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Enacted and Rejected Amendments to the Antidumping Law: In Implementation or Contravention of the Antidumping Agreement

Alan F. Holmer

Gary N. Horlick

Terence P. Stewart

ALAN F. HOLMER*
GARY N. HORLICK**
TERENCE P. STEWART***

Enacted and Rejected Amendments to the Antidumping Law: In Implementation or Contravention of the Antidumping Agreement?

Probably no group of substantive provisions of the Uruguay Round implementing legislation were more controversial and hypertechnical than the amendments to the U.S. antidumping law. Throughout the negotiation of the Round and efforts to implement its results into U.S. domestic law, a spirited debate ensued between U.S. producers that had brought antidumping petitions in the past and other U.S. producers who felt they had been harmed by such proceedings.

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*A partner of Sidley & Austin, Mr. Holmer formerly was the chief official at the Department of Commerce responsible for administering the antidumping law (1983-85). Subsequently, as General Counsel to the U.S. Trade Representative (USTR) and Deputy USTR (1985-89), he represented the United States in the GATT Anti-Dumping Code Committee and represented the administration in negotiations with the Congress about the Omnibus Trade and Competitiveness Act of 1988 and the antidumping amendments in the Trade and Tariff Act of 1984.

**A partner of O'Melveny & Myers, Mr. Horlick served previously as the chief official at the Department of Commerce responsible for administering the antidumping law (1981-83). He has taught, written, and lectured widely about the antidumping law, and represented the views of large U.S. exporters in the Uruguay Round debate on the antidumping law. The views expressed by Mr. Horlick in this article do not necessarily reflect the views of O'Melveny & Myers or any of its clients.

***The managing partner of Stewart & Stewart, Mr. Stewart is a longstanding practitioner under the antidumping law representing principally petitioners (that is, U.S. producers of goods). Mr. Stewart also has written and lectured widely about the antidumping law and recently edited a three-volume treatise on the negotiating history of the Uruguay Round. THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992) (Kluwer Law & Taxation Publishers 1993). Mr. Stewart is a co-author of a number of chapters in the treatise including the chapter on antidumping.

At the urging of major petitioning industries, key members of Congress repeatedly urged the administration to preserve aggressive enforcement of U.S. trade laws, including the antidumping law, to protect U.S. producers and workers. On the other side, major U.S. companies interested in exporting and importing opposed provisions they felt might jeopardize their international competitiveness by either the application of similar foreign practices against U.S. exports or restricted access to global sourcing.

In light of the controversy over these provisions, this article illustrates the debate between their champions and opponents. With respect to the most important and contentious antidumping amendments proposed or enacted, Alan Holmer first describes them. Gary Horlick and Terry Stewart then debate their merits and consistency (or lack thereof) with the Uruguay Round Antidumping Agreement.

Some of the provisions debated are likely, at some point in the future, to be subject to challenge in the U.S. courts and under the new World Trade Organization (WTO) dispute-settlement provisions. The Horlick-Stewart debate thus may foreshadow future U.S. and WTO litigation.

I. Provisions Enacted into Law

A. Start-up Costs

Mr. Holmer:

The Uruguay Round Antidumping Agreement provides that sales-below-cost calculations will be adjusted for circumstances in which costs are affected by start-up operations.[1] The premise of this provision is that costs incurred at the initial stages of an industry's production can artificially create the appearance of below-cost pricing. An adjustment for such costs could be significant in cases involving high-technology products, which typically have high start-up costs and a short life cycle.

Section 224 of the Uruguay Round Agreements Act adds a new provision to the Tariff Act of 1930[2] and authorizes an adjustment for start-up costs, subject to certain limitations. The debate between petitioner and respondent camps and within the administration, the House of Representatives, and the Senate focused principally on when an adjustment for start-up could be made, the duration of the start-up period, and the methodology for making start-up adjustments. For example, the administration's proposal and the Senate Finance Committee's draft

1. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, April 15, 1994, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 2.2.1.1 [hereinafter Antidumping Agreement].

2. *See* Tariff Act of 1930, § 773(f)(l)(C), 19 U.S.C. § 1671 [hereinafter the Act], amended by H.R. 5110, 103d Cong., 2d Sess. § 224 (1994), *reprinted in* H.R. Doc. No. 316, 103d Cong., 2d Sess. (1994) [hereinafter Uruguay Round Agreements Act].

bill[3] disallowed any adjustment for start-up costs with respect to products requiring retooling for routine model-year changes. On the other hand, the House Ways and Means Committee's draft bill allowed an adjustment for both fixed *and* variable start-up costs, as well as in instances where a factory is revamped to produce a new product, or an existing product is substantially redesigned.

Mr. Horlick:

Footnote 6 to article 2.2.1.1 of the Antidumping Agreement provides that, for start-up operations, an adjustment to cost shall be made to "reflect the costs at the end of the start-up period or, if that period extends beyond the period of investigation, the most recent costs which can reasonably be taken into account by the authorities during the investigation."[4] This exception to the normal "reasonable period of time" rule for cost recovery was a compromise between those favoring a provision reflecting business reality, where companies often live by projections of product lives, and the U.S. negotiators' reluctance to rely completely on company projections. The formula used in footnote 6 of the Agreement (i.e., the unit costs at the end of the start-up period or the investigation period) resulted from a series of discussions between U.S. computer companies worried about their exposure overseas, particularly during refund procedures, and the senior U.S. negotiator.

The Agreement does not limit the costs to be included in the start-up adjustment. Article 2.2.1.1 of the Agreement refers explicitly to "the costs associated with the *production and sale* of the product under consideration."[5] In the implementing legislation, the administration tried, unsuccessfully, to limit the costs included in the adjustment to fixed costs only.[6] The administration was successful, however, in limiting the costs eligible for adjustment to production costs.[7] Thus, for those operations that incur large marketing expenditures during the start-up phase,

3. Under the fast-track procedures, the administration essentially negotiates with the House and Senate the content of the bill the President ultimately submits to implement a trade agreement. Thus, the Senate Finance and House Ways and Means Committees (in addition to other relevant congressional committees of jurisdiction) each produces a draft bill; differences are resolved in an informal conference. With respect to the Uruguay Round implementing bill, a handful of differences were left unresolved. The Clinton administration was thus given the flexibility to pick (or modify) the version it preferred.

4. *See* Antidumping Agreement, *supra* note 1, art. 2.2.1.1 n.6.

5. Emphasis added.

6. *See* House Comm. on Ways and Means, 103d Cong., 2d Sess., Draft Legislative Language for the administration's Implementing Proposals on the Uruguay Round Antidumping Agreement and Corresponding Provisions of the Subsidies Agreement 93 (July 12, 1994) [hereinafter Draft Legislation].

7. *See* The Uruguay Round Agreements Act Statement of Administrative Action 167, in Message from the President of the United States Transmitting the Uruguay Round Trade Agreements, Texts of Agreements Implementing Bill, Statement of Administrative Action and Required Supporting Statements, H.R. Doc. No. 316, Vol. I, 103d Cong., 2d Sess. 656, 837 (1994) [hereinafter SAA].

such as consumer products industries, the start-up adjustment will be restricted, notwithstanding the express words of the Agreement.[8]

The statute also provides that the start-up period will be considered to end once the level of commercial production characteristic of the merchandise, industry, or producer is achieved.[9] The Statement of Administrative Action further indicates that the Department of Commerce (Commerce) will measure production levels based on the units processed.[10]

Mr. Stewart:

The issue of start-up has generally not been raised in antidumping cases. While it has had some relevance in consumer electronics and has clear application in short life-cycle products such as semiconductors, it has been an issue of no relevance in the vast majority of all cases considered in the United States and abroad. The reason is fairly obvious. Unless an investigation covers multiple generations of products, an investigation is not likely to be initiated until a foreign producer is well past the start-up phase. Prior to that time, any significant importations are unlikely. However, because of the importance of the issue in certain short life-cycle products and its potential relevance in future cases in the automotive area, the issue was heavily debated in the United States, particularly by semiconductor producers and their customers and by automobile companies.

The issue addressed in article 2.2.1.1 n.6 of the Antidumping Agreement on what, if any, adjustment should be made for start-up was a compromise between countries who wanted to have the ability to base decisions upon actual data within the context of ongoing investigations and those who wanted to have the opportunity to provide estimates of future or life-cycle costs.[11] The compromise reached indicated that "the adjustment made for start-up operations shall reflect the costs at the end of the start-up period or, if that period extends beyond the period of investigation, the most recent costs which can reasonably be taken into account by the authorities during the investigation."[12] The compromise is specifically incorporated into the administration's proposal.[13]

8. The U.S. auto industry is one of the largest beneficiaries of the lower trade barriers under the North American Free Trade Agreement (NAFTA). U.S. auto exports to Mexico have increased by approximately 241% since the NAFTA's entry into force. Robert J. Caldwell, *NAFTA Boosts Trade, Creates Jobs*, SAN DIEGO UNION TRIB., Sept. 4, 1994, at G-4. If Mexico were to adopt the U.S. statutory limitation on the start-up adjustment to production-related costs in its antidumping law, U.S. automotive exports could be the target of dumping allegations, since huge up-front marketing and advertising costs can occur when introducing a new car.

9. *See* the Act, *supra* note 2, § 1677b(f)(1)(C), *as amended by* Uruguay Round Agreements Act § 224.

10. *See* SAA, *supra* note 7, at 836.

11. For a discussion of start-up cost and the larger issues of sales below cost, see TERENCE P. STEWART, THE GATT URUGUAY ROUND: NEGOTIATING HISTORY (1986-1992) 1543-53 (1993) [hereinafter NEGOTIATING HISTORY].

12. Antidumping Agreement, *supra* note 1, art. 2.2.1.1 n.6.

13. *See, e.g.*, the Act, *supra* note 2, 19 U.S.C. § 1677b(f)(1)(C), *as amended by* Uruguay Round Agreements Act, *supra* note 2.

The Agreement does not provide a definition of what constitutes the end of a start-up process, how broadly or narrowly the concept of start-up should be viewed (for example, annual model changes vs. a new product) or what costs should be adjusted (variable or fixed or both). Yet the debate over U.S. implementing legislation largely revolved around these GATT-undefined issues. As is true in the GATT generally, where the agreement does not specify an outcome or approach, the choice of how an issue will be addressed is left to the individual governments absent violation of some other provision.

The administration bill and Statement of Administrative Action (SAA) devote an extraordinary amount of space to the start-up issue.[14] The issues covered include: (1) definition of start-up; (2) duration of start-up; and (3) adjustment methodology (incorporating GATT requirements). The statutory and administrative action language strikes a reasonable balance between the competing sides. As noted in the SAA:

> In calculating cost of production and constructed value, it is appropriate to take into account that a firm may experience unusually high costs when it is "starting up" a new product or new production facilities. However, any adjustment for such startup costs must be carefully limited to ensure that such an adjustment is not transformed into a license to dump. Section 773(f)(1)(C) accomplishes these objectives.[15]

Stated differently, an overly broad construction of start-up situations will permit unsustainable pricing practices, that is, prices below cost over time, to be viewed as "fair pricing," contrary to U.S. law and our international rights under the Agreement.[16]

Concerns of domestic producers who must bring cases against injurious price discrimination focused on several issues: (1) the burden of establishing entitlement to an adjustment should be on the company possessing the information (the respondent) as is true elsewhere in the law; (2) costs that are incurred during start-up that are unusual should not be permitted to escape scrutiny entirely, but should be amortized over a reasonable period; (3) situations in which start-up can be claimed should be limited to those where there is likely to be a significant cost difference, for example, new plant or major retooling of existing facilities; (4) start-up should be viewed as ending as soon as a company is in commercial production; and (5) the adjustment should be limited to differences in variable costs. Because the Antidumping Agreement requires that costs at the end of the start-up period be used (not an average of the costs during the period of investigation), the objectives of petitioners were fashioned to limit the adjustment to bona fide start-up situations and not permit other adjustments, such as the business cycle, to be piled-on.

Many of the domestic producer objectives (1, 2, and 3) are contained in the

14. Uruguay Round Agreements Act, *supra* note 2, at 199-201; SAA, *supra* note 7, at 835-38.
15. SAA, *supra* note 7, at 835.
16. Antidumping Agreement, *supra* note 1, art. 2.2.2.

statute or SAA. However, several issues remain troubling. Their resolution over time will determine whether start-up adjustments are properly limited or become "a license to dump." Most importantly, the determination of when start-up ends will be critical in many cases. Start-up is defined as ending "at the point at which the level of commercial production that is characteristic of the merchandise, producer, or industry concerned is achieved."[17] The SAA indicates that the decision will be made on a case-by-case basis and contains a number of qualifiers with respect to what factors will be considered in determining whether production is "characteristic."

B. Captive Production

Mr. Holmer:

As amended, the Tariff Act includes a new "captive production" provision relating to the manner in which the International Trade Commission (ITC) determines whether a U.S. industry is injured, or threatened with injury, by reason of less-than-fair-value imports.[18] The new provision applies where a portion of the industry's production is not sold on the merchant market, but rather is consumed internally to produce a downstream product.

The ITC's recent practice has been not to distinguish between captive and merchant sales in identifying the U.S. industry; all U.S. output of subject merchandise was treated as belonging to the U.S. industry, regardless of whether certain sales were destined for captive production.[19]

Representatives of the U.S. steel industry argued that under ITC practice, upstream steel products were "double counted"; for example, they claimed that hot-rolled steel transformed into cold-rolled steel was taken into account twice, because ultimately the only steel produced for consumption was the cold-rolled steel.

Section 222(b)(2) of the Uruguay Round Agreements Act provides that in circumstances in which the captive production provision applies,[20] the ITC will primarily focus on the merchant market for the domestic like product in analyzing market share and the financial performance of the U.S. industry.

Mr. Stewart:

Many producers are vertically integrated through a variety of stages of manufacture generally for manufacturing and cost efficiency reasons. Vertically integrated

17. *See* the Act, *supra* note 2, 19 U.S.C. § 1677b(f)(1)(C)(iii).

18. *Id.* § 1677(7)(C), *as amended by* Uruguay Round Agreements Act, *supra* note 2, § 222(b)(2).

19. Certain Flat-Rolled Carbon Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom, Invs. Nos. 701-TA-319-332, 334, 336-342, 344, and 347-353 (Final) and 731-TA-573-579, 581-592, 594-597, 599-609, and 612-619 (Final), USITC Pub. 2664 (Aug. 1993), Vol. I, at 15-18 n.50.

20. *See* Saarstahl A.G. v. U.S., No. 94-92, slip op. (Ct. Int'l Trade, June 7, 1994) (Mr. Horlick's comments on the circumstances in which the captive production provision is to be applied).

producers can manufacture products in various levels of integrated, automated facilities. Depending on the production process, by-products or co-products may result from a single production run. Producers may or may not be able to influence the amount of by-products or co-products produced. It is not uncommon for some companies to produce a product for the sole purpose of being sold to unrelated users, while other companies may produce a product solely or principally as an input into a later product. Imports of the product will directly impact the former producers and may or may not indirectly impact the second group. The ITC is frequently confronted with questions of whether integrated operations are, in fact, producers of multiple products even though the facilities may be integrated and production of an "earlier" product is done solely or primarily for production of a later product. These earlier-stage products are often called "captive production" when they are consumed by the producer for purposes of making a further processed item. ITC practice and treatment of captive production, as well as inconsistent ITC practice over time, are well summarized in its 1993 final determination in the flat-rolled steel cases.[21] Specifically, the ITC has recognized that imports may not affect merchant market production and captive market production in the same way and has given separate consideration to the effect of imports on the merchant market segment of the industry as part of its analysis in determining whether the imports are materially injuring the total domestic industry, including captive production. It is also true that the ITC has in prior cases also examined only merchant sales in rendering its final determination.[22]

The treatment of captive production was not an issue considered in Geneva during the Uruguay Round negotiations. Article 3 (injury) and article 4 (domestic industry) remain unchanged in areas arguably relevant to any consideration of captive production.

Section 222 of the Uruguay Round Agreements Act provides modifications to the definitions contained in section 771 of the Tariff Act of 1930. Specifically, a new section 771(7)(C)(iv) is added to provide specific statutory guidance on how the ITC is to handle situations where a product is both sold in significant quantities into the merchant market and further processed internally to produce a different product. A review of the statute and the SAA make clear that (1) the ITC's traditional "like product" analysis is not modified,[23] (2) the ITC will continue to examine, inter alia, total industry production and profit performance, and (3) the ITC's current practice of examining the impact of imports on merchant and captive portions of the market will be modified to make the focus on the

21. Certain Flat-Rolled Carbon Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom, Invs. Nos. 701-TA-319-332, 334, 336-342, 344, and 347-353 (Final) and 731-TA-573-579, 581-592, 594-597, 599-609, and 612-619 (Final), USITC Pub. 2664, *supra* note 19, at 17-18.

22. *Id.*

23. *See* SAA, *supra* note 7, at 183.

merchant market more important in the overall analysis: "[t]he Commission will focus primarily on the merchant market in analyzing the market share and financial performance of the domestic industry."[24]

The statutory provision as drafted is both narrowly drawn as to its reach and constitutes at most a modification in degree of past ITC practice. Because of the broad discretion given to the ITC in evaluating the impact of imports on domestic industries, the additional guidance to place primary focus on the area of direct competition is both logical and consistent with the existing U.S. statutory structure and our international obligations.

Mr. Horlick:

There is no basis in the Antidumping Agreement for singling out captive production for special treatment for purposes of material injury analysis. The Agreement requires that the effects of the dumped imports be assessed in relation to the domestic production of the like product.[25] In addition, with two limited exceptions, neither of which relates to captive production, the Agreement defines the domestic industry to be the domestic producers "as a whole" of the like product.[26] Thus, injury analysis that is premised upon the exclusion of captive production is likely to be challenged as inconsistent with the Agreement.

Still writhing from defeat in the 1993 hot-rolled steel cases,[27] the U.S. integrated steel mills actively lobbied for the inclusion of the captive production provision in the implementing legislation. The administration refused to include a captive production provision in its proposed legislation and, in fact, initially opposed the provision in official statements.[28] The administration eventually caved to

24. *See id.* at 182.
25. *See* Antidumping Agreement, *supra* note 7, art. 3.6.
26. *See id.* art. 4.1.
27. In its final injury determination, the ITC stated that

> in making our determination of whether a domestic industry is materially injured by reason of subsidized or LTFV imports, the Commission is required to evaluate the condition of the domestic producers *as a whole* of the like product or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product. The impact of the subsidized or dumped imports must be evaluated in relation to U.S. *production* of a like product. Thus, the statute defines the domestic industry in terms of *production*, not in terms of markets, distribution channels, or similar factors. Petitioners' proposal to exclude internal transfers of upstream or "semifinished" products from the calculations of apparent consumption, market share and financial performance relating to such products similarly is not supported by the statute, Commission practice or judicial precedent where investigations involve more than one industry.

Certain Flat-Rolled Carbon Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom, Invs. No. 701-TA-319-332, 334, 336-342, 344, and 347-353 (Final) and 731-TA-573-579, 581-592, 594-597, 599-609, and 612-619 (Final), USITC Pub. 2664, *supra* note 19, at 16-17.

28. *See, e.g.*, *Yerxa Sees Sunset, Compensation as Hard Issues in GATT Bill*, 12 INSIDE U.S. TRADE 7 (1994).

political pressure, however, and the captive production provision made its way into the implementing legislation.[29] The administration justified its abrupt change in position, in part, on its claim that Canada, in a 1993 case, adopted a practice of focusing primarily on merchant market production in its injury analysis.[30]

The captive production provision in the new bill directs the ITC to focus primarily—but not exclusively—on the merchant market in analyzing the market share and financial performance of the domestic industry in narrowly defined circumstances. Specifically, in addition to finding that the volume of the domestic like product sold captively and in the merchant market is "significant," the ITC must also find that: (1) the domestic like product, which is internally transferred for processing into downstream products, does not enter the merchant market for the domestic like product; (2) the domestic like product is the predominant material input in the production of the downstream products; and (3) the production of the domestic like product sold in the merchant market is not generally used in the production of those downstream products.[31] Further, with respect to the third factor, the ITC will consider the production of the domestic like product sold in the merchant market generally to be used in the production of the downstream products if a significant portion of the production that enters the merchant market is actually processed into the same downstream product as the product that is produced from the internally transferred captive production.[32] Similarly, captive imports would be excluded from the calculations as well.

C. Price Averaging

Mr. Holmer:

The Antidumping Agreement generally requires the calculation of dumping margins on an average-to-average or transaction-to-transaction basis.[33] This requirement represents a change from prior U.S. practice, under which margins

29. "Captive production" was part of an en bloc package that the administration negotiated with House Ways and Means Committee Chairman Gibbons. In addition to captive production, the integrated steel mills also got a provision in the subsidies legislation that reversed the 1994 Court of International Trade decision, *Saarstahl v. United States*, which overturned a highly political decision by Commerce in 1993 that subsidies automatically continued after an arm's-length privatization. *See* Saarstahl A.G. v. United States, No. 94-92, slip op. (Ct. Int'l Trade, June 7, 1994). In exchange, U.S. exporters obtained provisions in the en bloc package whereby more than one year would be permitted for cost recovery, and an explicit fair comparison rule would be adopted.

30. *See* Certain Cold-Rolled Steel Sheet Originating in or Exported from the Federal Republic of Germany, France, Italy, the United Kingdom, and the United States of America (CITT Inquiry No. NQ-92-009, Aug. 13, 1993, at 19).

31. *See* the Act, *supra* note 2, 19 U.S.C. § 1677b(7)(C)(iv), *as amended by* the Uruguay Round Agreements Act, *supra* note 2, § 222(b)(2).

32. *See* SAA, *supra* note 7, at 183.

33. *See* Antidumping Agreement, *supra* note 1, art. 2.4.2.

were calculated by comparing individual U.S. sales to average home (or third-country) market sales.[34]

As implemented, the new price averaging requirement provides that Commerce will normally determine dumping margins on the basis of a weighted-average of "normal" (formerly home-market or third-country) values with a weighted-average of "export" (formerly U.S.) prices. However, this provision will normally apply only in original investigations, not in subsequent annual administrative reviews (when antidumping duties are assessed rather than merely estimated). New section 777A(d)(2) provides that when a comparison is made between individual export prices and weighted average foreign prices in annual reviews, Commerce will limit its averaging of prices to the period not exceeding the calendar month corresponding most closely to the month of the individual export sale.

Mr. Horlick:

Throughout the Uruguay Round negotiations, the United States and the European Community were intransigent on the issue of fair comparisons. Hiding behind a purported fear of targeted dumping, they did not want to give up their longstanding practice of comparing individual sales in the import market to weighted average prices in the foreign market, the effect of which was to create or increase margins.[35] However, once a limited exception to the average-to-average or individual-to-individual comparison was included in the Agreement to address the concern about targeted dumping, the United States and the European Community no longer had a credible basis to object to the provision.

During the early stages of discussions on the implementing legislation, the administration took the position that it was agreed during the negotiations to compare weighted-average prices in each market only in investigations and not in administrative reviews. To justify this position, the United States relied on the Agreement's explicit reference to the "investigation phase."[36] Others have a different recollection of the negotiations, noting that the discussions did not focus on the administrative review phase, because the U.S. negotiators reportedly claimed that the then-current U.S. practice was to compare individual-to-individual sales in reviews. Moreover, nothing in article 2.4.2 of the Agreement

34. *See, e.g.*, Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of an Antidumping Duty Order, Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France et al., 58 Fed. Reg. 39,729, 39,779 (1993).

35. *See* CONGRESSIONAL BUDGET OFFICE, CONGRESS OF THE UNITED STATES, HOW THE GATT AFFECTS U.S. ANTIDUMPING AND COUNTERVAILING DUTY POLICY 33-35 (1994) [hereinafter CBO Study].

36. There is an internal inconsistency in the administration's interpretation of the use of the term "investigation" in the Agreement. For example, the implementing legislation provides for cumulation in sunset reviews, as well as in investigations, even though article 3.3 of the Agreement permits cumulation in investigations. *See* the Act, *supra* note 2, 19 U.S.C. § 1675, *as amended by* Uruguay Round Agreements Act, *supra* note 2, § 221.

overrides the express requirement in article 2.4 of a fair comparison, which even the administration concedes applies to administrative reviews.

In drafting the implementing legislation on price comparison methodology, the administration ignored the fair comparison requirement of article 2.4 of the Agreement and adopted for administrative reviews the current U.S. practice of comparing individual U.S. sales to a monthly weighted-average of sales in the foreign market.[37] The administration also ignored article 18.3 of the Agreement, which applies the agreed rules equally to both investigations and reviews of existing measures.[38] It is quite likely that the United States will be challenged in the WTO on the comparison methodology applied in reviews. This potentiality for challenge follows not only from the express wording of articles 2.4 and 18.3, but also from the practical consequences. That is, if the United States applies different price comparison methodologies in investigations and reviews, it will cause great uncertainty and unpredictability. Further, it will impede the ability of foreign producers and exporters subject to dumping orders to set prices in the United States at a level sufficient to be found selling at nondumped prices.

The legislation retains the explicit authority, granted by Congress in 1984, for Commerce to use average-to-average price comparisons in investigations and reviews.[39] Under past administrations, Commerce has almost always refused to use this authority, however, because it would usually result in more representative dumping margins.

Mr. Stewart:

Price averaging was a contentious issue in the negotiations in Geneva. However, unlike many other issues in the Antidumping Agreement, the limitation of price averaging to the investigation phase was accepted by parties to the negotiations by the fall of 1990 and was never seriously contested after the position was accepted.[40] Indeed, the debate in Geneva revolved mainly around what the investigation standard would be, whether there would be both transaction-to-transaction and average-to-average options, and whether targeting practices would permit an exception.

None of the countries with active dumping laws were willing to consider averag-

37. *See* the Act, *supra* note 2, 19 U.S.C. § 1677f-1(d)(2), *as amended by* Uruguay Round Agreements Act, *supra* note 2, § 229.

38. The administration claims that article 18.3 does not require the application of the same rules in investigations and reviews. *See* SAA, *supra* note 7, at 819. Again, others' recollections differ with respect to the intent of article 18.3. A WTO panel will be guided by the plain meaning of the words of article 18.3.

39. *See* the Act, *supra* note 2, 19 U.S.C. § 1677f-1, *as amended by* the Uruguay Round Agreements Act, *supra* note 2, § 229.

40. *See, e.g.*, "New Zealand I" version of Draft Antidumping Agreement (Nov. 6, 1990) art. 2.4.2, and similar provisions in New Zealand II (Nov. 15, 1990), New Zealand III (Nov. 23, 1990), Ramsauer I (Nov. 26, 1991), Dunkel Draft (Dec. 20, 1991), and Antidumping Agreement, *supra* note 1, art 2.4.2. *See generally* NEGOTIATING HISTORY, *supra* note 11, at 1537-43.

ing after the investigation phase. Many countries impose duties on individual entries as entered, making averaging unrealistic. Moreover, there are policy reasons for not extending any averaging to the assessment phase, perhaps the most important of which is preventing the windfall to those buying dumped merchandise having some part of the dumping duties that should be paid charged to those importers paying fair value. Those who sought an expansion of the Geneva agreement in U.S. implementing legislation were fighting a battle they had already lost in Geneva.

Section 229(a) of the Uruguay Round Agreements Act incorporates the antidumping agreement terms into proposed section 777A(d) of the Tariff Act of 1930. Section 777A(d)(1) reflects the terms of the antidumping agreement for investigations. Section 777A(d)(2) codifies existing agency practice in most cases with the compromise reached during the congressional review of limiting averaging of home market sales in reviews to a one-month period.

The proposed changes to U.S. law not only reflect our international obligations and rights, but also will minimize the possibility of unfair results to importers who pay fair value. It avoids allowing to go unanswered the problems of masking of dumping margins or targeting.

D. Export Price: Adjustment for Profit

Mr. Holmer:

The Antidumping Agreement requires a fair comparison between the export price and the normal value.[41] Under prior law, Commerce was directed to make a deduction from U.S. price for profit arising from further manufacturing in the United States.[42] However, the amended Tariff Act includes a controversial provision that directs Commerce to deduct from the constructed export price profit arising not only from further manufacturing, but also from selling and distribution activities performed by an affiliated party in the United States.[43] The provision is particularly controversial in that there is no equivalent deduction for profit from normal value.

The SAA describes the methodology to be followed by Commerce in calculating a deduction for United States profit.[44] The profit is calculated by multiplying total profit on the subject merchandise sold in the United States and the foreign like product sold in the home market by the ratio of total U.S. manufacturing costs and selling expenses to total manufacturing costs and selling expenses. The formula is as follows:

41. *See* Antidumping Agreement, *supra* note 1, art. 2.4.
42. *See* the Act, *supra* note 2, 19 U.S.C. § 1677a.
43. *See id.*, 19 U.S.C. § 1677a(d)(3).
44. SAA, *supra* note 7, at 824-26.

$$
\begin{aligned}
\text{U.S. profit} &= \text{Total profit} \times \frac{\textit{U.S. expenses}}{\text{Total expenses}} \\
\text{where U.S. expenses} &= \ \text{U.S. cost of manufacture} \\
&\ + \text{U.S. selling expenses} \\
\text{total expenses} &= \ \text{home market cost of manufacture} \\
&\ + \text{home market selling expenses} \\
&\ + \text{U.S. cost of manufacture} \\
&\ + \text{U.S. selling expenses} \\
\text{and total profit} &= \ \text{profit on subject merchandise} \\
&\ \ \text{sold in the United States} \\
&\ + \text{profit on foreign like product} \\
&\ \ \text{sold in the home market}
\end{aligned}
$$

The SAA directs Commerce to rely on costs specific to the subject merchandise provided that Commerce is simultaneously conducting a cost investigation or the respondent is willing to submit the necessary information voluntarily. Otherwise, Commerce may rely on costs for the narrowest category of merchandise sold in the United States and the exporting country that includes the subject merchandise, or, alternatively, the narrowest category of merchandise sold in all countries that includes the subject merchandise.

Mr. Stewart:

No other issue has been more grossly mischaracterized by importers and foreign producers than the issue of a deduction of profit from a related party importer's resale price in the United States. While the proposed amendment to U.S. law may be viewed as controversial, the controversy is not plausibly about GATT consistency or whether "mirror legislation" might be enacted by our trading partners. For nearly thirty years, U.S. administration of the antidumping law has singularly prejudiced U.S. manufacturers by refusing to deduct what three GATT Antidumping Agreements have specifically authorized[45] and what our major trading partners have routinely done to U.S. exports.[46]

45. Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade, June 30, 1967, art. 2(f), 19 U.S.T. 4348, 4350 [hereinafter 1967 Anti-Dumping Code] ("allowance for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made"); Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade, November 28, 1979, art. 2.6, 31 U.S.T. 4919, 4926 [hereinafter 1979 Anti-Dumping Code] ("allowance for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made"); Antidumping Agreement, *supra* note 1, art. 2.4 ("allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made").

46. *See* Terence P. Stewart, *Administration of the Antidumping Law: A Different Perspective*, *in* DOWN IN THE DUMPS 314-15 n.45 (1991) (citing EEC regulations from 1968 and 1985; Canadian law from 1968; Australian laws of 1975 and 1981).

Prior administrations have acknowledged that the deduction of profit on resale is both GATT-consistent and administrable.[47] Moreover, counsel representing foreign producers and exporters have acknowledged that existing U.S. law can create an advantage for foreign producers if they can structure their transactions through related party importers exactly because existing U.S. law—unlike the GATT and the law of our trading partners—does not deduct the importer's profit on resale.[48]

Neither the GATT nor the deduction of a reasonable profit on resale makes it harder for foreign producers who sell through related party importers to defend themselves. The GATT calls for a constructed export price in those situations because the transfer price (that is, the price to the importer) is unreliable.[49] One deducts expenses and a reasonable profit on resale (European Union practice is to deduct the profit margin normally obtained on the same general class of products by unrelated importers) to construct an export price to the importer.[50] As respondents' counsel acknowledge, failure to deduct profit on resale increases U.S. prices and reduces dumping margins simply because of the relationship of the importer—a bias no other country with an active law permits.

While there are problems with the implementing legislation, the problems flow from the United States' not going far enough in the construction of an export price—deducting some portion of "actual profit" on the combined transactions instead of a reasonable profit on resale, with the effect that foreign producers who sell below cost in the United States will be rewarded by having no profit deducted even though no importer could stay in business losing money on every transaction.

While other concerns exist about how the level of trade adjustment will be applied (particularly whether adjustments will be made where no demonstration of price effect has been made), the language of the level of trade provision and SAA remains ambiguous enough to say that whether problems will exist will largely be determined by case law.

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47. *See* CONG. REC. S8982 (daily ed. June 30, 1987) (statement of Sen. Bentsen) (in reference to amendment that would deduct profits on resale, "the administration agrees that it is GATT consistent and administrable").

48. *See, e.g.*, N. Hemmendinger & W.H. Barringer, *The Defense of Antidumping and Countervailing Duty Investigations under the Trade Agreements Act of 1979*, 6 N.C. J. INT'L L. & COM. REG. 427, 433-34 (1981) ("The exporter's sales price often is a more favorable basis of calculating fair value because, unlike purchase price, the profit of the U.S. importer is included in the net adjusted price, resulting in a higher United States price."); Memorandum from Wender Murase & White, attorneys for Sumitomo Metal Industries, Ltd. 12 (July 26, 1984) ("It has been our experience as trade lawyers that exporter's sales price frequently [but not always] operates to the advantage of foreign respondents. In the case of SMI steel sold to the U.S. through a trading company, there is no question but that the use of exporter's sales price would benefit the respondent, for the trading company's selling price includes a profit which would elevate the U.S. price by an equal amount.").

49. 1977 Anti-Dumping Code, *supra* note 45, art. 2.5.

50. *See id.* art. 2.6.

Mr. Horlick:

The 1967 and 1979 Anti-Dumping Codes stated that a fair comparison should be effected between the export price and the normal value.[51] Nevertheless, many countries used price comparison methodologies that skewed the margin results in favor of their domestic industries. Thus, one of the major negotiating objectives of many countries during the Uruguay Round antidumping negotiations was to include an explicit requirement that there be a fair comparison between the export price and the normal value in determining whether dumping is occurring.[52] Indeed, one of the major accomplishments of the negotiations is the preeminence of the explicit fair comparison requirement in article 2.4 of the Antidumping Agreement.

During the negotiations, the European Community, backed by the United States, was vehemently opposed to accepting any change in the language from the earlier Anti-Dumping Codes, regarding the manner in which dumping margins are calculated. The E.C. negotiators insisted on maintaining the language from the two earlier Codes, which provided that, for export sales through related parties, "allowance for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, *should* also be made."[53] The language of article 2.4 of the new Antidumping Agreement was carefully drafted to override that phrase, inter alia, by framing the fair comparison requirement as "shall," thus making it mandatory.

The U.S. implementing legislation includes the overriding fair comparison requirement of the Agreement.[54] However, during the final minutes of the negotiations between the administration and congressional committee staff to finalize the bill,[55] a provision was added to require that a calculated profit be deducted from certain related party transactions in the U.S. market only.[56]

In exchange for the profit deduction, the administration agreed to consider making an offsetting level of trade adjustment to the normal value in certain cases. However, the legislation mandates a cap on indirect expenses, which limits the amount of indirect expenses that may be deducted from the normal value to the amount of indirect expenses deducted from the U.S. price, regardless of the

51. *See id*; 1967 Anti-Dumping Code, *supra* note 45.

52. *See, e.g.*, Amendments to the Anti-Dumping Code, Communication from the Delegation of Hong Kong (Mar. 21, 1990), MTN.GNG/NG8/W/51/Add. 2 at 3; Amendments to the Anti-Dumping Code, Submission by the Nordic Countries (Dec. 22, 1989), MTN.GNG/NG8/W/64 at 5. Some of the specific language actually used can be found in informal (and unnumbered) submissions by interested parties.

53. *See* 1967 Anti-Dumping Code, *supra* note 45; 1979 Anti-Dumping Code, *supra* note 45 (emphasis added).

54. *See* the Act, *supra* note 2, 19 U.S.C. § 1677b(a), *as amended by* the Uruguay Round Agreements Act, *supra* note 2, § 224.

55. September 19, 1994, at 12:20 A.M.

56. An administration official stated that the inclusion of the profit deduction provision was essential to get Senator Hollings to agree not to block the entire bill.

actual amount of indirect expenses incurred on the home market (or third country) sales.[57]

Because these provisions were added at the eleventh hour in a secret meeting, no consideration and deliberation by members of the House and Senate occurred, nor did the trade community have an opportunity to comment before the deal was closed by the administration.

The United States is likely to be challenged in the WTO on the application of the cap, the deduction of profit only from the U.S. price side of the dumping equation, and the failure of the statute to ensure that a level of trade adjustment is made to normal value sufficient to compensate for the deductions from the U.S. price.[58] All of these are potential violations of the fair comparison requirement in the Agreement. In addition, challenges can also be expected on the artificial nature of the profit calculation. More fundamentally, the Agreement requires that price comparisons be made "normally at the ex factory level," reflecting United States practice since 1921 and the drafting history of the 1967 Anti-Dumping Code. If the new statute requires comparisons on other than an ex-factory basis, the United States is likely to be challenged on that ground as well.

E. Anticircumvention/Diversionary Input Dumping

Mr. Holmer:

Section 1321 of the Omnibus Trade and Competitiveness Act of 1988 added a new provision to the Tariff Act intended to prevent the evasion or circumvention of antidumping and countervailing duty orders in four separate circumstances.[59] This provision has been opposed by some respondents in U.S. antidumping proceedings as allowing an unwarranted expansion of U.S. law; conversely, some U.S. petitioners argued that the provision had been ineffective in addressing circumvention of antidumping and countervailing duty orders.

57. *See* 19 C.F.R. § 353.56(b)(2) (1993). The rationale offered for the cap is the inability of authorities to detect excessive claims for deductions of indirect expenses; the cap represents an irrebuttable presumption that all indirect selling expenses claimed for home market sales are false to the extent they are in excess of indirect selling expenses deducted from the U.S. price.

58. Commerce will be faced with the requirement to ensure that the level of trade adjustment to the normal value yields a fair comparison with the U.S. price after deductions of direct and indirect expenses and an allocated portion of profit. The automatic assumption that a comparison of sales at the same level of trade requires no adjustment is based on the fiction that sales to two different parties at the same level of trade are identical in all respects. Unless the Commerce Department can establish, based on positive evidence, that the activities of the two parties at the same level of trade are, in fact, identical (which is often unlikely for commercial entities in different countries), Commerce will not be able to assume that such sales are identical. Under article 17.6(i) of the Agreement, the authorities have an obligation to establish the facts. Antidumping Agreement, *supra* note 1. Thus, assumptions, such as one where Commerce would assume that sales are identical if sold at the same level of trade, would not satisfy that obligation.

59. The circumstances are merchandise completed or assembled in the United States or foreign countries, minor alterations to merchandise, and later developed merchandise. *See* the Act, *supra* note 2, 19 U.S.C. § 1677j.

Despite extensive negotiations on this subject in the Uruguay Round, the Uruguay Round Final Act did not include anticircumvention provisions. However, the WTO Agreement contains a Ministerial Decision and Declaration stating the desirability of obtaining "uniform rules in this area as soon as possible."[60]

Section 230 of the Uruguay Round Agreements Act amends sections 781(a) and 781(b) of the Tariff Act and makes it somewhat more likely that affirmative anticircumvention findings will be made in the future. Under the 1988 Act, in order for Commerce to include parts and components in the scope of an order, it must have found that the difference in the value of the finished merchandise sold in the United States (that is, the original merchandise subject to the order) was "small." According to the SAA, the Clinton administration believes that the 1988 Act provision (1) "fails to address adequately circumvention scenarios in which only minor assembly is done in the United States (or a third country), but for various reasons the difference in value is not 'small,' " and (2) allows U.S. imports of third-country parts to make it more difficult to apply the anticircumvention provision.[61] Accordingly, section 230 would require Commerce, in making an anticircumvention determination, to focus on whether (1) the process of assembly in the United States (or third country) is minor or insignificant, and (2) the value of the parts imported into the United States (or third country) is a significant portion of the total value of the finished product.

Regarding "diversionary input dumping," the SAA includes a Senate-originated provision (offered by Senator Danforth), which clarifies the so-called major-input rule.[62] Essentially, the measure provides that if an investigation or review is initiated of a downstream product (for example, cold-rolled steel) which incorporates an upstream product as a major input (for example, hot-rolled steel), Commerce may determine the value of the major input (in this case, hot-rolled steel) on the basis of the best information available regarding the cost of production, if there is an affiliation between the producer of the upstream and downstream products. The stated purpose of the provision is to account for the effect of below-cost inputs in the production of exported products.

Mr. Horlick:

The SAA attempts to justify the amended anticircumvention provisions in U.S. law, stating that "[T]he Ministerial Decision constitutes a recognition of the legitimacy of anticircumvention measures and does not preclude members from maintaining, modifying, or enacting anticircumvention measures at this time."[63] Article VI of the GATT states that antidumping duties may not be imposed without a finding of both dumping and injury with respect to the like product from the

60. Antidumping Agreement, *supra* note 1, Decision on Anticircumvention.
61. *See* SAA, *supra* note 7, at 893.
62. *Id.* at 894-95.
63. *Id.* at 819.

specific country subject to investigation.[64] Moreover, the new Agreement prohibits countries from taking action against dumping of exports by a member except in accordance with the provisions of the Agreement.[65] Thus, the amended law is likely to be challenged in the WTO.

With respect to diversionary input dumping, the major input rule in the amended law also appears likely to be challenged, since the Agreement requires that production costs be calculated based on the records kept by the exporter or producer under investigation, rather than on costs imputed by the administering authorities.[66] In addition, problems could arise if Commerce automatically limits itself to the greater of cost or market value.[67]

Mr. Stewart:

No problem has caused greater concern to petitioners than the ability of foreign producers to circumvent outstanding antidumping and countervailing duty orders. Every country that has been an active user of article VI rights has found itself facing the need to determine how to minimize the forms of circumvention that will remain unactionable. The issue and the solutions formulated by individual countries have had both GATT and domestic law dimensions.

The United States, the European Union, and other "user" countries had long believed that countries had the authority to see that remedies provided under article VI were effective. Japan successfully challenged European anticircumvention procedures in 1989–90 on the grounds that as applied in the European Union they violated the national treatment requirements of article III.[68] Efforts by the United States, the European Union, and other countries to obtain a consensus on the situations when anticircumvention measures could be taken as part of the Uruguay Round negotiations were ultimately unsuccessful as the United States viewed the draft language as too limited in reach and had the draft language removed and replaced by a ministerial decision.[69] The Decision on Anticircumvention both recognizes the problem of circumvention, the inability to reach consensus in the Round, the desirability of having uniform rules as soon as possible, and refers the issue to the Antidumping Committee for resolution.

64. *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, art. VI, 61 Stat. A11, 55 U.N.T.S. 188.

65. *See* Antidumping Agreement, *supra* note 1, art. 18.1.

66. *See id.* art. 2.2.1.1.

67. As one of the Senate conferees pointed out in 1988 when the major input rule was added to the statute, "[t]he conferees intended this to permit Commerce to use *either* the producer's own cost of production or an arm's length price. . . . With these guarantees, the conferees believe that the amendment is fair and does not violate the GATT rules." 134 CONG. REC. S 4912 (1988) (statement of Sen. Danforth) (emphasis added).

68. *EEC—Regulation on Imports of Parts and Components, Report by the Panel*, GATT DOC. L/6657 (March 22, 1990).

69. *See generally* NEGOTIATING HISTORY, *supra* note 11, at 1616-40; Terence P. Stewart, *The Development of U.S. Anticircumvention Law*, 1994 INTERNATIONAL TRADE UPDATE (June 23-24, 1994).

As reviewed on pages 222 and 223 of the SAA, the changes made in U.S. law will help address circumvention problems that the 1988 legislation rendered unreachable. While a useful step, the amendments do not address a wide range of problems identified during the Uruguay Round negotiations and in the 1992 debates over possible legislative change. While the proposed legislation recognizes that third-country parts can constitute significant problems in administration, the third-country parts are not in fact covered in the circumvention probe. This lacuna will minimize the utility of the provision in many consumer electronic and office equipment cases. Similarly, the administration does not address the problems posed by "country hopping"—a problem that plagues many orders and that was a focus of detailed consideration during the Uruguay Round. Thus, U.S. law, while moving a step forward through the changes made, will continue to create the illusion of effective enforcement for many industries. Petitioners will have to hope that the administration will obtain cover for these other issues in the Code Committee process in Geneva.

Diversionary input dumping is just a clarification of existing statutory authority for determining the value of an input in the manufacturing cost where it is a major input and from a related party.[70]

F. Cost Recovery

Mr. Holmer:

The U.S. antidumping law provides that home-market (or third-country) sales below the cost of production will not be used as the basis for determining normal value if, among other criteria, costs are not recovered within a reasonable time. Section 224 of the Uruguay Round Agreements Act (in accordance with House proposals) adds a new section 773(b)(2)(D) of the Act, providing that recovery of costs is shown if actual weighted-average prices exceed weighted-average costs during the period of investigation or review.[71]

Furthermore, the SAA directs Commerce to consider variations in unit costs caused by periodic temporary disruptions to production that occur on a less frequent than annual basis, and in such instances not to require full recovery of costs during the period of investigation or review. Additionally, Commerce is directed to consider other methods of demonstrating recovery of costs, if appropriate.[72]

Mr. Stewart:

The proposed changes to U.S. law on sales below cost are generally designed to conform exactly to the articulation of the test contained in the Antidumping

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70. *See* SAA, *supra* note 7, at 224-25; 19 U.S.C. § 1677b(d)(3).
71. *See* the Act, *supra* note 2, 19 U.S.C. § 1677b(b)(2)(D).
72. SAA, *supra* note 7, at 832.

Agreement. For example, article 2.2.1 of the Antidumping Agreement includes both the general test [compare section 773a(b)(1)], a definition of when recovery of costs will be found [compare section 773a(b)(2)(D)], a definition of extended period of time [compare section 773a(b)(2)(B)], and a definition of substantial quantities [compare section 773a(b)(2)(C)].[73] Thus, the cost recovery provisions should present very little controversy as they mirror the GATT requirements.

The permutations provided for when the ITA will take special account of unusual cost situations (for example, periodic temporary disruptions) are noncontroversial at least in principle. As respondents must claim the special treatment, the real concern will be whether Commerce will permit a claim to be made in a review where it has not been raised in earlier proceedings. Stated differently, petitioners would be concerned if respondents could claim the adjustment in the periods when the additional costs occur when the respondent has not identified the additional costs as applicable in earlier periods when the costs were not incurred.

Mr. Horlick:

The Antidumping Agreement provides that below-cost sales may be disregarded in the calculation of normal value only if such sales are at prices that do not permit cost recovery within a reasonable period of time.[74] The Agreement contains no limitation of the possible length of the "reasonable period of time" for cost recovery. However, the Agreement does establish a "safe harbor," whereby prices that are below cost at the time of sale but above weighted-average cost for the period of investigation will automatically be considered to provide for the recovery of costs within a reasonable period of time.[75]

During discussions on the formulation of the implementing legislation and in its proposed legislation, the administration proposed statutory language to limit the "reasonable period of time" for cost recovery to the period of investigation or review. However, the provision in the Agreement does not contain such limitation.[76] If the Agreement intended such limitation of cost recovery to the period of investigation or review, there would be no need for the "reasonable period of time" language in article 2.2.1.

73. *See generally id.* at 831-34.

74. *See* Antidumping Agreement, *supra* note 1, art. 2.2.1.

75. *See id.*

76. It is interesting to note that two U.S. steel companies, USX and Bethlehem, have argued against such limitations on the cost recovery period when charged with dumping in Canada. *See* Complainants' Reply Brief at 18, ¶¶ 54-56, Certain Hot-Rolled Carbon Steel Plate and High Strength Low Alloy Plate, Heat-Treated or Not, Originating in or Exported from the United States of America, 58 Fed. Reg. 34,420 (request for panel review) (CDA-93-1904-04) (in view of the "cyclical nature of pricing in that industry, such that periods of sales at a loss would not be uncommon"). Complainants' Brief at 29, ¶ 95, Certain Hot-Rolled Carbon Steel Plate and High Strength Low Alloy Plate, Heat-Treated or Not, Originating in or Exported from the United States of America, *id.* (request for panel review) (CDA-93-1904-04).

II. Provisions Proposed but Rejected

A. No or Short Supply

Mr. Holmer:

Efforts were made in both the Senate Finance and the House Ways and Means Committees to provide for the suspension of antidumping duties in cases where a specific product subject to such duties is not available from any domestic producer. While the amendments were defeated in the respective committees, the issue is likely to resurface in future trade bills.

Mr. Horlick:

The Antidumping Agreement explicitly provides for, and indeed encourages, the permissive application of antidumping duties.[77] In essence, the Agreement permits each country to make its own determination as to whether the imposition of antidumping duties is in its best interest. One of the flaws in the U.S. system has been the inflexibility to deal in a common-sense way with situations where domestic supply is nonexistent or insufficient to satisfy demand for merchandise subject to antidumping duties. Other countries, such as the European Union and Canada, are able to deal with such situations either through a public interest test or a lesser duty rule (where dumping duties may be imposed in an amount lower than the actual level of dumping found). The United States has rejected such concepts.

When domestic producers are unable to supply a needed product, the application of dumping duties to imports of that product only serves to punish U.S. industrial users, without providing any counterbalancing benefit to domestic producers. In this situation, there are only two true beneficiaries of the dumping duties: foreign suppliers, who can raise their prices in the U.S. market and earn windfall profits at the expense of U.S. industrial users; and the downstream foreign competitors of the U.S. industrial users, who gladly find their American counterparts hamstrung by higher costs. The higher costs from antidumping duties have a serious adverse impact on the ability of U.S. industrial users to compete in world markets and may ultimately translate into a loss of U.S. jobs. This disadvantage has occurred in a number of cases—notably, *Flat Panel Displays* and *Ball Bearings*,[78] where U.S. companies were forced to move operations offshore because of the lack of domestic supply of necessary components at any price. (For example, lead times of forty-eight weeks were quoted for domestically produced ball bear-

77. *See* Antidumping Agreement, *supra* note 1, art. 9.1.

78. *See* Certain High Information Content Flat Panel Displays and Display Glass Therefor from Japan, USITC Pub. 2413, Inv. No.731-TA-469 (Final) (August 1991); Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom, USITC Pub. 2185, Inv. Nos. 303-TA-19 and 20 and 731-TA-391-399 (Final) (May 1989).

ings.) The common-sense solution to short-supply situations is to give the Commerce Department the authority to grant time- and quantity-limited waivers from the payment of antidumping duties. As soon as a domestic producer is able to supply the product, the short-supply waiver would be terminated.

Although the inclusion of a short-supply proposal in the implementing bill was ultimately rejected, the provision received considerable support in the House. In the end, however, the administration won over the crucial votes in the Senate Finance Committee to defeat the measure, after convincing those senators that the administration already has the authority under the current law to accomplish the goals sought through the enactment of a short-supply provision.[79]

Mr. Stewart:

Proposals for a no-supply or short-supply exception to coverage from an antidumping or countervailing duty order represented a solution to a nonexistent problem. The nature of relief provided by an antidumping duty order is the assessment of a duty to offset any price discrimination found. Stated differently, the remedy does not limit supply in any way. Hence, there can never be a short-

79. During the course of the legislative debate, the Commerce Department claimed in a communication sent to Senator Boren that it has the authority under current law to assist U.S. industry faced with short-supply situations. Specifically, Commerce stated:

> There are mechanisms under current law by which a product can be excluded from an order without undermining the overall effectiveness of the antidumping and countervailing duty laws.
>
> . . . .
>
> Throughout the investigation, the administering authority has the ability to define and clarify the scope of the case to exclude products where coverage would not serve the purposes for which the petition was brought. In addition, in making the injury determination, the ITC must define "like product" based on consideration of whether the characteristics and uses of the domestic production are similar to those of the imported product. The fact that a product is not made in the United States will be reflected in the ITC's determination of whether the imports are a cause of injury to the domestic industry. If petitioning companies are not producing a competing product, there will be no lost sales, or adverse price impact with respect to the particular merchandise and this will be a factor taken into account in making the overall injury determination.
>
> . . . .
>
> After an order is in effect, the administering authority can clarify the scope of an order. If a product has substantially different characteristics or uses than the merchandise covered by the order and it is unclear whether the order included the specific product at issue, it can be declared outside the scope the order. Furthermore, the Department will continue to have the authority, based on a changed circumstances review, to revoke an order in part when maintaining an order as issued is no longer of interest to the domestic producers. Finally, an order will not continue indefinitely if it is not continuing to provide a needed remedy to the domestic industry. Under the new sunset review procedures required by the GATT, if injury is not likely to continue or recur, the order will be revoked. The goal of defining the scope and duration of orders through these procedures is to ensure that the petitioning industries are provided an adequate remedy while not unnecessarily inhibiting trade.

Facsimile from the Office of Import Administration to Sen. Boren (Aug. 8, 1994).

supply or no-supply situation caused by the existence of a dumping order or the payment of a dumping duty. Rather the remedy seeks the elimination of price discrimination. The law is intended to change the pricing practices of foreign producers. Congress has been long concerned that the unfair trade laws operate in a manner to provide effective relief from injurious price discrimination. The proposal for a no-supply or a short-supply provision would seriously erode the effectiveness of the relief provided.

Proponents of the no-supply or short-supply provision were unsuccessful in getting the issue included in the Uruguay Round agreement. Issues raised were rejected by most observers.

For example, the claim that purchasers in the United States are disadvantaged by having to pay fair value is counterintuitive. The antidumping law is an anti-price-discrimination statute. Elimination of price discrimination results in importers paying a price comparable to that paid abroad. This result is true today and has been true since the law took effect in 1921. While importers in such situations may lose a false advantage, the law has always intended that result.

Similarly, claims that the injured domestic industry should not be concerned when it is unable to supply all or any of a particular item ignore the commercial reality of why companies stop producing or never start producing a particular item—expected inadequate return on investment. Without the correction of the price discrimination, domestic producers will not be able to make market-driven decisions about expanding production, reentering products where prior dumped pricing signals dictated market exit. There is no realistic way to provide the market signals where products are exempted from payment of duty. Such a system also would have the perverse effect of rewarding the most successful dumpers—those that have eliminated all domestic production of an item or prevented U.S. companies from ever commencing production.

Finally, people who pursue short supply are acting against their long-term interest. In most situations, the imposition of duties provides the market signals to permit domestic and foreign companies to make rational decisions about production, which generally means more buying options will exist within a few years than existed at the time of the case.

Consider the antifriction bearing orders from 1989. At the time of the case, the industry had closed some thirty plants, or more than $1 billion in investment, and lost more than 13,000 workers. A number of users of bearings appeared at the hearing and testified about an inability to obtain the product from the petitioner. In the last five years, close to $1 billion has been reinvested in the United States by various companies. A substantial part of the investment would not have occurred had there been a no-supply provision. Domestic companies had stopped producing particular items because it was unprofitable to continue production at dumped prices. When prices were restored, investments again appeared profitable. Much of the investment was put into the very items identified as allegedly not produced in sufficient quantity in the United States. Had a short-supply or no-supply provision been opera-

tional, little if any of the investment would have occurred as there would have been no market signal to indicate likely profitability of reinvesting.

B. Duty as a Cost

Mr. Holmer:

Certain U.S. petitioners argued that Commerce should be required to treat the amount of an antidumping duty as a cost of doing business in the United States. Petitioners proposed to deduct this amount from the U.S. price in certain cases where an importer is related to the exporter and does not raise its price in the United States to reflect fully the payment of the duty (that is, where the exporter absorbs the duty).

Mr. Stewart:

One of the most important issues authorized by the Uruguay Round Antidumping Agreement and not dealt with by U.S. implementing legislation is the provision for a remedy to duty absorption. U.S. law and practice have historically prevented foreign producers from absorbing antidumping duties in purchase price situations involving unrelated parties.[80] In related party importer situations, Commerce defines reimbursement out of existence on the grounds that the transfer of funds between related parties should not be viewed as reimbursement.[81] Since the vast majority of cases involve related party importers, Commerce has effectively created a bias in administration in favor of related party importers. Such a result is unwarranted. The Uruguay Round Final Act provides authority to prevent such absorption in related party transactions.[82] The text also confirms the rights of importing countries to prevent price manipulation of multiple products by related party importers and their customers to create fictitious prices for antidumping review purposes. Congress should amend U.S. law to conform with the GATT right contained in the Uruguay Round text and to require certification by the importer (subject to potential verification) that no price manipulation has occurred.

Where a product subject to an antidumping duty order is imported by an unrelated importer, domestic producers generally receive price relief in the market (absent reimbursement). The unrelated importer must pay the antidumping duty owed. Even if the importer chooses to absorb the dumping duties, the importer's costs have been significantly increased, and the importer can be a bona fide prospect for domestic producers who will compete against the higher total costs for imports. By contrast, if the importer is related, to the extent that dumping continues and dumping duties are paid by the importer, relief is artificially curtailed. This result is due to the twin facts that the prices to the importer's customers

80. *See, e.g.*, 19 C.F.R. § 353.26.
81. 58 Fed. Reg. 39,729, 39,736 (July 26, 1993).
82. *See* Antidumping Agreement, *supra* note 1, arts. 2.4, 9.3.3.

have not been raised (or not raised sufficiently) *and* the importer is not a potential customer for the domestic producers.

Stated differently, where dumping continues, relief occurs where the importer is unrelated; relief is reduced or eliminated where the importer is related. Such a result is irrational and not required by the antidumping agreement (new or old). *Once an order is issued, every petitioner is entitled to compete against fair value in the market. In related party importer situations, the petitioner is routinely denied that right.*

The antidumping law is not intended as a revenue raiser for the government but as a remedial provision to "level the playing field." Yet the current administration, and the failure to adopt a provision permitting duty absorbed by related party importers to be treated as a cost, assures that the field will not be level and that the remedy will be at least partially denied in most cases.

In many cases, purchasers in the United States insist that foreign producers set up U.S. subsidiaries to absorb the antidumping duties so that the issuance of an antidumping duty order will have no actual effect on prices paid by purchasers. This cannot be right.

Predictably, those opposing the provision have raised a series of red herrings—whether treating duty as a cost under the U.S. retrospective duty assessment system would be consistent with article 2.4;[83] whether such a provision could be applied predictably and fairly;[84] and whether an absorption problem even exists. Each of the concerns listed are easily answered.

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83. Article 2.4 of the new Antidumping Agreement is identical to the relevant language with article 2.6 of the 1979 Anti-Dumping Code. Article 2.4 does not distinguish between situations where duties are collected "prospectively" (E.U. and Canadian systems) or "retrospectively" (U.S. system). Rather it identifies adjustments that should be made for differences in circumstance of sale and has special language for related party importations. Where a related party importer is involved, "allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made." Antidumping Agreement, *supra* note 1, art. 2.4. This language is the same as the 1979 Code. Indeed, article 9.3.3, which talks about when antidumping duties *cannot* be deducted from the export price in a related party importer situation, is not limited to either prospective or retrospective situations (just as articles 2.3 and 2.4 are not) even though other subparagraphs in 9.3 specifically reference either *prospective or retrospective* situations. *See id.* art. 9.3.1 ("When the amount of the antidumping duty is assessed on a retrospective basis"); *id.* art. 9.3.2 ("When the amount of the antidumping duty is assessed on a prospective basis").

84. The fact that the amount of antidumping duties owed is not certain at the time of importation or sale is irrelevant to whether an adjustment should be made. Commerce routinely grants downward adjustments to dumping margins to foreign producers for post-sale rebates where the system of rebates is known for part of the contract even though the amount cannot be determined until much later. *See, e.g.*, Certain Internal-Combustion, Industrial Forklift Trucks from Japan, 53 Fed. Reg. 12,553, 12,561 (Dep't Comm. 1988) (final LTFV deter.) ("Rebates do not have to be paid during the period of investigation, but they must be tied to sales made during that period"). Similarly, warranty expenses are not known at the time of sale, but are routinely adjusted for in dumping calculations. Color Picture Tubes from Japan, 52 Fed. Reg. 44,171 (Dep't Comm. 1987) (final LTFV deter.) (grant of warranty expense claim for Mitsubishi based on five-year historical warranty data, even absent written warranty agreement). Moreover, in many cases, reviews are not requested for many companies so that duties assessed are the duties deposited (reducing or eliminating any "uncertainty").

Applying the principle "fairly" is a nonsequitur. What is wrong with current practice is the failure of Commerce to treat the absorption of duties as a cost. This failure contributes to the lack of fair price competition in the marketplace. Related party importers could handle the problem by either raising prices sufficiently to eliminate the dumping or, if they seek to skate close to the edge, by including a clause in their contracts indicating that any duties found owed will be separately billed to the purchaser. It is the refusal by the exporter or related party importer to do either of the above that results in duties being absorbed. The proposed change to treat duty absorption as a cost would be fair by definition.

Finally, claims that absorption is not a problem are contradicted by the *Federal Register* notices in the administrative reviews of antidumping duty orders and by the experience of many domestic industries that have seen foreign producers selling through related parties not change their pricing in the U.S. market despite the existence of substantial margins. Duty absorption is a real and significant problem. Unfortunately, the issue is addressed at present solely as a factor in sunset reviews.[85] Until U.S. law is changed to take advantage of our GATT rights to neutralize duty absorption, the remedy will always be partial where related party importers are involved.

Mr. Horlick:

In 1986 the European Community began to treat antidumping duties as a cost and, as such, deducted the duties from the export price. One of the European Community's primary negotiating objectives in the Round was to include specific language in the Agreement to condone this practice.

In the past, the U.S. government had formally objected to the European Community's treatment of dumping duties as a cost.[86] However, the dynamic of the Uruguay Round antidumping negotiations was such that, very early on, the United States and the European Community entered into a "nonaggression pact" to support each other on antidumping.

As soon as the European Community succeeded in getting an explicit provision in the Agreement permitting the treatment of dumping duties as a cost, petitioning

Similarly, there is nothing about Commerce practice that suggests administrative changes are any more frequent or important than at other agencies. Moreover, construction of laws is generally applied to the factual situation before the agency or court even though the construction may not have been known at the time of the activity or may be changed upon review. *See, e.g.*, 2 AM. JUR. 2d *Administrative Law* § 81-83 and cases cited therein. Hence the concern that the law is not predictable does not appear either fact-based or due to a desire to provide special treatment to related party importers not warranted by general principles of administrative law.

85. *See* SAA, *supra* note 7, at 215.

86. *See* Letter from Alan F. Holmer, General Counsel, Office of the U.S. Trade Representative to Hans Beseler, Director, Trade Policy Instruments, Commission of the European Communities (Mar. 31, 1986) (objecting to the E.C.'s treatment of duties as a cost on the grounds that it perpetuates the imposition of dumping duties after the dumping has ceased, it undermines the remedial purposes of the antidumping law, and it violates the Code if the result is the imposition of a duty in excess of the margin of dumping). *See also* CBO Study, *supra* note 35, at 37.

industries in the United States jumped on the bandwagon and began lobbying for the inclusion of a duty as a cost provision in U.S. law. The administration succeeded in fighting off such efforts, and the fast-track package explicitly rejects duty as a cost.[87] In its stead is a limited provision on "duty absorption" under which Commerce will examine, if requested, during the second and fourth administrative reviews whether a foreign producer or exporter selling through an affiliated importer in the United States is absorbing the dumping duties rather than eliminating the dumping.[88] An affirmative finding of duty absorption will not affect the calculation of the dumping margins.[89] Rather, Commerce will make either an affirmative or negative duty absorption finding and notify the ITC of its finding. The ITC, in turn, will take into account Commerce's duty absorption finding for purposes of its analysis on the likelihood of continuation or recurrence of injury in the sunset review.[90]

C. COMPENSATION

Mr. Holmer:

Some U.S. industries proposed that a portion of the duties collected in an antidumping case should be given to members of the domestic industry to be earmarked for investment or worker-related benefits. However, despite considerable early activity, neither the House Ways and Means nor Senate Finance committee drafts of the implementing bill included this provision.

Mr. Stewart:

Congress as well as the current and prior administrations have repeatedly promised domestic producers a "level playing field" through the neutralization of dumping. Unfortunately, the law as administered delivers relief only after an industry is behind and permits duty absorption to go uncorrected, which denies most domestic producers even one opportunity to face fair pricing and provides no redress for past or ongoing harm. With the addition of sunset reviews, foreign producers now will have an incentive to continue to buy marketshare as there will be some probability of orders going away after five years. Congress has missed a major opportunity to rebalance the law to safeguard that relief provided is effective and that promises of a level playing field are, in fact, delivered.

The proposal during the Uruguay Round implementing bill to have dumping duties actually collected paid to the petitioner and those in support of the petition would have gone part of the way to making U.S. law more effective. It is critical

87. *See* SAA, *supra* note 7, at 885.

88. *See* the Act, *supra* note 2, 19 U.S.C. § 1675(a)(4), *as amended by* Uruguay Round Agreements Act, *supra* note 2, § 220.

89. *See* SAA, *supra* note 7, at 885.

90. *See* the Act, *supra* note 2, 19 U.S.C. § 1675(a)(1)(d), *as amended by* Uruguay Round Agreements Act, *supra* note 2, § 221(a).

that U.S. trade laws be effective and provide an incentive to foreign producers to charge and for importers to pay fair value. The provision of compensation, in the form of duties actually assessed, is viewed as one of the incentives appropriate to render the laws more effective.

This provision would not attempt to compensate injured industries for past harm, but merely provides that where dumping continues, duties collected will be distributed to those who petitioned or who supported the petition. Such distribution will allow those parties who have been promised a level playing field to reinvest in plant, equipment, and personnel without fear that continued dumping will render such investments economically unsound. Most importantly, the provision should encourage foreign producers to sell at fair values as continued dumping will result in duties being transferred to domestic competitors—reducing the economic incentive to continue dumping.

Arguments against compensation are either against interest (that is, compensation should improve the competitiveness of suppliers; purchasers who oppose compensation are acting against their long-term interest of having strong suppliers) or without merit. A few examples of concerns raised are explored below.

Some have argued that compensation is prohibited by the GATT. There is no prohibition in the GATT against the distribution of duties collected.[91] Some have opined that other countries might impose countervailing duties on products that receive compensation. While possible if one assumes that the distribution of duties collected would be viewed as a subsidy, it is unrealistic to assume that countervailing duties would be assessed in most situations[92] and that the United States could not provide the option for domestic producers concerned with such an outcome not to receive the funds.

Nor is compensation a form of private right of action. A private right of action places a foreign producer or importer at additional risk of liability where harm to a domestic producer is found. Compensation, by contrast, does not increase liability; it merely directs the distribution of funds collected because of continued dumping. Concerns about administrability, mirror legislation, or encouragement of frivolous suits are similarly without merit.

Mr. Horlick:

At the urging of certain domestic industries, including the integrated steel mills, legislation was proposed that would have granted compensation to domestic

91. In 1988 when Congress considered private rights of action, Professor John Jackson indicated in a letter to Chairman Rostenkowski that compensation (payment of duties collected to domestic industry) did not raise GATT concerns whereas private rights of action could raise GATT problems.

92. The GATT agreement recognizes that subsidies are provided for many legitimate reasons and are actionable only under certain circumstances. Even assuming that compensation would be viewed as a subsidy, it is not clear that the subsidy would be actionable, that domestic producers receiving compensation would be major exporters, or that exporters would be found to be causing material injury because of the "subsidies."

industries payable from antidumping duties collected.[93] After some debate on the issue, the administration eventually came out opposed to compensation, in part because it would reduce U.S. revenues by several billion dollars over five years, thus creating additional funding problems that the administration would have to make up elsewhere.[94]

The problems with the compensation proposal were far greater than the loss of revenue. The first and perhaps the most persuasive argument against compensation is that it could easily be seen as a potentially countervailable domestic subsidy. The administration would have been hard-pressed to justify the payment of subsidies to domestic industries, even if nominally usable only for pension plans, particularly to those industries such as steel that have long argued that all money is fungible, and that subsidies to larger groups than the likely recipients of compensation are specific.

Some argued that a compensation provision would likely be found to violate article 18.1 of the Agreement, which provides that antidumping duties or undertakings are the exclusive remedy for dumping. Many large U.S. companies opposed the idea of compensation, in principle, on the theory that it would create a private right of action and that it would encourage the filing of petitions for the wrong reasons. Finally, compensation posed a real problem of perception for Congress. Even if some constituents supported the concept of compensation, the image of voting in support of the payment of big law firms' legal fees was undesirable.

III. Conclusion

While other arguments may be made about the various antidumping provisions enacted or considered but rejected, this article illustrates the vigor of the debate that has absorbed the international trade law community for the last several years. In light of the high stakes on all sides of these issues, the debate is likely to continue, particularly if the congressional session convened in January 1995 considers more trade legislation, centered upon a renewal of fast-track negotiating authority.

93. *See* H.R. 4206, 103d Cong., 2d Sess. § 103 (1994).

94. *See* Letter from Ira S. Shapiro, General Counsel, Office of the U.S. Trade Representative, to Robert T. Matsui, Chairman, Subcommittee on Trade, House Ways and Means Committee (June 30, 1994), *reprinted in* 12 INSIDE U.S. TRADE S-4 (July 15, 1994).