensure that Congress does not pass laws that lower the thresholds and otherwise knowingly contravene those commitments, the U.S. track record regarding its responsiveness to adverse findings against its antidumping practices and procedures suggests otherwise.

The long-running softwood lumber dispute with Canada finally ended in a settlement. But the United States essentially gave the Canadians no choice but to settle because after losing time and again on its injury and dumping findings, exhausting its appeals, U.S. authorities refused to abide by those rulings.[8] And despite several indictments from the WTO and a NAFTA panel of the U.S. antidumping calculation methodology known as "zeroing," the United States has thus far refused to change its practice.[9]

Although the United States has taken preliminary action to comply with the WTO's ruling that the so-called Byrd Amendment violates provisions of the ADA, the process between enactment and repeal of the law will have taken seven years. The Byrd Amendment was a provision snuck into an agriculture appropriations bill at the eleventh hour in 2000. The provision directed all antidumping and countervailing duties collected by the Customs Service to be reserved in special accounts for reimbursement to the petitioners and supporters of the respective trade remedy cases. Byrd was immediately challenged by 11 WTO members and found by a dispute panel in 2002 and again by the WTO Appellate Body in 2003 to violate provisions of the ADA (and other WTO agreements). Although the U.S. Congress refused to repeal the Byrd Amendment for more than two years after the decision, despite retaliation being authorized to most complainants and imposed by some, the law was finally repealed as part of a budget reconciliation bill in late 2005. The provisions of that repeal, however, allow Byrd duties to be collected and distributed through September 2007.[10]

While U.S. petitioners, and most notably the trade lawyers representing them, argued that the Byrd Amendment in no way encouraged the filing of antidumping cases, the fact is that law firms used the prospect of receiving Byrd distributions to encourage companies to support trade remedy petitions. With repeal of the Byrd Amendment, the petitioners' bar is looking for alternatives to induce domestic companies to bring and support these cases. With legislation like Rep. English's, which would make it easier for the International Trade Commission to find injury and the Commerce Department to find affirmative dumping margins, the missing component is one that would address the cash flow uncertainty facing prospective petitioners. Bringing antidumping cases can be expensive. And that cost can be an obstacle, particularly for companies that are not convinced that imports are causing them harm. But in late 2005 and early 2006, a new model designed to overcome that obstacle may have emerged.

A Sign of Things to Come?

In 2004 the U.S. shrimp industry filed antidumping petitions against exporters from six countries. After a year-long investigation of the claims, antidumping orders were imposed with nearly 100 foreign companies receiving individual antidumping rates, and all other exporters assigned country-wide rates.

Under provisions of the law, every year the Commerce Department invites parties involved in antidumping cases to request reviews of the most recent year's imports to determine the actual amount of dumping for that year, and to set new deposit rates going forward. Neither petitioners nor the respondent companies are required to request a review, and if no such requests are made, the duty rates already in effect continue.

In the shrimp case, most of the foreign companies received relatively low antidumping rates in the original investigation. While each of those companies would have preferred zero antidumping rates, the rates for many were low enough that they could continue exporting to the United States. And subsequently, many foreign companies were not inclined to request reviews because the cost of litigation, as well as the cost of the uncertainty that the review might generate higher dumping margins than they were depositing, exceeded the cost of the rates they were posting.

Knowing that many exporters could live with their rates, the domestic industry requested reviews of dozens of companies—even though the industry had difficulty scraping up enough money to pay its lawyers for the original investigation until Byrd Amendment subsidies became available. But before the administrative reviews got underway, petitioners approached most of the respondents for which reviews were requested with an offer. Instead of going forward with the reviews, the petitioners would withdraw their requests for review in exchange for cash. Reports primarily in shrimp industry publications and in foreign newspapers indicated that petitioners were asking respondents for cash amounting to between 2 and 3 percent of the value of their exports to the United States in the previous year.

Most foreign companies accepted the deal, which arguably was the better option for both parties in each deal. But there is clearly something unseemly about the domestic industry extorting large sums of money from foreign shrimp producers under threat of burying them in heavy legal costs and the uncertainty associated with the Commerce Department's calculating new antidumping rates. There is also something ominous about the relative ease with which the petitioners' bar was able to effectively sell access to the U.S. market and split the proceeds with U.S. companies.

Although the Byrd Amendment was found in violation of the ADA and will cease to operate next year, the petitioners' lawyers seem to have concocted a model for effectively resurrecting Byrd. With this success under their belts, petitioners' lawyers have a new way to market antidumping actions to their current and prospective clients. This strategy, in conjunction with threshold-lowering legislation like Rep. English's, points to an increase in antidumping use in the future.

Conclusion

Although antidumping initiations have declined in recent years and structural changes in the world economy should curtail the conditions that traditionally have inspired antidumping cases, efforts are underway to make the law more accessible and more attractive to protection-seeking U.S. industries. If legislation like the Trade Law Reform Act of 2006 becomes law, it will change the analysis industries conduct when considering trade actions, weighing more heavily in favor of bringing more antidumping suits. And if settlements like those that prevailed in the shrimp case fly under the radar and fail to raise legal and ethical questions, antidumping will be marketable as a revenue-generating scheme and pitched with success to industries otherwise disinclined to bring such actions.

The shelving of the Doha Round is a serious setback for antidumping reform. Without significant changes to curtail the abuse of the antidumping law, sympathetic lawmakers and petitioners' lawyers are more likely to succeed at broadening the protectionist impact of the antidumping law.

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1. World Trade Organization; data compiled from table titled "AD Initiations by Reporting Member from 01/01/95 to 31/12/05," available at http://www.wto.org/english/tratop_e/adp_e/adp_stattab2_e.xls.
2. World Trade Organization; data compiled from table titled "AD Sectoral: Distribution of Initiations by Reporting Member from 01/01/95 to 31/12/05," available at http://www.wto.org/english/tratop_e/adp_e/adp_stattab12_e.xls.
3. U.S. Department of Commerce, Import Administration, "Antidumping and Countervailing Duty Initiations: January 1, 2000 to Current," available at http://ia.ita.doc.gov/stats/inv-initiations-2000-2005.html.
4. Doug Cameron, "Wariness Remains As Sector Finds New Rhythm," *Financial Times*, June 14, 2006.
5. For a detailed discussion of some of the legitimate explanations for price discriminating and selling below cost, see Brink Lindsey, "The U.S. Antidumping Law: Rhetoric versus Reality," Cato Institute Trade Policy Analysis no. 7, August 16, 1999.
6. For a detailed discussion of the Commerce Department's antidumping calculation methodologies, see Brink Lindsey and Dan Ikenson, "Antidumping 101: The Devilish Details of 'Unfair Trade' Law," Cato Institute Trade Policy Analysis no. 20, November 26, 2002.
7. *Gerald Metals, Inc. v. The United States, et al.*, United States Court of Appeals for the Federal Circuit (97-1077)(1997).
8. For a summary of events in the U.S.-Canada softwood lumber dispute, see Dan Ikenson, "America's Credibility Goes 'Timber!'" Cato Institute Free Trade Bulletin no. 20, October 28, 2005.
9. For further elaboration of the practice known as zeroing, see Dan Ikenson, "Zeroing In: Antidumping's Flawed Methodology under Fire," Cato Institute Free Trade Bulletin no. 11, April 27, 2004.
10. For a brief history of the Byrd Amendment, see Dan Ikenson, "'Byrdening' Relations: U.S. Trade Policies Continue to Flout the Rules," Cato Institute Free Trade Bulletin no. 5, January 13, 2004.