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Abuse of Discretion

Time to Fix the Administration of the U.S. Antidumping Law

by Daniel Ikenson

Executive Summary

Administration of the U.S. antidumping law has been a significant source of friction in international trade in recent years. Since the establishment of the World Trade Organization in 1995, various aspects of U.S. antidumping practice have been subject to dispute settlement in 26 different cases. Most of the issues raised in those cases concern the discretionary practices of the U.S. Import Administration, an agency within the Department of Commerce that administers part of the antidumping law.

At present, the United States remains noncompliant with several WTO determinations that certain U.S. antidumping methodologies violate the rules established by WTO members. Compliance in some of those cases could be achieved simply by changing the offending discretionary practices and would require no actions by the U.S. Congress.

IA routinely exploits gray areas in the law to favor the domestic interests that seek protection—and, according to the verdicts of U.S. courts, sometimes violates the law in the process. In the 18-month period ending in June 2005, IA published 19 antidumping redeterminations pursuant to court orders to revise its assumptions or calculations to become compliant with the law. In 14 of those redeterminations, the revised antidumping rates were lower than those originally calculated. The imposition of antidumping orders and the inflation of antidumping duty rates based on erroneous judgments have profound adverse effects on trade and trade relations.

It is time for U.S. antidumping policy to be brought into the fold of broader U.S. trade policy objectives. Its administration must be disciplined and calibrated with the efforts of other U.S. agencies to open markets abroad and to demonstrate that the United States believes in the merits of free trade. Accordingly, policymakers should consider the merits of establishing an oversight board, comprising representatives from various agencies with jurisdiction over trade policy, to review IA's antidumping determinations before they are published. Such a body could help buffer antidumping decisions from the results orientation and politicization to which they are currently so prone.

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Introduction

Regardless of one's opinion about the efficacy of the antidumping law, there is at least one significant point of consensus. Administration of the antidumping law in the United States—as well as efforts to address dumping under other statutes—has been found inconsistent with the World Trade Organization's Antidumping Agreement on numerous counts in recent years. Though antidumping measures are permitted in the WTO, the particulars of how such determinations are rendered and the remedies applied must conform to a set of rules coauthored by the United States.

Since the establishment of the WTO in 1995, various aspects of U.S. antidumping practice have been subject to dispute settlement in 26 cases. Most of the issues raised in those cases concern the discretionary practices of the U.S. Import Administration (IA), an agency within the Department of Commerce that administers the antidumping law. In other words, WTO members are consistently challenging and WTO adjudicators are consistently finding fault with, not the U.S. antidumping law as written, but the way in which IA administers the law.

At present, the United States remains noncompliant with several WTO rulings concerning its antidumping practices. Compliance in some of those cases would require no legislative changes; the problems could be resolved simply by changing the offending discretionary practices. Of course, as a sovereign nation the United States reserves its right to ignore international agreements. But there are real costs to exercising that right—costs that are borne, generally, not by those who benefit from antidumping protection, but by those who do not. To dismiss those costs as acceptable collateral damage in the exercise of U.S. sovereignty is to mistake parochial interests for national trade policy.

IA routinely exploits gray areas in the law to favor domestic interests that seek protection—and according to the verdicts of U.S. courts, sometimes violates the law in the process. Between January 2004 and June 2005, IA published 26 antidumping redeterminations pursuant to court orders to either explain the rationale behind a decision or to change a decision so that it would become compliant with the law. In 14 of the 19 cases in which the court instructions required recalculation of the antidumping rate, the revised figures were lower than those originally calculated.

The repeated rebukes from U.S. courts and the WTO underscore the need to scrutinize IA's decisions before they are published. Even though judicial review can correct improper decisions of IA, cases generally take years to resolve. And during the period of appeal, exaggerated antidumping rates remain in place, penalizing normal commercial behavior and creating trade frictions. The imposition of antidumping orders and the inflation of antidumping duty rates based on erroneous judgments have profound adverse effects on trade and trade relations.

This study highlights some of the areas in which IA routinely exercises discretion, evaluates its exercise of that discretion, and asks whether it is good policy to leave so much oversight in the hands of an agency that may lack the objectivity needed to administer the law evenhandedly. The establishment of an oversight board comprising representatives from various agencies with jurisdiction over trade policy is recommended to review IA's antidumping determinations before they are published. Such a board could help restrain IA's tendency to rule in a politicized and results-oriented manner. In so doing, such a board could reduce the collateral damage from erroneously penalizing unobjectionable commercial behavior. It would help to ensure that broader U.S. trade policy objectives are not undermined by overly aggressive determinations of a single agency with a myopic view of trade. It would help the United States avert further embarrassing, credibility-taxing showdowns in the WTO. And it would show that the United States is willing to lead by example on trade issues, which is an asset that will be needed if the Doha Round is to have a chance of meeting its ambitious goals.

Discretionary Practices

To the casual observer, antidumping determinations are the product of a purely mathematical process, driven exclusively by objective data and free of discretionary judgment calls. But that is an incomplete and inaccurate picture of the process.[1]

In an antidumping investigation, IA is tasked with measuring dumping. It begins by sending detailed questionnaires to the major exporters of the subject merchandise seeking information about their corporate structures, their business affiliations, the products they produce and sell in all markets, the prices and volumes of their sales, the processes and expenses involved in bringing their products to market and selling them, the costs of production, operational expenses, financial expenses, and so on.

The questionnaires seek narrative explanations as well as complete databases containing records of every U.S. and comparison market[2] sale during the period of investigation, including prices and per unit amounts for every expense incurred to produce, package, transport, and sell the merchandise, as well as operational expenses not directly linked to the sales in question. That information is fed into a series of computer programs, and a finding of dumping is rendered when a foreign producer's net U.S. price is less than "normal value."[3]

That sounds objective enough. But from the initial collection of data to the final publication of results, the antidumping determination process is guided by a series of questions that defy simple quantification and that require the exercise of judgment and discretion. Those judgment calls include the following: How is the product defined? What are the relevant product characteristics for purposes of averaging prices and costs and for comparing prices between markets? Who is affiliated with whom? What comparison market should be used? Are the expenses properly categorized and entirely reported? Which accounting period best corresponds to the period of investigation? What differences exist between a company's selling activities in its home market and its selling activities in the United States? Do those differences warrant "level of trade" adjustments to the prices before comparing them? What constitutes the date of sale? Should "facts available" be used?[4] If so, what approximations should be used? And so on.

In cases involving so-called nonmarket economies (NMEs), yet more questions become relevant: Is the respondent sufficiently free from government control? Which is the most appropriate surrogate market? What surrogate values are the best approximations for the various costs of production components? Can certain purchases of inputs from market economies serve as cost of production components? Which companies should be entitled to a "separate rate"?[5] And so on.

To answer those and other questions, IA must render subjective judgments, which usually require adjudicating between competing perspectives. Sometimes IA rejects all competing arguments on a point and imposes its own interpretations. In a typical investigation, there are dozens of "up-for-grabs" issues. At the end of the day, the confluence of those various judgment calls can affect—sometimes dramatically—the final result.

When IA publishes its final determinations, it often includes a list of the issues raised by the parties concerning methodologies employed, calculations made, or decisions rendered, along with a summary of each party's arguments and an explanation for its ultimate judgment on each decision. In the 18-month period ending in June 2005, IA issued 38 final determinations in original antidumping investigations, finding dumping in 36 of those 38 determinations.[6] In 11 of those final determinations there were 5 or fewer issues raised by the parties; in 13 of those determinations there were between 10 and 20 issues raised; and in 14 of those cases, there were 21 or more issues that IA was required to adjudicate. A total of 650 issues—an average of more than 17 per case—were presented and required adjudication by IA in those 38 final determinations. Thus, dumping calculation involves more than simply plugging objective numbers into a computer program. In many cases, IA's judgment calls determine the numbers themselves.

Table 1 presents a summary of all issues

Dumping calculation involves more than simply plugging objective numbers into a computer program.

Table 1
Contested Issues in IA Investigations (January 2004–June 2005),
Frequency of Issues by Broad Issue Group and Case

Case Name	Accuracy/ Completeness	Administrative/ General	Affiliated Parties
Wax and Wax/Resin Thermal Transfer Ribbons from Japan	0	1	0
Certain Color Television Receivers from China	3	2	0
Certain Color Television Receivers from Malaysia	2	0	2
Wax and Wax/Resin Thermal Transfer Ribbons from Korea	1	0	2
Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from China	1	0	0
Polyethylene Retail Carrier Bags from China	0	2	1
Polyethylene Retail Carrier Bags from Malaysia	0	0	1
Polyethylene Retail Carrier Bags from Thailand	1	0	2
Tetrahydrofurfuryl Alcohol from China	0	0	0
Light-Walled Rectangular Pipe and Tube from Turkey	0	1	3
Certain Aluminum Plate from South Africa	0	0	0
Hand Trucks and Certain Parts Thereof from China	1	0	0
Carbozole Violet Pigment 23 from China	0	1	0
Carbozole Violet Pigment 23 from India	1	0	0
Wooden Bedroom Furniture from China	6	2	3
Certain Frozen and Canned Warmwater Shrimp from Brazil	1	0	1
Certain Frozen and Canned Warmwater Shrimp from China	2	2	0
Certain Frozen and Canned Warmwater Shrimp from Ecuador	0	0	2
Certain Frozen and Canned Warmwater Shrimp from India	0	1	0
Certain Frozen and Canned Warmwater Shrimp from Thailand	1	0	0
Certain Frozen and Canned Warmwater Shrimp from Vietnam	0	1	0
Outboard Engines from Japan	1	0	2
Certain Tissue Paper Products from China	0	1	0
Magnesium Metal from China	0	2	0
Magnesium Metal from Russia	0	0	2
Bottle-Grade Polyethylene Terephthalate (PET) Resin from India	2	2	0
Bottle-Grade Polyethylene Terephthalate (PET) Resin from Indonesia	0	3	1
Bottle-Grade Polyethylene Terephthalate (PET) Resin from Taiwan	1	1	2
Bottle-Grade Polyethylene Terephthalate (PET) Resin from Thailand	2	1	0
Live Swine from Canada	3	1	3
Chlorinated Isocyanurates from China	0	1	0
Chlorinated Isocyanurates from Finland	0	0	0
Chlorinated Isocyanurates from Netherlands	0	0	0
Total	29	25	27

Note: There were no official contested issues in 5 of the 38 investigations reviewed.

Cost of Production	Date Issues	DOC Methodologies	Facts Available	Model Matching	NME Separate Rates	NME Surrogates	Price Adjustments	Scope/ Ordinary Course	Total
0	0	0	0	0	0	0	0	1	2
0	1	1	1	0	1	30	5	0	44
6	2	1	0	0	0	0	12	1	26
9	0	3	1	0	0	0	1	0	17
0	0	1	0	0	0	8	1	0	11
0	0	4	6	0	0	18	1	1	33
7	0	1	1	0	0	0	1	0	11
3	1	0	0	0	0	0	3	0	10
0	0	1	1	0	0	7	1	0	10
3	0	0	1	0	0	0	3	0	11
0	0	2	0	0	0	0	1	0	3
0	0	1	2	0	4	11	3	0	22
0	0	0	5	0	0	13	1	0	20
0	0	0	0	0	0	0	2	0	3
0	0	8	1	0	4	44	7	3	78
8	0	3	1	2	0	0	6	0	22
0	0	3	4	0	0	10	0	0	21
6	1	2	0	3	0	0	11	5	30
6	0	5	0	3	0	0	5	1	21
2	1	4	1	1	0	0	4	1	15
0	0	7	4	0	2	8	1	0	23
4	1	2	0	0	0	0	6	5	21
0	0	0	0	0	2	1	0	1	5
0	0	0	1	0	2	12	0	0	17
10	2	1	0	2	0	0	3	4	24
5	1	2	0	0	0	0	4	0	16
5	0	1	0	0	0	0	5	1	16
1	1	0	0	0	0	0	4	0	10
3	0	2	0	0	0	0	7	0	15
54	0	2	0	0	0	0	5	1	69
0	1	0	0	0	0	18	0	0	20
0	0	0	1	0	0	0	0	0	1
0	0	1	0	0	0	0	1	1	3
132	12	58	31	11	15	180	104	26	650

raised and adjudicated in each of the 38 final investigations rendered during the 18-month period. Each issue has been assigned to one of 12 broad issue categories.[7] As is evident, issues pertaining to nonmarket economy surrogate values arose most frequently—180 times—partly because one-third of all investigations concluded during the 18-month period involved nonmarket economies, but also because almost every NME case features disagreements with respect to what data to use for constructing surrogate values.

NME Surrogate Values

NME surrogate valuation is an area in which IA has an enormous amount of discretion and has exercised that discretion in so many different ways that it has created a case history with precedents to support almost any methodological undertaking. In NME cases, IA disregards home market sales as the basis for normal value and instead relies on a surrogate value methodology.[8] Under that approach, IA estimates what the home market selling price should be by determining the amount of inputs required to produce the subject merchandise and then values those inputs using prices paid for them in a "comparable" market economy country. Then IA adds to those estimates yet further estimates for overhead, selling expenses, general and administrative expenses, and profit. This may sound straightforward, though clearly imprecise or inaccurate, but no two NME cases are administered alike.

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A significant determinant of dumping margins in NME cases is the choice of surrogate companies to use for calculating overhead, expenses, and profits. Higher costs and profits lead to higher normal values and thus higher dumping margins. Accordingly, petitioners and respondents naturally are inclined to advocate use of the financial statements that serve their interests. Such advocacy is encouraged because IA has no consistent standards governing its selection of financial statements.

The issue of surrogate financial ratios arose in several of the 38 investigations. And IA's logic for its decisions with respect to that issue differed from case to case. In *Certain Color Television Receivers from China* (CTVs), IA used the financial statements of five of six Indian companies whose data were on the record. The statements for three of those five companies covered a period that was not contemporaneous with the period of investigation. The relatively large sizes of two of those three companies were cited as a reason to include them despite the lack of contemporaneity. IA used the financial data of the third company, whose financial statement also was not contemporaneous, because "[it] is an Indian CTV producer in the preferred surrogate country with financial statements equally contemporaneous to those of BPL and Videocon [the two large but noncontemporaneous companies]."[9] Thus, neither size nor contemporaneity mattered with respect to that company. Its data were contemporaneous with the noncontemporaneous data of two companies, both of which were included because of their size. IA summarizes its position in this case by stating that "the Department considers a variety of factors, not just contemporaneity, in selecting the appropriate surrogate producers on which to base our surrogate financial ratios."[10]

Yet in *Polyethylene Retail Carrier Bags from China*, IA cited lack of contemporaneity as the sole reason for not using the financial statements of four producers. "We have not used the financial statements of Diamond, Kuloday, Sangeeta, and Synthetic Packers because the period covered by each of these financial statements is April 1, 2001, through March 31, 2002. . . . The period of investigation is October 1, 2002, through March 31, 2003. Thus, none of these companies' financial statements are contemporaneous with the POI [period of investigation]. Because there is at least one appropriate financial statement on the record that is contemporaneous with the POI, we find it is not appropriate to use these companies' financial statements to calculate surrogate financial ratios."[11] That logic is in direct conflict with that applied in the *Color Television* case, where three of the financial statements used were not contemporaneous with the period of investigation and two were. According to the logic in *Retail Bags* presented above, there was no justification for using the

three statements from the *Color Television* case that were not contemporaneous with the period.

Likewise, in *Wooden Bedroom Furniture from China*, IA "did not use the 2001/2002 financial statements of MM Agencies Private Limited, Wood Kraft Private Limited, Imperial Furniture Company, and Usha Shriram Furniture Industries because the record contained numerous financial statements that were more contemporaneous."[12] However, IA did not use contemporaneous financial statements in *Furniture* anyway. There was only one surrogate company financial statement that covered the period of investigation completely, but it showed no profit. Thus, "considering the Department's preference for using multiple financial statements and the absence of any profitable financial statements completely covering the POI, the Department determined that the pool of 2002/2003 Indian financial statements would provide the best basis for calculating the surrogate financial ratios."[13]

But while IA justified its use of the pool of 2002–03 statements by citing its preference for multiple financial statements, that preference seems to come and go. In a case involving *Certain Automotive Replacement Glass Windshields from China*, IA opted to use the financial statement of only a single company, employing the circular logic that this company's profit experience was probative of the surrogate industry's profitability because the company was a member of that industry. IA argued: "In this case, the 8.42% profit of Asahi [the single source of profit] is a reasonable amount for surrogate profit because it represents the actual profit experience of a surrogate company in the surrogate country. It is an amount actually realized by a surrogate company and the record does not contain any evidence demonstrating that the profit experience of Asahi is abnormal."[14] IA considered those profits not abnormal despite the fact that the financial statements of the other producers on the record showed losses during the period.

Every NME case entails ad hoc selection of financial statements from which to cull surrogate financial components. Indeed, every NME case features a process whereby various surrogates are proposed to serve as estimates for the cost of every input consumed in the production of the subject merchandise. Thus, the determination of whether a Chinese company is dumping and to what extent reflects in large measure IA's selection of those surrogate values, which in sum constitute the normal value to which the investigated company's U.S. prices are compared.

Considering the growing hostility toward China among policymakers in Congress, IA's vast latitude to effectively create dumping margins should be viewed as a potential challenge to the exercise of prudent rules-based trade policy.

Cost Allocations

Cost of production issues are prominent in market economy cases, as well—132 issues were raised and adjudicated on this subject during the 18-month period. While IA is somewhat more constrained in its capacity to invent normal values in market economy cases, it still wields plenty of discretion to alter outcomes significantly. IA normally relies on data from a respondent's books and records when those records are prepared in accordance with the home country's generally accepted accounting principles and reasonably reflect the costs of producing the merchandise. But it is extremely rare that respondent companies maintain their cost records at the level of detail required by IA.

In the normal course of business, companies may maintain cost records at an aggregated level. That is, they may have accounts for total materials costs, total labor costs, total overhead, and general and administrative costs. In some cases, companies may allocate their production costs to a few broad product categories so that they can track profits and losses by each product line. But in an antidumping investigation, IA requires highly detailed unit costs for each product narrowly defined by the product characteristics deemed relevant in the case. Although a widget manufacturer might maintain separate cost records for widgets of different material (i.e., rubber and plastic), IA would require unit costs by material, size, and color if those were deemed by the agency to be the product characteristics relevant to the antidumping analysis. The question

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becomes one of allocation. What is the most reasonable method of allocating the total costs to all of the individual products when the company's records are maintained more broadly?

In some cases, IA allocates costs according to product weight. The heavier the product, the more total cost allocated to its unit cost. In other cases, IA allocates according to realizable sales value—the higher the price, the higher the unit cost. And in other cases, IA has resorted to yet other methodologies. The bottom line is that the various cost allocation methodologies distort the true picture of a company's financial performance and produce fictitious unit costs that differ from methodology to methodology. One methodology might produce a unit cost for the most important comparison market product that is 25 percent higher than some other methodology. Thus, many of the cost issues raised over the past 18 months concern allocations, adjustments, and allowances.

Under certain circumstances, IA will make adjustments or allowances when the cost experience of the respondent is somehow atypical or otherwise unrepresentative of normal operating conditions. If a company incurs unusually high costs during the period because it is a start-up operation or there was a fire in the plant or a labor strike, IA may recognize those events as having an abnormal impact on the unit cost of production and make allowances for the event. While total costs of production may be in line with historical averages (in the case of fire or strike), unit costs of production—a procedural construct for antidumping calculation purposes—would rise because of the event's curtailing effect on total output (unit cost is total cost divided by total output). Although allowances for those types of events have been made in some cases, IA has also rejected other seemingly valid claims.

One vivid example occurred in the final determination for *Canned Preserved Mushrooms from India* in 1998. In that determination, IA refused to make an adjustment to the costs reported by Ponds, an Indian producer who was claiming that "extraordinary events" reduced the company's crop yield during the period of investigation.

Ponds argued that IA should consider Ponds' low mushroom yield in 1997 a consequence of highly unusual events, including a major flood, crop disease, and the unexpected death of its experienced plant manager, and should adjust its costs by considering historical yields. Citing previous cases in which IA made such adjustments, Ponds argued that the circumstances in its case fit IA's definition of unforeseen and extraordinary: the events were infrequent in occurrence, unusual in nature, and caused an unforeseen disruption in production that was beyond management's control.

But IA rejected Ponds' request, stating that "with regard to the death of a production manager, the flooding, and the crop disease experienced by Ponds during the POI, we find none of these events to be extraordinary or unforeseen."[15] IA concluded that heavy rainfall was not unusual for India and that Ponds' management had taken preemptive steps to mitigate the effects of flooding by building drainage ditches. IA also noted that various disease prevention measures in place at Ponds' facilities implied that crop disease was not unusual or unexpected. And with respect to the death of the experienced manager, IA found that "the loss of an employee, whether through tragic death or resignation, is neither unusual [n]or infrequent."[16]

After rejecting the company's claim, IA performed its cost test, which found, unsurprisingly, that every sale was made at a price below the unit cost of production. Accordingly, constructed value was used as the estimate for normal value. But since the company had no sales above cost (i.e., no profits) during the period of investigation, IA picked and applied the profit rate experienced by the company in the previous year. Thus, the company incurred a financial loss during the period of investigation because of a stunted crop yield; IA declined to adjust for the aberrational output by ruling that the cause was not extraordinary; and then IA pretended that the company actually realized a profit on its operations.

Price Adjustments

A third major category of issues in which IA exercises discretion concerns price adjustments, which include billing adjustments, sell-

ing and movement expenses, and any other adjustments that IA makes to the gross selling prices before they are compared between markets. During the 18-month period, price adjustment issues arose 104 times.

Price adjustments have a direct impact on the antidumping duty calculation. Deductions from U.S. price and increases to the comparison market price increase dumping margins, whereas increases to U.S. price and decreases of comparison market price reduce the dumping margin. Accordingly, interested parties focus a great deal of effort on trying to convince IA to accept or reject price adjustment claims. And, as is the case throughout an antidumping proceeding, IA has wide discretion in this area.

Some price adjustments are fairly straightforward and well justified. For example, a documented commission of 2 percent paid to a selling agent that can be associated directly with a specific sale can be deducted by subtracting 2 percent from the unit selling price. Likewise, service fees charged by the seller's bank for processing wire payments from customers can be associated directly with a specific sale and deducted from the unit price. Other adjustments, such as rebates, discounts, and certain types of warranty expenses, also can be tied directly to specific sales on occasion and might warrant deductions from the price.

But many price adjustments made in the calculation of dumping cannot be associated directly with specific sales invoices. The company may incur advertising costs to promote its entire line of products or to promote brand name recognition. It may incur expenses associated with its sales operation that are not directly linked to sales of the subject products. It may incur transportation and storage expenses, which it tracks on a broad basis (i.e., total widgets, as opposed to red versus blue widgets). Those indirect or otherwise nonspecific expenses are usually allocated to the subject sales and deducted from price, much like general production costs are allocated to the unit costs of production. And, as is the case with respect to allocating costs of production, IA has wide discretion over how it allocates the various selling expenses. Hence, issues related to the subject are common, as seen in Table 1.

Affiliated Parties

IA's capacity to influence the outcome is not limited to issues concerning cost components and price adjustments. Judgments concerning whether a customer or supplier is affiliated with the subject exporter inform subsequent procedures in the antidumping margin calculation programs. Although statutory guidance exists to help IA determine whether a customer or supplier is affiliated, IA still reserves a lot of discretion in making that call. But there is little ambiguity with respect to the implications of labeling a supplier as affiliated. It gives license to IA to use the highest of actual cost, market value, or transfer price to serve as the acquisition cost for the input obtained from the affiliate. In other words, if a supplier is affiliated, the "major-input rule" allows IA to simply increase the price of that input if one of the other benchmarks is higher than the price actually paid.

Furthermore, when a customer is deemed affiliated, IA can request information pertaining to that customer's resales if it is a reseller. Often the "affiliated" customer has no interest in providing or obligation to provide those data, yet IA holds the respondent accountable for the information anyway and sometimes uses adverse facts available as a substitute for the missing information. That exact situation arose in a recent case concerning hot-rolled steel from Japan, which made its way through WTO dispute settlement and produced a finding that IA's actions had violated WTO rules.

Date of Sale

Likewise, issues pertaining to dates—particularly dates of sale—affect the universe of sales considered in the proceeding and affect the monthly weight averaging. As a general rule, IA considers the date of sale to be the date on which the material terms of the transactions are firmly established. In some cases that might happen on the invoice date, and in other cases it might happen at an earlier date, such as the date when a long-term contract is signed. In any event, IA leaves itself plenty of latitude to select either date, or even to select some other date, such as the date of shipment.

As is the case with respect to allocating costs of production, IA has wide discretion over how it allocates the various selling expenses.

The definition of what constitutes a "significant" change in a sales contract directs IA's decisions with respect to date of sale. And without any clear standards, a benchmark of "significant" leaves plenty of room for discretion.

In *Bottle-Grade Polyethylene Terephthalate (PET) Resin from Indonesia*, IA's position was that "in determining date of sale, the key element to consider is which date best reflects the date on which the exporter or producer establishes the material terms of sale. The Department considers a sale as made when the material terms of sale (i.e., price and quantity) are firmly established."[17] IA concluded that, for a particular exporter in that case, "the contract date firmly establishes the material terms of sale . . . and therefore, best represents the date of sale. We reviewed the sales contracts of Indorama's billing entity and its invoices for those contracts and found that the sales terms did not change *significantly* between the contract date and invoice date."[18]

Meanwhile, in a case concerning *Certain Frozen and Canned Warmwater Shrimp from Ecuador*, IA ruled that the contract date was an inappropriate measure of sale date and used the invoice dates instead, despite its finding that "the per-unit prices and shipment quantities of the transactions shipped pursuant to [the long-term contract], including the post-POI shipments, were consistent with the terms of the agreement."[19] The basis for that conclusion was that the respondent provided certain billing adjustments on some sales, which were not specified in the contract. Yet IA acknowledged that "the price differences for the two types of billing adjustments are small relative to the per-unit prices specified in the agreement."[20] Apparently the definition of what constitutes a "significant" change in a sales contract directs IA's decisions with respect to date of sale. And without any clear standards, a benchmark of "significant" leaves plenty of room for discretion.

Zeroing

Issues related to the calculation methodologies employed by IA also arise quite frequently. One of the most controversial—and distortive—IA methodologies is the procedure known as "zeroing."

Calculating a single, company-specific antidumping duty rate usually involves a multitude of price comparisons of many different products or transactions. Some of those comparisons may generate negative dumping margins (i.e., when U.S. price exceeds normal value). But before averaging the dumping margins from all of the comparisons to arrive at one single figure, the negative margins are set equal to zero (i.e., "zeroed"), preventing them from having any effect on the overall dumping margin calculation.

Table 2 presents the results of a fictitious case concerning widgets. Sold in the U.S. market are five different types of widgets: rubber, plastic, metal, brick, and stone. Each is sold at identical prices in both markets with the exception of the rubber and stone widgets. The rubber widget is sold for $0.50 less in the home market than in the U.S. market, and the stone widget is sold for $0.50 more. The unit margin

Table 2
Effects of Zeroing in a Fictitious Widgets Case

Product Code	Net U.S. Price	Net H.M. Price	Unit Margin	U.S. Quantity	Total Margin	Total PUDD	Total Value
Rubber	$1.00	$0.50	-$0.50	100	-$50	$0	$100
Plastic	$1.00	$1.00	$0.00	100	$0	$0	$100
Metal	$1.00	$1.00	$0.00	100	$0	$0	$100
Brick	$1.00	$1.00	$0.00	100	$0	$0	$100
Stone	$1.00	$1.50	$0.50	100	$50	$50	$100

Total Margin	$0
Total PUDD	$50
Total Value	$500
Percent Margin	10.00%

is equal to the amount of dumping calculated for each unique comparison. The arithmetic sum of the individual dumping margins (total margin) is zero because the price differences for the rubber and stone widgets cancel each other out. But zeroing contravenes this mathematical truth because the negative dumping margin on the rubber widget comparison is set equal to zero and thus denied any impact on the overall margin. Through zeroing, in this example, IA would find a dumping margin of 10 percent (the sum of the total potentially uncollected dumping duties, or PUDD, divided by the sum of the total value) even though the average rate of dumping is 0 percent.

Model Matching

Another area in which IA's discretion can have profound impacts involves product characteristics and model matching. The first step in comparing U.S. and home market prices is deciding which prices to compare. If products identical to those sold in the United States are not sold in the home market—which is the case in most antidumping investigations—IA compares the average U.S. price to the average home market price of the "next most similar" product. Among the most important aspects of antidumping calculation methodology, therefore, are product definition and determination of the next most similar products.

Products are defined for this purpose by the specific product characteristics that IA determines are necessary for "model matching"—that is, the characteristics that determine which products are more or less similar to each other and thus which products are compared with each other. In some cases, the defining characteristics are few and the options within each characteristic are limited. For example, widgets may be classified by size (large or small) and material (rubber or plastic). Using those classifications, there are only four possible models (large rubber, large plastic, small rubber, small plastic). And since there are only two possibilities within each characteristic, it is necessary only to determine "rank between" the characteristics, not "rank within" each characteristic. If size is considered a more important matching characteristic than material, the best match for a large rubber widget in the absence of an identical product in the home market is a large plastic widget. Alternatively, if material is more significant than size, the best match for a large rubber widget would be a small rubber widget.

If there were a third type of material (say vinyl) and a third size (say medium), there would be nine possible products, and it would be necessary to rank the order of similarity "within" each characteristic, as well as between. Here things can get tricky. Which is more similar to medium—large or small? Is rubber more similar to plastic or to vinyl? Those answers—provided ultimately by IA—weigh heavily on the final result.

Consider the three components of Table 3. Part A is a fictitious summary of 16 U.S. sales of widgets, identified by size and material, along with the prices of the matching home market products. If IA considers only size to be a relevant characteristic, the dumping margin is 9.09 percent (see Part B). If it considers both size and material to be relevant, the dumping margin is 18.18 percent (see Part C). Here we have the exact same set of facts (respondent's objective data) leading to dramatically different results after a subjective decision is rendered.

Table 3 also demonstrates the interplay between product definition and zeroing. The more characteristics there are (in Part C there are two; in Part B there is one), the greater the likelihood of finding higher dumping margins. That is because the more characteristics there are, the more averaging subgroups there are. And zeroing prevents the negative margins from one subgroup from mitigating the positive margins in another subgroup. As Table 3 shows, if zeroing were precluded, the results would be identical (9.09 percent) under Part B and Part C.

That is not to say that IA always selects the product characteristics and hierarchy that lead to the highest margins, but that subjectivity in rendering a seemingly innocuous decision can influence the outcome—sometimes dramatically. And with the knowledge that more product characteristics always lead to more averaging groups, and that more averaging groups compound the margin-inflating effects of zeroing, decisions to include superflous characteristics in

One of the most controversial—and distortive—IA methodologies is the procedure known as "zeroing."

Table 3
Outcome Variations under Different Model Match Specifications

Part A: Summary

Invoice	Size	Material	U.S. Qty	U.S. Price	H.M Qty	H.M Price
1	small	rubber	10	$1.00	10	$2.00
2	small	rubber	10	$1.00	10	$2.00
3	small	rubber	10	$1.00	10	$2.00
4	small	rubber	10	$1.00	10	$2.00
5	small	plastic	10	$3.00	10	$2.00
6	small	plastic	10	$3.00	10	$2.00
7	small	plastic	10	$3.00	10	$2.00
8	small	plastic	10	$3.00	10	$2.00
9	large	rubber	10	$3.00	10	$4.00
10	large	rubber	10	$3.00	10	$4.00
11	large	rubber	10	$3.00	10	$4.00
12	large	rubber	10	$3.00	10	$4.00
13	large	plastic	10	$4.00	10	$4.00
14	large	plastic	10	$4.00	10	$4.00
15	large	plastic	10	$4.00	10	$4.00
16	large	plastic	10	$4.00	10	$4.00

Part B: DOC considers only SIZE to be a relevant product characteristic

Size	Total U.S. Quantity	Average U.S. Price	Average H.M. Price	Unit Dumping Margin	Extended Dumping Margin	Numerator in the % Dumping Calculation	Total Value of U.S. Sales	Percent Margin of Dumping
small	80	$2.00	$2.00	$0.00	$0.00	$0.00	$160.00	0.00%
large	80	$3.50	$4.00	$0.50	$40.00	$40.00	$280.00	14.29%
					$40.00	$40.00	$440.00	9.09%

Part C: DOC considers both SIZE and MATERIAL to be relevant product characteristics

Size	Total U.S. Quantity	Average U.S. Price	Average H.M. Price	Unit Dumping Margin	Extended Dumping Margin	Numerator in the % Dumping Calculation	Total Value of U.S. Sales	Percent Margin of Dumping
small, rubber	40	$1.00	$2.00	$1.00	$40.00	$40.00	$40.00	100.00%
small, plastic	40	$3.00	$2.00	-$1.00	-$40.00	$0.00	$120.00	0.00%
large, rubber	40	$3.00	$4.00	$1.00	$40.00	$40.00	$120.00	33.33%
large, plastic	40	$4.00	$4.00	$0.00	$0.00	$0.00	$160.00	0.00%
					$40.00	$80.00	$440.00	18.18%

the product definition bias the outcome in favor of finding higher dumping margins.

In the various *Shrimp* investigations in 2004, there were 14 product characteristics deemed relevant to the analyses. One little shrimp was defined by its combination of 14 characteristics. In descending order of importance, they were processed form (whether the shrimp were preserved by freezing or by canning); cooked form (whether the shrimp were sold in cooked, blanched, or raw form); head status (whether the shrimp were sold with the head on or off); count size (the range of the number of shrimp per pound); shell status (whether the shrimp were sold shell-on, shell-off, or split-shell); vein status (whether the shrimp were veined or deveined); tail status (whether the shrimp were sold tail-on or tail-off); other shrimp preparation (whether the shrimp were stretched, butterflied, etc.); frozen form (whether the shrimp were quick frozen, block frozen, not frozen, etc.); flavoring (whether the shrimp were spiced, marinated, etc.); container weight (weight of the packaging in which the shrimp were sold); presentation (whether the shrimp were sold in bulk, on a tray, on a skewer, etc.); species (black tiger, white, pink, etc.); and preservative (whether the shrimp contained sodium chloride, sulfites, etc.).

Within each characteristic, there are multiple classifications: processed form can be frozen or canned; cooked form can be raw, blanched, or cooked; count size carries 20 range possibilities, and so forth. Thus, according to IA's product definition, there were theoretically more than 34,560,000 specific shrimp product groups.[21] If there were only one group, all of the higher U.S. prices and lower home market prices would be considered in the calculation of an average dumping margin. But with that many characteristics, and that many theoretical products, the impact of zeroing is pronounced—even determinative—since the potential for comparisons that generate negative margins to offset those that generate positive ones is limited by the existence of infinitesimally small product groups.

The bottom line is that IA has so much discretion, and has exercised that discretion so inconsistently over the years, that it can find precedents for almost any decisions it makes. As an agency of the executive branch, IA must be afforded some discretion in administering the law when the statutory language is ambiguous. But most judgment calls have quantifiable interpretations that translate directly to the final dumping margin calculation. Although some degree of subjective intervention is in many cases unavoidable and is sometimes more reasonable than following an explicit boilerplate decision tree, there must be assurances that the system is being administered fairly. But evidence suggests that IA views itself more as a prosecutor than an arbiter.

Fox Guarding the Henhouse?

Even though IA must have some latitude when it comes to administering the law, the agency's mission, statements, and actions raise questions about its inclination to exercise its discretion objectively. A recent Commerce Department news release, touting IA's aggressive record combating unfair trade practices, boasts:

> The [Bush] Administration has vigorously pursued allegations of unfair trade to ensure that U.S. workers and businesses are not injured by imported products sold below market prices or subsidized by foreign governments. The *number* and *size* of the cases the Administration has accepted and initiated demonstrate its unprecedented commitment to combating unfair trade. . . . The Commerce Department has initiated over 200 new dumping and subsidy cases since January 2001, already more than the previous Administration initiated in either term. . . . The Commerce Department has already put in place nearly as many antidumping orders against China (21) as the previous Administration had in eight years (25). . . . The Commerce Department initiated the largest cases against China ever on imports of TVs, furniture and shrimp, valued at over $1.5 billion.[22]

Even though IA must have some latitude when it comes to administering the law, the agency's mission, statements, and actions raise questions about its inclination to exercise its discretion objectively.

If an agency measures its success by the number and size of cases it initiates and the number of antidumping measures it imposes, there is reason to question whether it can administer the law in an unbiased and objective manner. IA's statements reveal that the agency views its role more as prosecutor than judge.

In September 2004 IA announced the creation of the Antidumping/ Countervailing Duty Petition Counseling and Analysis Unit, which is an in-house "staff of professionals who are available to assist U.S. companies in a myriad of ways with respect to the U.S. unfair trade laws."[23] Among the examples of how that advisory panel might help U.S. companies is by "providing guidance to potential petitioners to assist them in determining what types of information will be required in order to pursue action against an industry suspected of unfair trade practices" and by "assisting potential petitioners in ensuring their petition is in compliance with statutory initiation standards."[24]

The description goes on the say that the "website in not meant to be a substitute for counseling by private experts," but the fact is that it provides a service on behalf of petitioners and potential petitioners. There is no equivalent source of advice for respondents and importers on how to defend against such allegations. Is it realistic to believe that after assisting companies with the task of assembling petitions for antidumping relief—to be presented to itself—that IA has no interest in seeing those requests bear fruit for petitioners?

Is it realistic to believe that after assisting companies with the task of assembling petitions for antidumping relief—to be presented to itself—that IA has no interest in seeing those requests bear fruit for petitioners?

Hearing from the U.S. Courts

One can look to the rulings of U.S. courts for evidence that IA administers the law in a manner that favors petitioning interests. In any given year, there are numerous issues remanded by the courts to IA with instructions to do it again, but the right way. Some of those remands appear to reveal something more than poor judgment. Some issues are remanded time and time again. Whether it's the same issue in the same case being remanded a second or third time because IA failed to get it right or the same issue arising in different cases, it is difficult to avoid the conclusion that IA's agenda goes beyond administering the statute in an unbiased manner.

Between January 2004 and June 2005, IA published 26 redeterminations of antidumping proceedings pursuant to remand orders from the courts.[25] As Table 4 indicates, seven of the remand orders required IA to explain how its decisions were consistent with the law and did not expressly mandate that IA make any changes. But of the 19 remands that did require methodological changes, 14 produced lower antidumping duty rates upon recalculation for at least one of the foreign companies involved.

The recalculated duty rates for four companies declined 100 percent to a dumping margin of zero. For another five companies, the rates were reduced by between 50 and 100 percent; and for another six companies, the rates were reduced by between 10 and 50 percent. In other words, the business relationships and sales of those companies in the United States, as well as their U.S. customers, suffered unnecessarily because of IA decisions that were ultimately found contrary to law.

Issues remanded were broad in scope, covering items such as the use and selection of adverse facts available, the choice of surrogate values, the use of a parent company's financial statements, the appropriate components of general and administrative expenses, the choice of interest rates to use for the credit expense calculation, the propriety of collapsing the financial data of companies that were deemed to be unaffiliated, and more.

In a case involving *Stainless Steel Butt-Weld Pipe Fittings from the Philippines*, the U.S. Court of International Trade (USCIT) remanded the final determination to IA with instructions to "reconsider its decision to resort to adverse facts available in calculating Tung Fong's antidumping duty margin and, if appropriate, reevaluate the particular adverse facts selected."[26] In the final determination, IA concluded that the respondent, Tung Fong, withheld certain cost of production information that IA requested. Without the cost data allocated according to

IA's specifications, IA claimed it was unable to make the necessary "difference in merchandise" adjustments applied in situations in which the prices of nonidentical products are compared. As a result, IA used as partial adverse facts available the highest dumping margins calculated on comparisons of identical merchandise. It then imposed those dumping margins on every nonidentical price comparison, producing a final determination rate of 33.81 percent.

In its remand, the court ruled that IA "improperly resorted to adverse facts available—instead of using the weight-based cost allocation data provided to the agency by Tung Fong—in calculating the company's dumping margin."[27] The court concluded that "the record is simply devoid of evidence to support either the Commerce Department's finding that Tung Fong withheld critical information that it had in its possession, or the agency's finding that it would have been—as a practical matter—feasible for Tung Fong to have obtained actual 'machine times' to respond to the agency's request for time-based cost allocation data during the course of the investigation."[28]

IA's redetermination pursuant to the court remand to use the respondent's submitted cost data produced a revised antidumping rate of 7.49 percent, a reduction in the margin of 78 percent.

In a case involving *Stainless Steel Butt-Weld Pipe Fittings from Taiwan*, the U.S. Court of International Trade remanded the final determination to IA to, among other things, reconsider its determination that a respondent was reimbursing the importer for the antidumping duties paid in connection with the importation of the subject merchandise. In circumstances in which IA determines that reimbursement of duties is occurring, it normally doubles the assessed duty rate. That is precisely what IA did in this case upon issuance of the final determination.

At issue was a reimbursement agreement between Ta Chen (the exporter) and Ta Chen International CA Corp. (the importer) specifying the terms under which the former would reimburse the latter for antidumping duties paid. The agreement was in effect for the period 1992–94. During the administrative review for the period 1998–99, IA presumed that the agreement was still in effect, rejected Ta Chen's submitted evidence to the contrary, and doubled the calculated antidumping duty rate. Pursuant to the court's remand, Ta Chen was allowed to place new information on the record, which led to a reversal of IA's earlier conclusion: "Because this agreement to reimburse expressly mentions only the 1992–1994 period, upon reconsideration, we conclude there is no basis to presume the agreement was in effect for any subsequent period."[29]

Although it is reassuring that the court was able to compel IA to comply with the law, there is no way to undo the adverse effects caused by the inflated dumping rate that prevailed for five years. The rate of 12.84 percent, which was reduced to 6.42 percent upon remand, undoubtedly affected business decisions and strategies irreversibly.

In a case concerning *Tapered Roller Bearings from China*, the court remanded to IA, among other issues, its basis for calculating the surrogate value for roller steel. One of the plaintiffs (Luayong Bearing Corp.) argued that IA failed to evaluate the Indian import data and eliminate aberrational values before calculating an average import price to serve as the surrogate, as IA normally does. Upon remand instructions by the court to "address the aberrational record data," IA revised downward its valuation of the surrogate for roller steel, resulting in lower margins for each of the investigated companies.

In the process of recalculating the dumping margins, IA found a clerical error in its original calculations for one of the respondents, Zhejiang Machinery Corporation (ZMC). Upon correction of the error, the company's dumping margin declined from 7.37 percent to zero. Again, although the company was undoubtedly happy with the ultimate outcome, it was required to operate under the cloud of a 7.37 percent duty assessment on its products for more than four years. Meanwhile, the rates of the other individually assessed Chinese companies had been lower than ZMC's for the four-year period because of that clerical error. It is highly likely that ZMC lost business on account of that clerical error.

Five methodological decisions were remanded to IA in a case concerning *Certain Automotive Replacement Glass Windshields from China*. But in

Although it is reassuring that the court was able to compel IA to comply with the law, there is no way to undo the adverse effects caused by the inflated dumping rate that prevailed for five years.

Table 4
U.S. Court Remands of Antidumping Decisions (January 2004–June 2005)

DOC Case	Court Case	Company	Remand	Orig. Rate	Rev. Rate	% Change
Heavy Forged Hand Tools from the People's Republic of China	*Shandong Huarong General Group Corporation and Liaoning Machinery Import & Export Corporation v. United States*, No. 01-00858, slip op. 03-135 (USCIT, October 22, 2003)	Huarong	Change	47.88%	139.31%	190.96%
Heavy Forged Hand Tools from the People's Republic of China	*Shandong Huarong General Group Corporation and Liaoning Machinery Import & Export Corporation v. United States*, No. 01-00858, slip op. 03-135 (USCIT, October 22, 2003)	Liaoning	Change	47.88%	139.31%	190.96%
Polyethylene Terephthalate Film, Sheet, and Strip from India	*Dupont Teijin Films USA, et al. v. United States and Polyplex Corporation Limited*, No. 02-00463, slip op. 03-167 (USCIT, December 17, 2003)		Explain	--	--	
Stainless Steel Bar from Italy	*Slater Steels Corp. et al. v. United States*, No. 02-00189, slip op. 03-162 (USCIT, December 16, 2003)		Explain	--	--	
Certain Softwood Lumber from Canada (AD) (2nd Remand Redetermination)	North American Free Trade Agreement (NAFTA) Article 1904 Panel Review, Binational NAFTA Panel Decision USA-CDA-2002-1904-02	West Fraser Mills	Change	2.22%	1.79%	-19.37%
Certain Softwood Lumber from Canada (AD) (2nd Remand Redetermination)	North American Free Trade Agreement (NAFTA) Article 1904 Panel Review, Binational NAFTA Panel Decision USA-CDA-2002-1904-02	Tembec	Change	6.66%	6.28%	-5.71%
Certain Softwood Lumber from Canada (AD) (2nd Remand Redetermination)	North American Free Trade Agreement (NAFTA) Article 1904 Panel Review, Binational NAFTA Panel Decision USA-CDA-2002-1904-02	Slocan	Change	8.77%	8.56%	-2.39%
Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from Germany	*Consolidated Bearings Company v. United States*, No. 98-09-02799, slip op. 04-10 (USCIT, January 30, 2004)		Explain	--	--	
Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from Japan	*NTN Corp., et al. v. United States*, No. 00-09-00443, slip op. 04-11 (USCIT, February 3, 2004)	NTN—Ball Bearings	Change	6.14%	4.71%	-23.29%
Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from Japan	*NTN Corp., et al. v. United States*, No. 00-09-00443, slip op. 04-11 (USCIT, February 3, 2004)	NTN—Cylindrical Bearings	Change	3.49%	3.50%	0.29%
Stainless Steel Bar from India	*Slater Steels Corporation v. United States*, No. 02-00551, slip op. 04-22 (USCIT, March 8, 2004)		Explain	--	--	
Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from Germany	*Timken US Corporation and Timken Nadellager, GmbH v. United States*, No. 00-09-00454, slip op. 04-21 (USCIT, March 5, 2004)		Explain	--	--	
Silicon Metal from Brazil	*Elkem Metals Company, et al. v. United States*, No. 01-00098, slip op. 04-36 (USCIT, April 15, 2004)	CBCC	Change	0.63%	0.00%	-100.00%
Silicon Metal from Brazil	*Elkem Metals Company, et al. v. United States*, No. 01-00098, slip op. 04-36 (USCIT, April 15, 2004)	Electrosilex	Change	93.20%	61.58%	-33.93%
Heavy Forged Hand Tools (Picks/Mattocks) from the People's Republic of China	*Tianjin Machinery Import & Export Corporation v. United States, and Ames True Temper*, No. 03-00732, (USCIT, April 8, 2004)		Explain	--	--	
Certain Stainless Steel Butt-Weld Pipe Fittings from Taiwan	*Ta Chen Stainless Steel Pipe Co., Ltd. v. United States of America, et al. and Taylor Forge Stainless, Inc. v. United States of America*, No. 01-00027, slip op. 04-46 (USCIT, May 4, 2004)	Ta Chen	Change	12.84%	6.42%	-50.00%

Dynamic Random Access Semiconductors from Korea	*Hyundai Electronics Industries Co., LTD., and Hyundai Electronics America, Inc. v. United States*, No. 00-01-00027, slip op. 04-37 (USCIT, April 16, 2004)	Hyundai	Change	10.44%	5.37%	-48.56%
Dynamic Random Access Semiconductors from Korea	*Hyundai Electronics Industries Co., LTD., and Hyundai Electronics America, Inc. v. United States*, No. 00-01-00027, slip op. 04-37 (USCIT, April 16, 2004)	LG	Change	10.44%	15.87%	52.01%
Stainless Steel Butt-Weld Pipe Fittings from the Philippines	*Tung Fong Industrial Co., Inc. v. United States*, No. 01-00070, slip op. 04-32 (USCIT, April 7, 2004)	Tung Fong	Change	33.81%	7.49%	-77.85%
Certain Cased Pencils from the People's Republic of China	*Kaiyuan Group Corp., et al. v. United States and Pencil Section Writing Instrument Manufacturers Ass'n, et al.*, No. 02-00573, slip op. 04-51 (USCIT, May 14, 2004)	Guandong	Change	114.90%	13.91%	-87.89%
Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China	*Luoyang Bearing Corp. (Group), et al. v. United States*, No. 01-00036, slip op. 04-53 (USCIT, May 18, 2004)	ZMC	Change	7.37%	0.00%	-100.00%
Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China	*Luoyang Bearing Corp. (Group), et al. v. United States*, No. 01-00036, slip op. 04-53 (USCIT, May 18, 2004)	Luoyang	Change	4.37%	3.85%	-11.90%
Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China	*Luoyang Bearing Corp. (Group), et al. v. United States*, No. 01-00036, slip op. 04-53 (USCIT, May 18, 2004)	CMC	Change	0.82%	0.78%	-4.88%
Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from France, et al.	*NSK LTD and NSK Corporation et al. v. United States*, No. 02-00627, slip op. 04-105 (USCIT, August 20, 2004)	NTN—Ball Bearings	Change	9.34%	9.30%	-0.43%
Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from France, et al.	*SNR Roulements, et al. v. United States*, No. 01-00686, slip op. 04-100 (USCIT, August 10, 2004)	NTN—Ball Bearings	Change	9.16%	8.98%	-1.97%
Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles from the People's Republic of China	*Shandong Huarong Machinery, Co., Ltd., et al. v United States*, No. 04-00460 (USCIT, November 3, 2004)	China-wide	Change	27.71%	45.42%	63.91%
Certain Hot Rolled Carbon Steel Flat Products from the People's Republic of China	*Anshan Iron & Steel Company, Ltd., et al. v. United States of America and United States Steel Corporation and Gallatin Steel Company, et al.*, No. 02-00088, slip op. 04-121 (USCIT, September 22, 2004)	Baosteel	Change	64.20%	12.39%	-80.70%
Certain Hot Rolled Carbon Steel Flat Products from the People's Republic of China	*Anshan Iron & Steel Company, Ltd., et al. v. United States of America and United States Steel Corporation and Gallatin Steel Company, et al.*, No. 02-00088, slip op. 04-121 (USCIT, September 22, 2004)	Anshan	Change	69.85%	31.09%	-55.49%
Certain Hot Rolled Carbon Steel Flat Products from the People's Republic of China	*Anshan Iron & Steel Company, Ltd., et al. v. United States of America and United States Steel Corporation and Gallatin Steel Company, et al.*, No. 02-00088, slip op. 04-121 (USCIT, September 22, 2004)	Benxi	Change	90.83%	57.19%	-37.04%
Silicon Metal from the Russian Federation	*Globe Metallurgical, Inc. and SIMCALA, Inc. v. United States and Bratsk Aluminum Smelter and Rual Trade Limited*, No. 03-00202, slip op. 04-123 (USCIT, September 24, 2004)	ZAO Kremny	Change	56.11%	56.20%	0.16%
Silicon Metal from the Russian Federation	*Globe Metallurgical, Inc. and SIMCALA, Inc. v. United States and Bratsk Aluminum Smelter and Rual Trade Limited*, No. 03-00202, slip op. 04-123 (USCIT, September 24, 2004)	Bratsk	Change	79.42%	87.08%	9.64%
Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles from the People's Republic of China	*Shandong Huarong General Group Corporation and Liaoning Machinery Import & Export Corporation v. United States*, No. 01-00858, slip op. 04-117 (USCIT, September 13, 2004)		Explain	--	--	

Continued

Table 4 *continued*

DOC Case	Court Case	Company	Remand	Orig. Rate	Rev. Rate	% Change
Stainless Steel Butt-Weld Pipe Fittings from Taiwan	*Alloy Piping Products, Inc., et al. v. United States of America and the U.S. Department of Commerce*, No. 02-00124 slip op. 04-134 (USCIT, October 28, 2004)	Ta Chen	Change	6.11%	6.10%	-0.16%
Stainless Steel Wire Rods from India	*Carpenter Technology, Corp. v. United States and Viraj Group*, No. 02-00448, slip op. 04-103 (USCIT, August 16, 2004)	Viraj Forgings Limited	Change	0.73%	1.29%	76.71%
Stainless Steel Wire Rods from India	*Carpenter Technology, Corp. v. United States and Viraj Group*, No. 02-00448, slip op. 04-103 (USCIT, August 16, 2004)	Viraj Impoexpo Limited	Change	0.73%	3.77%	416.44%
Silicon Metal from Brazil	*Elkem Metals Company and Globe Metallurgical, Inc. v. United States*, No. 02-00232, slip op. 04-145 (USCIT, November 16, 2004)	Rima	Change	0.35%	0.48%	37.14%
Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from Japan	*NSK Ltd. v. United States*, No. 98-07-02527, slip op. 05-26 (USCIT, February 18, 2005)	NSK—Cylindrical Bearings	Change	2.21%	2.19%	-0.90%
Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from Japan	*NSK Ltd. v. United States*, No. 98-07-02527, slip op. 05-26 (USCIT, February 18, 2005)	NSK—Ball Bearings	Change	2.35%	2.34%	-0.43%
Certain Automotive Replacement Glass Windshields from the People's Republic of China	*Fuyao Glass Industry Group Co. v. United States*, No. 02-00282, slip op. 05-6 (USCIT, January 25, 2005)	Fuyao	Change	11.80%	0.00%	100.00%
Certain Automotive Replacement Glass Windshields from the People's Republic of China	*Fuyao Glass Industry Group Co. v. United States*, No. 02-00282, slip op. 05-6 (USCIT, January 25, 2005)	Xinyi	Change	3.71%	0.00%	100.00%

its final remand redetermination, IA changed its decision with respect to only one. That change was enough to eliminate the antidumping rate altogether for two companies. One company's rate declined from 11.80 percent to zero, and the other's declined from 3.71 percent to zero.

The major issue in *Windshields* concerned IA's "reason to believe or suspect" standard, which guides its decisions regarding whether purchases from market economy countries can serve as the cost of an input in the surrogate value methodology. That issue has become a very significant point of contention and discretion in NME cases because market economy purchase prices are normally lower than the surrogate values that are otherwise used to construct the normal value benchmark. Traditionally, IA rejects market economy purchases made from countries that are presumed to have subsidies available to their producers, if it is reasonable to assume that the input in question benefited from a subsidy.

In this case, the court ordered IA to either reopen the record and submit evidence to support its assertion that imports of certain float glass inputs from Thailand, Indonesia, and Korea were subsidized or use the market economy purchase prices to value the inputs. IA opted to use the actual purchase prices with the following explanation: "Because re-opening the record to find more specific information would be tantamount to conducting a formal investigation, which is plainly not required, the Department has complied with the only remaining remand instruction [to use the purchase prices]."[30]

In May 2005, four months after issuing its remand redetermination in the *Windshield* case, IA published a request for comments on a change it is proposing that would affect its acceptance and use of market economy inputs in NME cases. Currently, IA accepts market economy purchases of inputs to serve as the value for the entire input if the purchase is "meaningful," a determination that is made on a case-by-case basis. But citing "concern that our current practice may allow parties to manipulate the Department's margin calculations by sourcing just enough of an input from market economy suppliers so that the market economy price is used to value the entire input, even though that party does not source the entire input from foreign (market economy) suppliers in the normal course of business,"[31] IA has proposed establishing benchmarks for "meaningful" (i.e., a certain percentage) above which the market economy input price would continue to be used. IA's concern, astonishingly, is that "the market economy prices the Department would use to value an entire input may not be reflective of actual prices,"[32] as if normal NME surrogate valuation were more reflective.

Defenders of IA's aggressive application of the antidumping law tend to view court remands, not as a rebuke of IA discretion, but as evidence that the system provides safeguards against wayward, biased, or otherwise unfair decisionmaking. According to that view, judicial review is an insurance policy, the existence of which allows IA to push the legal envelope. Certainly, the courts help to constrain such abuse, but by the time any decisions are handed down that might reverse an IA decision, the economic and political damage usually has been done. And many cases with prospective issues for court adjudication are never appealed for lack of resources or for other reasons.

Hearing from the WTO

U.S. antidumping measures have been subject to WTO dispute settlement in 26 cases since 1995.[33] Eight of those 26 cases were settled during the consultation phase (or at some point before a dispute panel's or the Appellate Body's decision was "adopted" by the Dispute Settlement Body); nine produced indictments of one or more aspects of U.S. antidumping practice; two produced outright victories for the U.S. position; and seven are still in the consultations phase or a forthcoming decision has yet to be published. The WTO has issued rulings against systemic discretionary policies of IA, such as the so-called arm's-length test, "zeroing," and its sunset review policy bulletin. It has ruled against the so-called Byrd Amendment[34] and against the antidumping statute with respect to its requirements for calculating "all others" rates of duty. The WTO has also ruled against case-specific IA discretionary judgments, including its

U.S. antidumping measures have been subject to WTO dispute settlement in 26 cases since 1995.

treatment of unpaid sales as direct selling expenses, its injudicious use of "facts available" on more than one occasion, its use of multiple averaging periods, and its currency conversion methodology. The pattern revealed by those systemic methodologies and case-specific decisions is one of bias against foreign respondents, which in practice has the effect of increasing antidumping duty rates, needlessly harming consumers and import-consuming industries.

Arm's-Length Test

The arm's-length test is premised on the idea that prices to customers affiliated with the seller might not reflect normal market transaction prices. Thus, those sales should be subject to heightened scrutiny. To IA, however, only lower-priced home market sales to an affiliate could fit this description. Accordingly, until November 2002, IA filtered out all home market sales made to any affiliated customer when the average sales price was less than 99.5 percent of the average price to all unaffiliated customers. But the filter failed to consider the just-as-likely possibility that prices to affiliates might be higher than those to unaffiliated customers. If the seller and buyer are seeking to maximize their combined income (which is why sales to affiliates might be treated differently in the first place), it might be optimal to show higher prices and revenues for the seller (to attract investors, improve the value of stock, etc.) and higher costs for the buyer (to avoid tax liabilities, etc.). Yet, only when prices to affiliates were lower than prices to unaffiliated customers were they excluded. That one-sided exclusion had the effect of raising average prices in the comparison market unequivocally, and hence raising dumping margins.[35]

In the *Japanese Hot-Rolled Steel* case, the Dispute Settlement Body found fault with this asymmetric application of the arm's-length test, and in November 2002 IA amended its procedures to exclude all sales to affiliates under a 98 percent threshold and above a 102 percent threshold, thus removing the adverse inference and bringing U.S. practice into compliance with the Antidumping Agreement. Unfortunately, IA has been anything but compliant with respect to its repeatedly indicted discretionary methodology known as zeroing.

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Zeroing

Zeroing is the single most significant distortion in IA's repertoire, and as it has come under fire from respondents, WTO members, and the WTO Appellate Body, the agency has dug in its heels.[36] Zeroing can never lead to lower dumping margins. In most cases, it raises them. It often does so substantially. Analysis published in previous Cato Institute studies shows that the elimination of zeroing in a sample of 18 actual antidumping cases would have led to an average reduction of 87 percent in the calculated dumping margin.[37]

In the *Canadian Softwood Lumber* case, the Appellate Body ruled that zeroing violates the Antidumping Agreement by precluding real average-to-average comparisons. It ruled similarly on a case brought by India against the European Union (and the EU revised its practice). A case brought by the EU against the United States in which the EU has identified 31 separate cases in which its exporters were adversely affected by zeroing is presently working its way through the WTO dispute settlement process.

Still, IA takes the position that zeroing is a reasonable interpretation of the U.S. statute—a position that is backed by rulings in the U.S. Court of International Trade and the Court of Appeals for the Federal Circuit. But the USCIT also found that the statute does not unambiguously require zeroing, leaving open the possibility of a change in IA practice. Such a possibility, however, looks remote, given IA's most recent posture.

In May 2005, more than three years after publication of the original determination in the highly contentious *Softwood Lumber* case, IA published in the *Federal Register* a "Notice of Determination under Section 129 of the Uruguay Round Agreements Act," which represents the agency's effort to bring its *Lumber* decision into conformity with the Appellate Body's ruling. But instead of changing its zeroing methodology, IA changed its price comparison methodology from an "average-to-average" to a "transaction-to-

transaction" approach. With that new methodology, which opens up a slew of new challengeable procedural issues, some of which Canada could contest at the WTO again, IA believes it does not have to change its zeroing practice since the Appellate Body's ruling found zeroing to be problematic in the context of average-to-average comparisons only. IA's new approach has thus made an inconsistent measure "not inconsistent" with the Antidumping Agreement. According to IA's logic: "The Department's Section 129 Determination does not involve 'zeroing' in a weighted-average-to-weighted-average comparison methodology, in full compliance with the Appellate Body's determination. Thus, this Section 129 Determination renders the Department's analysis 'not inconsistent with the findings of the Appellate Body.'"[38]

Whether the WTO Dispute Settlement Body will find zeroing to contravene the agreement in the context of transaction-to-transaction dumping calculation methodology is unclear—the rules are highly technical and show great deference to national authorities—but the evidence points to an IA that is adamantly opposed to changing its zeroing practice. Given that zeroing can only increase calculated dumping margins, it should be crystal clear that IA does not wish to relinquish its capacity to produce exaggerated dumping margins in order to serve its mission of safeguarding American industries and jobs. IA's insistence on continuing this distortive practice—despite the availability of even-handed alternatives—reflects its pro-petitioner bias. There can be no other interpretation.

Sunset Reviews

IA has also resisted efforts to bring its sunset review policy into conformity with the Antidumping Agreement. Article 11.3 of the agreement mandates the automatic termination of antidumping duty orders after five years unless a special review initiated before expiration determines that termination of the order "would be likely to lead to the continuation or recurrence of dumping and injury."[39] But a review of the data suggests that Article 11.3 is being ignored in the United States.

Between July 1998 (the month of the first U.S. sunset review determination) and May 2005, 335 antidumping sunset review determinations were issued. In 80 of those 335 cases, the measures were revoked because there was no domestic interest in their continuation. In the remaining 255 cases, in which a domestic industry demonstrated interest in preserving the antidumping measures, IA found that revocation would be likely to lead to a continuation or recurrence of dumping *in every single case*.[40]

In the *Korean DRAMs* case, a panel rejected the U.S. standard for revocation, which required continuation of antidumping duty orders unless it could be demonstrated to IA's satisfaction that dumping was not likely to recur. The panel found that this "not likely" standard reversed the burden of proof required under the Antidumping Agreement that continuation of an order be "necessary to offset dumping."

In recent decisions concerning *OCTG from Argentina and OCTG from Mexico*, the Appellate Body found that a Commerce policy bulletin, which guides IA in its decisions regarding continuation or termination of orders in sunset reviews, is inconsistent with the investigating authorities' obligations to determine likelihood of continuation or recurrence of dumping under Article 11.3 of the agreement.

It should not come as a surprise that IA always finds that revocation is likely to lead to a continuation or recurrence of dumping. The only conditions that normally would warrant a "no likelihood" finding—according to the Sunset Policy Bulletin—are extremely unlikely, given rational economic behavior.[41] IA's approach to sunset reviews, as evidenced by the paucity of orders revoked pursuant to them, has effectively blockaded any realistic way for companies to get out from under orders. In essence, IA has turned what should be a temporary remedial measure into permanent protection.

Selling Expenses

In the *Korean Stainless Steel* case, the WTO spurned IA's decision to treat as a direct selling expense (to be deducted from U.S. price or added to home market price) certain unpaid invoices. The Korean exporter had made some sales to a U.S. customer who subsequently declared bank-

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Erecting trade barriers is what IA does in the name of "safeguarding American industries and jobs."

ruptcy and failed to make good on the outstanding invoices. That IA could take the invoice value of unpaid sales resulting from an unforeseen bankruptcy—sales that it properly disregarded in its preliminary determination—and somehow consider them a direct cost of doing business, thereby tainting the price comparisons of all other sales to unambiguously inflate dumping margins is yet another reason to question the agency's objectivity. What objective, reasonable arbiter could possibly think that getting stiffed by a customer is evidence of unfair trade?

Facts Available

Under certain circumstances, antidumping determinations are based, not on information provided by the foreign company, but on "facts available." Dumping margins based on facts available are usually much higher than those based on actual respondent data.[42] The surrogate data, which are often derived from allegations in the petition, are used when respondents fail to participate in the process or if the information they provide is deemed insufficient or inaccurate. In the *Japanese Hot-Rolled Steel* case, IA was found to have been too zealous in its resort to facts available.

In that case, IA applied adverse facts available to Kawasaki Steel Corporation for its failure to supply detailed information concerning the resales of one of its affiliated customers, California Steel Industries. But CSI was also one of the petitioners in the case, and as such refused to provide the necessary information on Kawasaki's behalf. IA concluded that Kawasaki was being unresponsive—since it was unable to convince an opposing party to cooperate—and used adverse facts available to hit it with a 68 percent dumping margin. To first insist that Kawasaki provide information, and then penalize it for not complying with a request, IA, at a minimum, could have guessed would be rejected by CSI, speaks volumes about IA's agenda. Ultimately, the WTO ruled that no "objective authority" could have concluded that Kawasaki was being uncooperative and that IA's punitive decision to apply adverse facts available violated the Antidumping Agreement's rules governing its use.

Estimated Impact of IA Discretion

Much of this paper has been devoted to describing areas in which IA exercises discretion, often in a manner adverse to respondents and sometimes in a manner contrary to law or international agreement. But is there some way to quantify the impact of the use of that discretion? A 2003 paper by Bruce Blonigen, an economist at the University of Oregon, concluded that discretionary practices at IA have played "the major role in rising dumping margins." Blonigen found that average antidumping margins increased from 15.5 percent in 1980 to more than 63 percent by 2000—about 2.5 percentage points per year.[43]

Using a database containing 1,600 firm-specific dumping margins, Blonigen endeavored to attribute those increasing margins to (1) changes in the law, (2) changes in the composition of investigated firms and products, and (3) discretionary practices of IA. Using regression analysis, Blonigen was able to "decompose the relative contributions of these potential sources of rising dumping margins."[44]

What Blonigen found was that certain discretionary practices, including the use of facts available, adverse facts available, and NME methodology, had large and statistically significant impacts on calculated dumping margins. Facts available were used in 31 percent of the 1,590 observations considered. The use of facts available was found to increase calculated dumping margins by 30.67 percent. The use of adverse facts available was found in 20 percent of the observations and was determined to increase margins by 62.98 percent. Finally, NME methodology was employed 22 percent of the time and was found to increase dumping margins by 24.54 percent.[45]

Blonigen found that discretionary practices in general accounted for "the upward trend in U.S. dumping margins . . . with little or no role for changing country composition of investigated cases or legal changes . . . while rule changes due to implementation of the 1995 Uruguay Round agreements are estimated to have reduced the U.S. baseline dumping margin by 20

percentage points, greater extensive and intensive use of discretionary practices had already compensated for these Uruguay Round effects by the sample in year 2000."[46]

Qualitative Impact of IA Discretion

The collection of U.S. court and WTO Dispute Settlement Body decisions impugning various aspects of IA's antidumping administration points to a larger systemic problem: IA lacks the proper incentive to administer the law objectively. Prominently displayed at the top of the homepage of the IA website is a mission statement that reads: "Safeguarding American Industries and Jobs against Unfair Trade." That is a rather narrow expression of purpose, from which derives a culture in which there is no downside to aggressively interpreting the law. Erecting trade barriers is what IA does in the name of "safeguarding American industries and jobs." When duties are imposed and then eventually found to be unwarranted, IA changes its determination (usually) and moves on, incurring no political or economic costs itself. Its mission is not compromised.

Yet there are indeed costs to those indiscretions. The mess IA leaves behind includes needlessly damaged commercial relationships, strained trade relations, sullied U.S. credibility, and subsequently a compromised capacity for the United States to pursue broader trade policy and even foreign policy objectives. Those costs are paid by others, such as businesses, consumers, and the other federal agencies whose missions require greater tact and diplomacy.

Although IA's mission forces it to view trade skeptically, the broader purpose of U.S. trade policy—indeed of IA's sister agencies within the same Commerce Department—is to open markets and eliminate tariff and nontarrif barriers to trade around the world. The U.S. Commercial Service is one such sister agency. According to its mission statement, "The Commercial Service shall place primary emphasis on the promotion of exports of goods and services from the United States, particularly by small businesses and medium-sized businesses, and on the protection of United States business interests abroad."[47] The Office of Market Access and Compliance is another of IA's sister agencies at the Commerce Department. Its overall objectives are "to obtain market access for American firms and workers and to achieve full compliance by foreign nations with trade agreements they sign with our country."[48] At an even broader level, the Office of the U.S. Trade Representative is responsible for "developing and coordinating U.S. international trade, commodity, and direct investment policy, and overseeing negotiations with other countries."[49]

There can be little doubt that accomplishment of the objectives of IA's sister agencies—and indeed overall U.S. trade policy—is made more difficult by IA's provocative decisions. How can the United States effectively persuade other countries to drop their trade barriers when it fails to practice what it preaches? And how can the United States expect a country like China to negotiate and act in good faith on matters concerning intellectual property rights enforcement, currency issues, and fulfillment of WTO commitments when U.S. antidumping policy toward China grows increasingly belligerent?

Important U.S. foreign policy objectives are compromised by IA's zeal in imposing antidumping duties. Fighting terrorism and preventing the ranks of would-be terrorists from growing is perhaps the paramount U.S. foreign policy goal today. According to a State Department report, southern Thailand has become a region of concern where violence has been on the rise in certain Muslim-majority provinces. Although the report concludes that there is no evidence of a connection between militants in southern Thailand and international terrorist organizations, there is concern that "transnational groups may attempt to capitalize on the increasingly violent situation for their own purposes."[50]

Creating economic opportunity for young Muslims in countries where extremism and terrorism have taken root is one of the more important tools in the war on terror. Gainfully employed people are less likely candidates for terrorist recruitment. But many of the Thai shrimp farms adversely affected by the imposi-

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tion of U.S. antidumping duties in 2004 are located in the very southern provinces that are of concern. In imposing its antidumping duty order against Thai shrimp exporters, IA did not consider how its action might damage or undermine U.S. interests since the bigger policy picture is of little or no concern to IA. Likewise, while the world dug into its collective pockets to help rebuild countries devastated by last year's tsunami, IA's antidumping measures against Indian and Thai shrimp exports—both countries' industries suffered considerable damage—remained in place.

Antidumping Oversight Board

At present, there is nothing like a peer review process to help ensure that IA's decisions are consistent with broad U.S. trade policy and foreign policy objectives, not to mention consistent with the law. The closest thing to a formal review of pending IA decisions is an internal discussion between the case analysts, program supervisors, and the assistant secretary for import administration. Those reviews attempt to achieve consensus on outstanding issues and calculation methodologies. Once consensus is achieved, the assistant secretary or acting assistant secretary for import administration publishes IA's findings in the *Federal Register*. There is no formal consultation between IA officials and other Commerce Department officials or with representatives from other government agencies that have trade policy jurisdiction or oversight of issues affected by trade policy decisions.

That's just not good enough. The process must be more inclusive. The fact that IA's decisions do carry costs—costs that IA itself does not bear—presents a moral hazard that must be addressed if U.S. trade policy is to have a consistency of purpose. Those who are burdened with the costs of IA's decisions should be entitled to a place at the table. At the very least, the U.S. Trade Representative, who has jurisdiction over broad policy and is technically the president's principal adviser on matters of trade policy, should have the opportunity to review and comment on prospective IA determinations before they are published. Likewise, the State and Treasury Departments should be required to sign off on IA's antidumping determinations before they are published.

The idea of an Antidumping Oversight Board, comprising officials of USTR and the Departments of Commerce, State, and the Treasury, should be given serious consideration by policymakers. The role of the board would be to ensure that all antidumping determinations are internally consistent, compliant with U.S. trade agreements, and defensible in the sense that they do not undermine the broader policy goals of the four agencies. Of course, such reviews likely would require a level of expertise that the various agencies may not have in-house. Accordingly, the board should be staffed from outside those departments with experts on antidumping policy, international treaties, and U.S. law. The agencies themselves could provide their own policy experts to determine whether the rulings were likely to complicate their agendas. Together, those experts could make recommendations to the board as to whether antidumping decisions should be published with or without amendments or not at all.

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Conclusion

Rulings from the WTO and U.S. courts suggest that the Import Administration may have too much discretion in its administration of the antidumping law and that it may be incapable of using that discretion objectively. Statistical analysis suggests that discretionary practices, more than other factors, explain the escalation in calculated antidumping rates since 1980.

Antidumping determinations, and in particular those that do not comport with U.S. law or international agreement, carry real costs. But those costs are not borne by the agency that renders the determinations, nor are they borne by the industries protected by the imposition of antidumping duties. It is the missions of other agencies and the objectives of other economic and political interests that suffer the costs of wayward antidumping determinations.

If U.S. policymakers wish to advance trade liberalization further, a healthy rules-based system of trade is indispensable. But such a system is threatened when the rules are broken, ignored, or stretched so that normal, unobjectionable trade is routinely punished under the guise of enforcing the unfair trade laws. It is time for U.S. antidumping policy to be brought into the fold of broader U.S. trade policy objectives. Its administration must be disciplined and calibrated with the efforts of other U.S. agencies to open markets abroad and to demonstrate that the United States believes in the merits of free trade.

Accordingly, policymakers should strive to create an oversight board comprising representatives from various agencies with jurisdiction over trade and foreign policy. The function of this body would be to review IA's antidumping determinations before they are published. It would collectively evaluate the WTO-compatibility of the determinations and make recommendations on how to improve them in cases in which disputes can be foreseen. Such a board could help buffer antidumping decisions from the narrow-minded focus of parochial interests. In so doing, it would reduce the collateral damage from erroneously penalizing unobjectionable commercial behavior and help ensure that broader U.S. trade policy objectives are not undermined. It would help the United States avert further embarrassing, credibility-taxing showdowns in the WTO. And it would show that the United States is willing to lead by example on trade issues, which is an asset that will be needed if the Doha Round is to have a chance of meeting its ambitious goals.

Notes

1. For a detailed assessment of IA's antidumping methodology, 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.

2. For the sake of simplicity, it is assumed for the purposes of this paper that the comparison market is the home market. Under certain circumstances—if the volume of home market sales is relatively small, for example—a third country is selected as a surrogate comparison market. In cases involving a so-called nonmarket economy, there is no comparison market. Normal value is based on estimates of production costs instead.

3. Normal value can be based on comparison market prices, the cost of production (constructed value), surrogate valuation, facts available, or some combination of the above.

4. When IA deems a respondent's data to be deficient or otherwise unrepresentative, it often substitutes "facts available" for those data. Facts available often derive from allegations in the antidumping petition or from industry-wide averages.

5. NME companies that demonstrate independence from the central government sometimes qualify for an antidumping rate based on their own data—a "separate rate."

6. Import Administration website, http://ia.ita.doc.gov/ia-decisions-and-data.html (*Federal Register* notices).

7. Original data are on file with the author and available upon request.

8. For a detailed explanation of NME methodology, see Daniel Ikenson, "Nonmarket Nonsense: U.S. Antidumping Policy toward China," Cato Institute Trade Briefing Paper no. 22, March 7, 2005.

9. Jeffrey A. May, acting assistant secretary for import administration, U.S. Department of Commerce, "Issues and Decision Memorandum for the Antidumping Duty Investigation of Certain Color Television Receivers from the People's Republic of China," April 16, 2004, p. 68.

10. Ibid., p. 67.

11. Jeffrey A. May, deputy assistant secretary for import administration, Group I, U.S. Department of Commerce, "Issues and Decision Memorandum for the Antidumping Duty Investigation of Polyethylene Retail Carrier Bags from the People's Republic of China," June 18, 2004, p. 16.

12. Jeffrey A. May, deputy assistant secretary for import administration, U.S. Department of Commerce, "Issues and Decision Memorandum for the Less-Than-Fair-Value Investigation of Wooden Bedroom Furniture from the People's Republic of China," November 8, 2004, p. 67.

13. Ibid., p. 68.

14. U.S. Department of Commerce, "Final Results of Redetermination Pursuant to Court Remand," *Fuyao Glass Industry Group Co. v. United States*, slip op. 05-6 at 51(USCIT, January 25, 2005).

15. Department of Commerce, International Trade

Administration, "Notice of Final Determination of Sales at Less-Than-Fair-Value: Certain Preserved Mushrooms from India," December 31, 1998.

16. Ibid.

17. Barbara Tillman, acting deputy assistant secretary for import administration, U.S. Department of Commerce, "Issues and Decision Memorandum for the Final Determination in the Antidumping Investigation of Bottle Grade Polyethylene Terephthalate (PET) Resin from Indonesia," March 14, 2005, p. 6.

18. Ibid. Emphasis added.

19. Barbara Tillman, acting deputy assistant secretary for import administration, U.S. Department of Commerce, "Issues and Decision Memorandum for the Final Determination of the Anti-dumping Investigation of Certain Frozen and Canned Warmwater Shrimp from Ecuador," December 23, 2004.

20. Ibid.

21. By multiplying the number of classifications within each characteristic provided by IA in its questionnaire (even leaving out container weight, since the designations within it are not predefined), there are 34,560,000 possible shrimp products. That would make for a fairly unwieldy menu at Red Lobster!

22. Department of Commerce website, http://www.commerce.gov/opa/press/2004_Releases/October/05_FairTrade_FactSheet.htm. Emphasis added.

23. Import Administration website, http://ia.ita.doc.gov/pcp/pcp-index.html.

24. Ibid.

25. List of "Remand Redeterminations" is available at the website of the Import Administration within the Commerce Department at http://ia.ita.doc.gov/remands/index.html. Comparing dumping results before and after remand in some cases entailed a review of Department of Commerce notices published in the *Federal Register*, which are available at http://ia.ita.doc.gov/frn/index.html.

26. U.S. Department of Commerce, "Final Results of Redetermination Pursuant to Court Remand, Stainless Steel Butt-Weld Pipe Fittings from the Philippines," *Tung Fong Industrial Co., Inc. v. United States*, No. 01-00070, slip op. 04-32 at 2 (USCIT April 7, 2004).

27. *Tung Fong Industrial Co., Ltd. v. United States*, No. 01-00070, slip op. 04-32 at 31 (USCIT, April 7, 2004).

28. Ibid. at 27.

29. U.S. Department of Commerce, "Final Results Pursuant to Remand," *Ta Chen Stainless Steel Pipe Co., Ltd. v. United States of America; and Alloy Piping Products, Inc., Flowline Division, Markovitz Enterprises, Inc., Gerlin, Inc., and Taylor Forge Stainless, Inc. v. United States of America*, No. 01-00027, slip op. 04-46 at 29 (USCIT May 4, 2004).

30. U.S. Department of Commerce, "Final Results of Redetermination Pursuant to Court Remand," *Fuyao Glass Industry Group Co. v. United States*, No. 02-00282, slip op. 05-6 at 20 (USCIT, January 25, 2005)

31. U.S. Department of Commerce, International Trade Administration, "Request for Comments, Market Economy Inputs Practice in Antidumping Proceedings Involving Non-Market Economy Countries," *Federal Register* 70 (May 26, 2005): 30418.

32. Ibid.

33. Data compiled from reports available on the World Trade Organization website, http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm#2005. In the 332 cases that have officially entered the purview of the dispute settlement system since 1995, the United States has been a defendant in 89 and a complainant in 76. Twenty-six of those 89 cases involve some aspect(s) of U.S. antidumping practice (this figure does not include the case concerning the Antidumping Act of 1916).

34. The Byrd Amendment, known formally as the Continued Dumping and Subsidy Offset Act, mandates the distribution of antidumping and countervailing duties from the general treasury to the domestic companies that brought or supported the petitions in the underlying cases. Byrd became law in 2000 and has since been found in violation of various WTO agreements. For a detailed discussion 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.

35. For greater detail concerning the arm's-length test, see Lindsey and Ikenson, "Antidumping 101." Table 4 in that study shows that eliminating the one-sided test reduced dumping margins by nearly 7 percent in a sample of 13 cases.

36. For a detailed discussion of zeroing, see Dan Ikenson, "Zeroing In: Antidumping's Flawed Methodology under Fire," Cato Institute Free Trade Bulletin no. 11, April 27, 2004.

37. See Lindsey and Ikenson, "Antidumping 101," Table 4.

38. U.S. Department of Commerce, International

Trade Administration, "Notice of Determination under Section 129 of the Uruguay Round Agreements Act: Antidumping Measures on Certain Softwood Lumber Products from Canada," *Federal Register* 70 (May 2, 2005): 22636.

39. World Trade Organization, "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the 'Antidumping Agreement'), Article 11.3," www.wto.org.

40. Data compiled from two sources: U.S. International Trade Commission, Office of Investigations, "Import Injury Investigation Case Statistics (FY 1980–2003)," November 2004, http://www.usitc.gov/trade_remedy/USITC_Stat_Report-11-04-PUB.pdf; and other sunset review decisions and data available at www.usitc.gov.

41. For a detailed discussion on Commerce's sunset review policy, see Daniel Ikenson, "Shell Games and Fortune Tellers: The Sun Doesn't Set at the Antidumping Circus," Cato Institute Free Trade Bulletin no. 18, June 20, 2005.

42. See Brink Lindsey, "The U.S. Antidumping Law: Rhetoric versus Reality," Cato Institute Trade Policy Analysis no. 7, August 16, 1999. Table 2 in that study documents that 36 of 141 dumping calculations over a three-year period were based on facts available, and the average margin in those cases was 95.58 percent. The average for all of the 141 cases was 44.68 percent.

43. Bruce A. Blonigen, "Evolving Discretionary Practices of U.S. Antidumping Activity," Working Paper, August 2003, p. 2. Publication of this paper in the *Canadian Journal of Economics* is pending.

44. Ibid., p. 3.

45. Ibid., Tables 1 and 3.

46. Ibid.

47. U.S. Commercial Service, http://www.export.gov/comm_svc/about_us/about_home.html.

48. Office of Market Access and Compliance, http://www.mac.doc.gov/.

49. Office of the U.S. Trade Representative, www.ustr.gov.

50. U.S. Department of State, "Country Reports on Terrorism—Thailand," April 27, 2005, http://www.state.gov/s/ct/rls/45388.htm.

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