THE ANTIDUMPING LAW OF THE UNITED STATES

According to the Global Antidumping Database, U.S. producers filed 124 antidumping petitions between 1997 and 2005, as illustrated in Figure [1]; eighty percent of these cases eventually resulted in the imposition of antidumping duties. The leading targets of U.S. antidumping actions during this time period included China, Japan and South Korea.

![Figure 1](image)

Legal Procedures

Under U.S. antidumping law, any interested party can file an antidumping petition on behalf of a domestic industry requesting the imposition of antidumping duties.\(^1\) The petition must claim that products are being imported from a particularly foreign country at less than "normal" value, and that these imports are causing or threatening to cause material injury to the domestic industry. If the International Trade Administration (ITA) of the Department of Commerce determines that the petition has been filed on behalf of the domestic industry and includes the required information, then it initiates the antidumping investigation.\(^2\)

Once initiated, all antidumping investigations are undertaken by two separate agencies. The International Trade Commission (ITC) is charged with determining whether or not the domestic industry is materially injured or threatened with materially injury due to unfair imports. The ITA determines whether or not dumping has occurred by reviewing the price and cost data of foreign firms.

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\(^1\) An antidumping petition is deemed to have been filed on behalf of the domestic industry if domestic producers and workers who support the petition account for (1) 25 percent of the total production of the product and (2) 50 percent of the production of those who both support and oppose the petition.

\(^2\) The ITA must initiate an investigation or dismiss the petition within 20 days from the day the petition was filed.
Material Injury Determination

The ITC has 45 days from the initiation of the investigation to make a preliminary determination regarding whether or not the domestic industry has been, or is threatened with, material injury due to unfair imports. The ITC makes this determination on the basis of information included in the petition and the questionnaires sent to foreign and domestic producers and U.S. importers. The ITC also takes into account information presented by interested parties in legal briefs and during public hearings.

Under U.S. regulations, the ITC must consider three separate aspects of the market when making their injury determination. First, the ITC must consider the volume of imports of the product under investigation. Specifically, the ITC must decide whether the volume, or increase in volume, of imports under investigation is significant. If the ITC finds that the volume of imports is negligible, or less than three percent of the total volume of imports of the product, then the antidumping investigation is automatically terminated.

Next, the ITC must consider the effect of the imports under investigation on U.S. prices for the domestic "like product." Specifically, the ITC explores (1) whether there has been significant price underselling of the imported merchandise when compared with the price of the domestic product and (2) whether the effect of imports depresses market prices or prevents price increases to a significant degree.

Finally, the ITC must consider the impact of imports on domestic producers. Factors taken under consideration include declines in output, sales, market shares, profits, productivity, the return on investments, and capacity utilization. The ITC also takes into account the negative effect the imports under investigation may have had on cash flow, inventories, employment, wages, growth, the ability to raise capital, and investment.

Calculation of the Dumping Margin

If the ITC makes an affirmative preliminary injury determination, the ITA has 160 days from the date on which the petition was filed to make a preliminary dumping determination. This determination is typically made using price and cost information collected from the questionnaires sent to the foreign producers under investigation. In general, the ITA calculates the level of the dumping margin by calculating the degree to which the export price charged by the producer under investigation is less than the normal value of the product. If the calculated

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3 The ITC may cumulatively assess the impact of imports from all countries under investigation if it determines that these imports compete with each other, and with the domestic like product. To make this determination, the ITC considers whether the imports are sold in the same geographic region and during the same time period, as well as whether the imports have similar characteristics and reach the market through similar channels of distribution.

4 The ITC is charged with defining the domestic "like product," which is defined as a product that is most similar in characteristics and uses to the imported product, and the domestic industry, which are producers of this product. For example, in the 2002 antidumping investigation into imports of Vietnamese frozen fish fillets, the ITC defined the domestic industry as processors of frozen catfish fillets; catfish farmers were excluded from the definition of the domestic industry.

5 The ITA may also use "facts available," typically information contained in the original petition or from public data sources, if they determine that parties to the investigation have withheld information or provided faulty information or information that cannot be verified.
dumping margin is greater than the de minimis threshold, the ITA makes an affirmative dumping determination.  

The export price charged by the producer under investigation is adjusted for various costs such as insurance, tariffs, and storage fees. The ITA also takes into account such things as the terms of sales of the product and product characteristics.

The ITA can use one of four methods to calculate the normal or fair value. When possible, the agency calculates normal value by collecting the prices associated with sales in the foreign country's home market. It excludes from this calculation all sales found to be below the country's average cost of production. If sales in the home market are deemed inadequate, the ITA calculates the normal value using the prices set by the foreign industry in a third-country market. The ITA also has the option of defining the normal value using a constructed value, or the calculated average cost of production in the foreign market. The agency builds into this constructed value a profit margin of as much as eight percent and other administrative and sales costs. If the country under investigation is a non-market economy such as China or Vietnam, the ITA typically calculates a normal value using prices in a market economy at a similar level of development to the non-market economy.

An antidumping margin is typically calculated for each foreign producer under investigation by calculating the difference between the weighted average normal value and the weighted average export price during the period of investigation—usually the four most recently completed fiscal quarters prior to the month the petition was filed. In exceptional circumstances, the ITA may compare the export price to the normal value on a transaction by transaction basis, or compare the weighted average normal value to individual export prices.

*Imposition of Duties*

If the ITA makes an affirmative preliminary dumping determination, it requires importers to post cash deposits to cover the estimated dumping duty costs. Any producer from the country under investigation not specifically investigated is required to post duties equal to the "all others" margin, typically calculated as the weighted average of the margins of all exporters included in the investigation with dumping margins greater than de minimis.

Regardless of whether the preliminary dumping determination is negative or affirmative, the ITA must make a final dumping determination within 235 days from the date on which the petition was filed. If the ITA makes a negative final dumping determination, the investigation is terminated. If the ITA makes an affirmative final dumping determination, the case returns to the ITC for a final injury determination. The ITC decision must be made within 280 days from the date on which the petition was filed. If the ITC makes a negative injury determination, then the case is terminated and all cash deposits are returned to the importers. An affirmative injury determination results in the collection of antidumping duties in the amount calculated in the final phase of the ITA investigation.

U.S. antidumping law allows the government to negotiate with the foreign exporters or foreign government under investigation a "suspension agreement." These agreements typically require the foreign exporter to cease exporting, eliminate sales at less than fair value, or eliminate the injurious effect of the exports. These agreements also include significant monitoring provisions

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6 During the preliminary investigation, the de minimis threshold is set at 0.5 percent; during final investigations this threshold is set at 2 percent.
to ensure that dumping does not reoccur. If the United States reaches a suspension agreement with the foreign exporter or country, then the antidumping investigation is suspended until the ITA determines that the agreement has been violated.

Reviews

The ITA must review the amount of the dumping margins as often as every twelve months at the request of a foreign producer or importer during administrative reviews. New exporters from the targeted country that are assessed the "all others" antidumping rate may request the calculation of a company-specific antidumping margin during a new shipper review.

Since 1995, the United States must review the imposition of antidumping duties every five years in an investigation known as a sunset review. The ITA publishes a notice of the initiation of the review, and requests that interested parties submit statements that they are willing to participate in the review. If no interested parties respond to this request, then the antidumping duty order is lifted. Otherwise, the ITC and ITA conduct full reviews similar to the investigations described above in order to determine whether dumping would likely reoccur absent the antidumping duties, and whether the domestic industry would likely be injured from the reoccurrence of this dumping. Affirmative determinations by both the ITC and ITA result in continuation of the antidumping duties.

Compliance with the WTO Antidumping Agreement

U.S. antidumping law has been challenged 24 times under the World Trade Organization (WTO) dispute settlement system since 1995. Some of the major aspects of U.S. antidumping law challenged in these disputes, as well as the outcomes of the disputes, are highlighted below.

The Byrd Amendment

In 2000, the United States enacted a law commonly referred to as the Byrd Amendment, but more formally known as the Continued Dumping and Subsidy Offset Act (CDSOA). The Byrd Amendment required the U.S. Customs Service to re-distribute the antidumping revenue collected due to successful antidumping petitions to the firms that supported the original petitions requesting the imposition of antidumping protection. More than $500 million was distributed to U.S. firms during the Byrd Amendment's first two years of operation.

In 2002, eleven members of the WTO requested the establishment of a dispute settlement panel regarding the Byrd Amendment. The complainants stated in their request that the law not only violated U.S. obligations under the WTO's Antidumping Agreement, but also violated the WTO's Subsidies and Countervailing Measures provisions. A panel ruled in September 2002 that the Byrd Amendment violated a number of aspects of the antidumping and subsidies agreements. The appellate body upheld many of the panel's initials findings. Specifically, the appellate body found that the Byrd Amendment was a "non-permissible specific action" against dumping. The Byrd Amendment was also found to be inconsistent with a number of articles in the antidumping and subsidies agreements.

Because the United States failed to revise the Byrd Amendment in the required time frame, in 2005 the European Union, Canada and Japan announced that they would suspend concessions on imports of certain products from the United States. The U.S. Congress finally repealed the law in
February 2006, although revenue from antidumping duties will continue to be distributed to U.S. firms through October 2007.

Zeroing

The European Union and Japan have brought disputes to the WTO regarding the U.S. practice known as "zeroing."\(^7\) When the ITA calculates the weighted average dumping margin for a company, it historically has assigned a dumping margin of zero to all those transactions in which the export price is higher than the normal value (or when no dumping occurs), rather than the negative dumping margin equal to the difference between the export price and the normal value. This zeroing methodology is not a written law or regulation, but rather a norm used by the ITA during its investigation.

In April 2006, the Appellate Body ruled in the case filed by the European Union that using the zeroing methodology during administrative reviews violated the WTO antidumping agreement. Moreover, the Appellate Body ruled generally that the practice of zeroing could be challenged under the WTO when it was used in U.S. investigations that calculated dumping margins by comparing the weighted average export price to the weighted average normal value. The Appellate Body also upheld the original panel's finding that zeroing by itself is not an impermissible allowance or adjustment to the dumping margin. In response to this ruling, the United States promised to bring its regulations into compliance by April 2007.

In January 2007, the Appellate Body ruled in the case filed by Japan that the United States violates the WTO Antidumping Agreement when it uses zeroing to calculate dumping margins in investigations that compare export prices to normal values on a transaction by transaction basis. The Appellate Body also found that zeroing practices were inconsistent with the Antidumping Agreement when used during periodic reviews, new shipper reviews, and sunset reviews. The United States has yet to comply with this ruling.

The 1916 Act

The European Union and Japan both requested consultations under the WTO dispute settlement act regarding the U.S. Antidumping Act of 1916 after a firm filed suit in the U.S. court system under this seldom used law. Under the 1916 law, courts can fine foreign firms that are found to be dumping their product on the U.S. market treble damages, and impose jail term. The 1916 Act requires none of the investigative procedures/safeguards described above prior to imposing these sanctions. The 2000 the Appellate Body upheld all aspects of the original panel report regarding the cases filed by both the European Union and Japan, including the fact that the 1916 Act violated many aspects of the WTO Antidumping Agreement.

In November 2004, the U.S. Congress passed legislation repealing the Antidumping Act of 1916.

Arms Length Transactions

In 2001, an Appellate Body found that the United States acted inconsistently with several aspects of the WTO Antidumping Agreement during its investigation into Japanese hot rolled steel products. Specifically, the body found that the United States inconsistently applied the use of

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\(^7\) Zeroing has also been a major issue in other disputes brought before the WTO, including a case filed the Canada regarding antidumping duties imposed on softwood lumber.
"facts available" in its calculation of margins for three of the firms under investigation; moreover, the U.S. failed to exclude the margins calculated using facts available from the calculation of the "all others" rate as required under the Antidumping Agreement.

The Appellate Body also requested that the United States revise its regulations regarding the calculation of normal value using the "arms length" test; historically, the United States excluded from the calculation of normal value any sales made by foreign producers to affiliated parties on the basis of a 99.5 percent or arms length test. The United States has since revised the regulations governing this "arms length" test.