UPDATE

Backgrounder

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HOW THE SPECIAL INTERESTS WANT TO AMEND ANTIDUMPING LAWS

(Updating *Backgrounder* No. 985, "A Guide to the New GATT Agreement," May 25, 1994, and *Backgrounder* No. 906, "A Guide to Antidumping Laws: America's Unfair Trade Practice," July 21, 1992.)

To implement the new General Agreement on Tariffs and Trade (GATT) agreement, which was signed on April 15 by the United States and 124 other governments in Marrakech, Morocco, Congress will need to make a number of changes in current U.S. trade law. This will be done in the form of a "fast track" bill.[1] Such a bill essentially is negotiated between congressional leaders and the White House, and it will be put to Congress for an up-or-down vote without amendment.

Unfortunately it now seems likely that Congress will be asked to include measures to "strengthen" the U.S. antidumping law in the bill.[2] But if enacted, the antidumping provisions actually would result in increased trade barriers worldwide and undermine the intent of the new GATT agreement. By including these provisions, the White House and protectionists in Congress seem determined to go against the sound observation of the President's Council of Economic Advisers, which reported earlier this year that "Both in the United States and elsewhere, antidumping laws go beyond preventing anticompetitive practices—which *should* be their rationale—and often have the effect of protecting domestic industries from foreign competition."[3]

The U.S. antidumping law has become the primary legal tool invoked by domestic industries supposedly to protect themselves from unfair trade by imports, but in reality to shield themselves from competition. Dumping is the practice of selling goods in one market at a price below that charged in another market. The notion of a "fair value" is usually associated with the higher price by industries competing against the lower price, and the antidumping laws are used to impose a tariff on the "unfair value" of the lower-priced goods. Seasonal depart-

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1 The provision for "fast track" consideration of the GATT Uruguay Round implementing legislation is found in P.L. 103-49, July 2, 1993.

2 See Committee on Ways and Means, "Draft Legislative Language for the Administration's Implementing Proposals on the Uruguay Round Antidumping Agreement and Corresponding Provisions in the Subsidies Agreement," July 12, 1994. For a summary of current U.S. antidumping law, see Committee on Ways and Means, *Overview and Compilation of U.S. Trade Statutes* (Washington, D.C.: U.S. Government Printing Office, 1993), pp. 62-71. See also, "Administration AD/CVD Proposals," *Inside U.S. Trade*, Special Report, June 21, 1994, pp. S2-S22, and "Summary of AD/CVD Proposals," *Inside U.S. Trade*, Special Report, June 17, 1994, pp. S2-S8. Lobbying to influence the antidumping sections of the GATT implementing legislation is reported in Robert Keatley, "More Protectionism May Be the Result As Congress Studies Dumping Laws," *The Wall Street Journal*, July 1, 1994, p. A10; "Dumping on Importers," *The Journal of Commerce*, June 30, 1994, p. 10A; and Helene Cooper, "Corporate America Finds Devil Is in the Details As Its Lobbyists Press Congress to Change GATT," *The Wall Street Journal*, June 27, 1994, p. A14.

3 Council of Economic Advisers, *Economic Report of the President*, February 1994, p. 239. Emphasis in original.

Note: Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

ment store clearance sales and promotional price cutting are normal business practices in domestic commerce, and may lead to prices that are lower than "costs" figured in certain ways. But under the antidumping laws, the same price and cost structure used by an exporter to the United States could be considered a violation of U.S. law.

Around the world, this kind of protectionism has been growing as tariffs and other non-tariff barriers have come down. Indeed, more dumping cases have been filed annually against U.S. exporters around the world in recent years than against any other country.[4] The U.S. economy produces the world's largest volume of exports, and therefore is the most vulnerable to the abuse of antidumping laws. Instead of benefiting the U.S. economy, "strengthening" the antidumping laws in this country would not only raise costs for American consumers, but also likely would trigger more antidumping cases against U.S. exporters worldwide, through similar antidumping rules adopted by other governments in future years.

The new GATT Antidumping Agreement[5] was drafted in the spirit of fair and open trade, but individual governments still will determine what they regard as the unfair pricing of imports. The new agreement cannot eliminate the bias in favor of domestic industries in every country, but the new rules are intended to improve the transparency and fairness of national antidumping laws. The GATT agreement requires governments to follow certain rules in determining when dumping cases may legitimately be filed by domestic producers, and specifies some procedures that must be followed in calculating whether goods are being sold "at less than fair value." A primary goal in the Antidumping Agreement is for governments to make their antidumping laws compare real market conditions in a producer's home country and its export markets, and not to bias the process of finding whether dumping has occurred by resorting to unrealistic accounting rules. Countries also are supposed to reexamine antidumping orders at least every five years and revoke those that are no longer valid. This provision of the Uruguay Round agreement has been criticized by some as "weakening" the U.S. trade laws.

When an antidumping case in the United States is decided against an accused importer, the Commerce Department imposes a tariff on the imported product, in effect raising its price to a "non-dumping" level. The amount of the tariff is calculated by using accounting procedures spelled out in the antidumping law. Advocates of "strengthening" the law in Congress and the Administration would amend the technical accounting procedures in ways that would help domestic producers more easily win antidumping cases. But if that happens, other countries will toughen their antidumping rules as well. The result: a general increase in tariffs by means of case-by-case litigation, as industries in the United States and around the world file charges against each other alleging "less than fair value" pricing. This would perversely close markets to competition rather than opening them.

Comparing Foreign and Domestic Prices

One of the most serious problems under current U.S. antidumping law is the Commerce Department's method of comparing an importer's prices charged in the United States with prices in its home country. An average home-market price is computed by obtaining sales data. The average price is then compared with individual sales transactions (*not* the average) in the United States. Any U.S. sales that are above the average home-market value are disregarded.[6] But if any U.S. sales are found to be below the average home-market value, the Depart-

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4 In the period 1988-1992, 166 cases were filed against the United States, compared to 98 against Japan, 75 against Korea, 69 against Brazil, and 13 against Canada. A total of 1,196 were filed worldwide. U.S. International Trade Commission, *The Year in Trade: Operation of the Trade Agreements Program*, Reports 40-44 (1988-1992).

5 Office of U.S. Trade Representative, *Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations* [cited hereafter as MTN/FA] (Washington, D.C.: U.S. Government Printing Office, 1994), II-A1A-8.

6 The comparison of "price" to "value" is not a simple exercise because the calculations are not simple. Note that "value" is based on the producer's cost-accounting data according to statutory rules, and it is thus the second major area where arbitrary, unfair results can be mandated by law or administratively imposed by a government favoring a domestic industry. Cost accounting depends far more on judgmental factors than accounting for financial reports because of different ways a producer's general fixed costs might be allocated to individual products.

ment concludes the imported product has been dumped, and a "dumping margin" is calculated on the basis of the price differences between the two countries.

The Uruguay Round Antidumping Agreement requires that this unfair method be changed to use average transaction prices in *both* markets (an "apples to apples" comparison).[7] The proposed legislation, however, specifically creates a loophole to evade this requirement. Parties to an antidumping case may request an annual review of a dumping order and the new GATT requirement for comparing average prices would not apply to an annual review. This deliberate omission would permit the Commerce Department to conclude there has been a significant *increase* in a product's dumping margin after such a case review, through an "apples to oranges" comparison based on individual below-average transaction prices only.

Dumping When the Importer and Exporter are Related

Increasingly in international trade, companies produce components of products in one country and bring them to a second country for further work or modification before sale. Cost accountants and economists employed by a company use various methods to allocate indirect selling costs, including such things as advertising and promotion costs, and to set the selling price depending on how managers view market conditions.

The new GATT agreement does not require any change in current U.S. law in this area. But the Administration has proposed to change the current practice, which is complicated enough but in general tries to determine the price at the factory gate. The proposal is to determine the price to the first unrelated purchaser in both the U.S. market and the exporter's home market. This change would give the Commerce Department more power to disregard the way international companies allocate their indirect costs.[8] But there is also a strong lobbying effort by domestic producers who compete in the U.S. market with foreign companies that built factories here in the 1980s on behalf of a different method, which would require the Commerce Department to treat indirect costs in a specific way that would bias the comparisons in favor of alleged dumping.[9]

The 1980s saw a significant increase in direct foreign investment in the United States, which created millions of jobs, but both foreign-owned and domestic companies that import component parts from foreign affiliates are vulnerable to the abuse of antidumping laws. Competitors could accuse internationally diversified companies of dumping and win cases that would require the government to impose punitive tariffs. Even the threat of such litigation would jeopardize future foreign investment in the United States and the benefits of competition and lower prices, which would not only affect U.S. consumers but also thousands of U.S. companies that depend on international suppliers to produce their own goods and services for export.

More careful economic study should be done before Congress changes the rules in these cases. It is unclear how the Administration's proposal would work, and any change in the U.S. antidumping law in this area would be a minefield, with consequences that may increase protectionism. The United States economy depends critically on the free movement of investment, both to enable foreign companies to establish factories here and for U.S. companies to diversify abroad. The Administration's proposal would give the Commerce Department sweeping powers to determine the way business must allocate costs. The investment decisions of business worldwide could be affected, after the fact, by arbitrary bureaucratic decisions in antidumping cases. It might no longer be prudent for many companies to invest in the United States.

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7 MTN/FA, II-A1A-8, §2.4.2, pp. 3-4.

8 Ways and Means Draft Legislative Language, *op. cit.*, pp. 96-100.

9 The so-called Exporter Sales Price (ESP) methodology as described in the Administration's memorandum: "This is perhaps the most technical and obtuse issue in implementing the AD agreement. Unfortunately it is also one of the most important." *Inside U.S Trade,* June 17, 1994, p. S3.

Antidumping Duty as a Cost

Another proposed change that would also strongly bias the U.S. antidumping laws against imports, in cases where the foreign exporter and domestic importer are related, involves the accounting treatment of money deposited with the U.S. Treasury. The proposal would effectively double the tariffs in these related-party cases. Under current U.S. law, dumping duties are calculated retrospectively, but importers accused of dumping have to deposit their potential dumping duties with the U.S. Treasury until a review determines the actual amount, if any, of the tariff. Later, when a subsequent review of the dumping charge is made, the deposit is used to pay the duty or refunded.

Under the proposal, during the period the Treasury is holding an importer's deposit, the Commerce Department would calculate the imported product's price in the United States (which determines if "dumping" has occurred) by subtracting the deposited amount from any actual sales prices, treating it as a cost rather than a financial asset. Thus the only way an importer could avoid being found guilty of dumping—and being stuck for the duty twice—would be to increase its U.S. price by twice the amount of the duty to avoid any risks, which would mean no price competition at all. The issue is further biased against importers by the Administration's proposal specifically *not* to follow the new GATT requirement to use average market prices during the review period, as discussed above.

This measure was not contained in the Administration's published draft proposal, but Congress is likely to insist it be in the implementing legislation put before lawmakers because it resembles a practice in the European Union and Canada, which do not use a retrospective system to calculate dumping. Under the system used by other countries, dumping duties are paid in advance and not later modified by a review of the case.

Captive Production

The International Trade Commission (ITC) decided a case last year involving flat steel products, including steel at different stages of manufacturing. At each stage as a product is processed, it can be sold to customers or used by the same firm for further processing. The steel industry petitioners failed to obtain the dumping protection they sought last year because, as the ITC analyzed the facts of the case, the test of harm to the domestic industry was deemed not to have been met. But if steel that was further processed by the same firm had been artificially excluded from the total amount of domestic production, the test might have been met.

A proposed alteration to the Administration's draft legislation by some in Congress is to mandate the methodology the ITC must use in these cases, so that domestic production of intermediate products consumed within the same company to make another product cannot be counted. As a result, the ITC would be stripped of its current discretion to exclude such production, or not, in its analysis if it is appropriate given the facts of each case. The Administration did not include this very parochial proposal sought by lobbyists for the steel industry in its recommendations. It is contrary to the traditional requirements of international law in determining injury, and contrary to the Uruguay Round agreement.[10] The ITC is not an agency so biased against U.S. domestic producers that its analysis of the facts of each industry's conditions of competition needs to be dictated by Congress.

Compensation for Petitioners

Under current law, antidumping duties are general revenue to the Treasury. Two proposals in Congress[11] would provide for the payment of dumping duties into a special fund that would then be used to compensate companies supporting an antidumping petition for various alleged injuries. Aside from providing a subsidy to domestic industry petitioners, which could be illegal under the GATT rules, payments to any company that supported a petition for dumping relief would amount to a private right of action, and a lucrative source of new income for trade lawyers. In addition, the proposal would provide a powerful incentive to domestic industries to

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10 MTN/FA, II-A1A-8, §4.1, p. 6 and §3.4, p. 5.

11 H.R. 4206 sponsored by Representatives Ralph Regula (R-OH) and Norman Mineta (D-CA), and H.R. 4716 sponsored by Representative Nancy Johnson (R-CT).

harass importers by bringing petitions, increasing the probability that American consumers would ultimately have to pay higher prices for a wide range of products as a result of higher tariffs.

Conclusion

There is a confusion between the advocacy of antidumping measures to promote trade on equal terms and the actual use of these laws as a smokescreen for protectionism. A prominent critic of antidumping is J. Michael Finger, Lead Economist for Trade Policy at the World Bank. In his recent book, *Antidumping, How it Works and Who Gets Hurt*, Finger concludes:

> Antidumping, as practiced today, is a witches brew of the worst of policy-making: power politics, bad economics, and shameful public administration. *Antidumping law* is an oxymoron. Expansion of the power of the state to act against imports in the name of antidumping has been built on the meanest of violations against the principles of rule of law. Antidumping is a particularly insidious threat in that it appears to bring systemic justification to the trade restrictions it creates: it is as if the GATT system were programmed to destroy itself.[12]

Since a fast track bill is being put together by congressional leaders and the White House, it may already be too late to have a full and open debate about the way in which the United States should comply with the new GATT Antidumping Agreement in the Uruguay Round implementation legislation. But before they try to "improve" on the GATT agreement by modifying the antidumping laws, lawmakers should carefully investigate the costs and purported benefits of the U.S. antidumping laws. Because amendments are not permitted, the fast track legislative process tends to invite back room negotiations between the Administration and advocates of particular trade law changes that have no general economic benefits, because the White House and congressional leaders want to assure wide support for the bill when it is finally introduced in Congress. Some of the proposals discussed above could have extremely serious economic consequences on the U.S. economy, and the "back room" nature of negotiations have given protectionists a rare opportunity to insist on measures to gain their support.

Supporters of the Uruguay Round of GATT and its objectives of more open world trade should insist that the fast track implementing legislation be narrowly drafted to make only those changes in U.S. law necessary to adopt its specific provisions. The antidumping laws are, after all, U.S. domestic statutes that Congress could debate and amend in the future in a more open manner, without the constraint of the fast track process. That debate is needed. Hopefully, the more the American people learn about how "antidumping" laws are used to raise prices to some U.S. companies for the profit of others, to violate the spirit of GATT rules, and to reduce American competitiveness, the more likely will be the eventual repeal of the largely protectionist antidumping rules.

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2 Ann Arbor: University of Michigan Press, 1993, p. 57. Emphasis in the original.