# UNIVERSITY
*of*
# GLASGOW

Faculty of Law and Financial Studies

# The Impact of International Law on the Trading Policies of the United States and the European Union with Special Reference to the Regulation of Subsidies, Dumping and Countervailing Measures

## Volume I

A Thesis Submitted for the
Degree of Doctor of Philosophy

by

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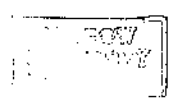

## ABSTRACT

Everyone should be concerned when the rule of law fragments in international relations. Once this phenomenon occurs, international disputes become rife and international order is threatened. Understanding why the rule of law has such a limited normative impact on international behaviour is the subject of this work.

A body of international rules has been selected and analyzed in their application by states. The particular rules selected are those of the pre-1995 GATT in general and the specific rules regulating the use of subsidies, countervailing duties and anti-dumping measures in particular. This thesis examines these principles and how they operated on the international plateau prior to the adoption of new rules at the Uruguay Round of Multilateral Trade Negotiations.

Thereafter, the impact of these rules on the trade policies and practices of the United States and the European Union are examined in rigorous detail. Specific attention is paid to the substantive anti-dumping and countervailing duty lwas of the US and the EU as well as the administrative practices of the two trading entities.

After such a comparison is made, it becomes clear that, in this context, both the United States and the European Union conduct this aspect of their respective trade policies independently of the prescribed rules. This comparison requires an indepth evaluation of the policies and administrative practices of both these states. Hence, the size of this work is justified by the need for close and detailed analysis of the relevant laws, regulations and administrative practices.

The final conclusion is that the limited normative impact of these rules can then be ascribed to five factors: (a) the limited normative efficacy of the international trade legal order itself; (b) the degree to which substantive rules of law embody an adequate consensus in relation to their content; (c) the extent to which these international rules are compatible with the policy objectives and goals sought by the United States and the European Union in this context; (d) the ability of the rules to permeate the decision-making processes inside states and to prevail over non-legal factors and considerations; and (e) the strength of such rules in terms of their ability to withstand dilution or avoidance when incorporated at the national level.

These conclusions are an unfortunate reflection of the limitations of the rule of international law. However, perhaps they can provide greater understanding of the manner in which international relations are conducted in reality.

To

My parents

for their love, patience and support

and

The Peoples of Bosnia-Herzegovina

with the Hope that my Generation
will Not Let You Suffer
in the Same Way Again

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**VOLUME I**

## A Statement of the Objectives, Parameters and the Methodology for this Study

Any thesis is a proof of the validity of a particular statement, assertion, proposition or theory and, at the most basic level, this work is an attempt to achieve just such an objective. As a preliminary matter, it is necessary to set down at the outset the exact nature of the proposition which is being presented, together with an outline of the broad parameters of the study and the methodology adopted in the pursuit of this aim. The identification of these elements is the function of this introductory chapter.

### (1) Statement of Objectives

In very broad terms - perhaps too broad terms - international law can be described as a framework of principles and rules which prescribe acceptable standards of behaviour for the international community. These rules are created and, to a certain extent, implemented by an institutional superstructure which has a decentralised character. This peculiar character has even given rise to speculation that the international legal system is not a valid legal order because it does not fit inside the model of law typified by the domestic legal order.[1]

Those asserting these views confuse two separate issues. On the one hand, there is the assimilation of the international legal order with the legal processes and features of domestic legal systems. On the other hand, there is the analytical evaluation of the normative

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[1] For a rebuttal of these assertions, see R.M. MacLean, "Does Anyone Still Ask the Question 'Is International Law Really Law'", (1991) Juridical Review 230.

efficacy present in the international legal order and, in particular, the effect of law on the behaviour of states. Only debate on the latter can explain the relevance of law in the determination of state behaviour.

There is no value in generalised statements that international law does or does not induce states to act in particular patterns of behaviour. Even the most vociferous advocates of the rule of international law must concede that, in certain circumstances, the applicable norms of law are insufficient to prevent states from adopting courses of action or policies in violation of the international rules. Conversely, in other situations, the influence of law is decisive and the behaviour of states dictated in terms of its precepts. In the equation which formulates state behaviour, legal principles and rules collectively constitute only one variable competing with other non-legal factors in the international decision-making processes.

Crudely speaking, the actions of a particular state will be dictated by the weight of international rules against other non-legal forces compelling non-compliance. To determine the eventual patterns of behaviour both sides of this equation must be examined. In this competition of influences and forces it must be recognised that legal principles do not invariably prevail.[2] Quite clearly, this assertion is an oversimplification which leaves a number of questions outstanding such as:

(a) Why do states feel compelled to comply with rules of international law on some occasions

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[2] See R.M. MacLean, "The Proper Function of International Law in the Determination of Global Behaviour", (1989) 27 Canadian Yearbook of Int'l Law 57.

and disregard their application in other circumstances?

(b) What pressures do legal and non-legal factors impose on the decision-making processes inside states?

(c) How do states evade their international obligations by manipulating their own internal legal procedures and administrative techniques?

Definitive answers to these questions would go a long way to resolving the issue of the efficacy of international law and its influence on state behaviour.

A comprehensive and all-embracing study into the whole international legal system, in terms of both institutions and rules, and into the non-legal factors impinging on the decision-making processes within each state, or even a major group of states, is obviously not a feasible endeavour. Accordingly, this study must be narrowed down in terms of both the particular legal subject-matter and the specific states to be investigated.

In terms of subject-matter, the scope of the investigation will be confined to the field of international trade regulation. But there exists a labyrinth of international agreements to co-ordinate and regulate such transactions, ranging from the physical transportation of goods to the assessment of duties and the payment mechanisms created to facilitate trade. Since the diversity of international trade regulation still remains too extensive for proper examination, attention will be confined to the impact of one institution operating in this area, namely the General Agreement on Trade and Tariffs (GATT) which has recently transformed itself into the World Trade Organization

(WTO). An analysis of this organisation's institutional structure and principles prior to this transformation will allow the determination of how, and to what degree, these impacted on the trade policies of particular states.

However, throughout this work, the focus will be almost exclusively on the GATT as it existed prior to the transformation which occurred on January 1, 1995. This is for two reasons.

First, a reservoir of over 40 years experience in the regulation of international trade is embodied in the history of the GATT. It has been the most important international trade organisation during this period and it would be highly artificial to make any judgments in this area of law without focusing thoroughly on its contribution to the regulation of trade.

Second, since the WTO remains a fledgling institution with little organisational history to analyze, it would be premature to judge the effectiveness of the organisation in regulating trade matters in the present context. This thesis is therefore exclusively concerned with the pre-Uruguay Round rules of international trade law and any reference to the post-Uruguay Round rules is made only for the purposes of completeness or comparison with the pre-existing regime.

Two dimensions of the GATT's operations merit detailed consideration. First, its institutional structure and, second, its fundamental substantive principles. Both of these exerted, in different ways, a normative influence on the behaviour of states.

I shall also examine a number of specific rules within this institutional framework for the purposes of

regulating specific activities. In this context, the international rules regulating subsidies, dumping and countervailing measures have been selected for analysis to determine their normative influence on particular aspects of the trade policies of certain GATT contracting parties.

In terms of the actual states and their trade policies, again we must limit the scope of the study to a relatively few states. Given the nature of the legal subject-matter selected for closer investigation, the two most obvious candidates for detailed analysis are the United States and the European Union.[3] Along with Japan and Canada, these two states (or more accurately one state and one supranational organisation) are the main actors in the international trading system.

Not only do these two states provide a stimulating contrast in terms of internal decision-making structures, but also their trade policies are the most dynamic and, arguably, the most controversial in the present system. This study will focus on the impact of the international legal norms for the regulation of trade, as defined in the terms above, on the respective trade policies of the United States and the EU.

Now that the parameters of the investigation have been defined, it is appropriate at this juncture to pronounce, in as brief a manner as feasible, the exact proposition which the following chapters will demonstrate. In its most simple terms, this study will prove the following proposition:

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[3] While the European Community has only recently been transformed into the European Union, for the sake of consistency and to avoid confusion, the term 'European Union' will be used throughout this work to refer to the pre-1993 organisation as well as its successor, unless the context otherwise requires.

> The institutional and legal framework for the regulation of international trading relationships as established under the GATT exercised only the most superficial normative influence on the present trade policies of both the United States and the European Union, having regard to both the general direction of the trade policies of this state and this organisation and the particular rules of international trade regulation selected for this study.

Naturally, the investigation will not be confined to providing evidence that this assertion is correct. An endeavour will also be made to explain why this situation has come to exist, the reasons behind the inefficacy of this particular legal institutional structure and its rules, and the departure in the behaviour of states from the norms created at the international level.

This is not merely an academic exercise. Proof that the contemporary trade policies of the United States and the European Union operated virtually independently of the international rules has a number of significant repercussions and consequences. Most prominently, recognition of this situation is implicit acknowledgement that the international trade order established by the GATT de facto fragmented, even if this eventuality was not formally recognised. No two states of this economic magnitude could be allowed to effectively operate outside the international system without the whole system itself falling into disrepute and losing its essential credibility.

The economic consequences of the fragmentation of the international trading system established under the GATT

were almost too frightening to contemplate. It could have easily heralded the return to 'beggar-thy-neighbour' economic philosophies which brought turmoil to the international trade system in the 1930s. These policies - which involved increasing protection to domestic industries from international competition - suffocated international trade. Preventing the return of this phenomenon was a principal motivating factor behind the discussions on an international trade organisation immediately after the Second World War which culminated in the negotiation of the General Agreement itself.

Perhaps less dramatically, deviation from the GATT multilateral trading system could have resulted in the fragmentation of the world trade system into regional trading blocks. To a certain extent this has already occurred with the creation of the European Economic Community in 1957 and the European Free Trade Association which was established in response. The recent North American Free Trade Agreement (NAFTA) is a more sinister manifestation of this spectre as are the discussions on the formation of a similar regime among Japan and certain states of the Pacific Rim.

But the most damaging consequences of the United States and the European Union forsaking the GATT legal order fell on the developing states of the world. The greater the tendency of these two states to neglect their international trade policy obligations, the more serious the possibility that the economic development of less developed states, struggling to enter the international economy, would have been retarded. The creation of a system of preferences, the pursuit of unilateral or bilateral policy objectives and the raising of tariff rates by industrialised countries would have effectively closed these markets to their goods. In the final analysis this would have had a far more damaging impact

on their nascent progress towards industrialisation and a higher standard of living for their populations.[4]

Finally, from an economic perspective, deviation from the principle of multilateralism embodied in the GATT trading order could have significantly decreased international competition, and hence efficiency, leading to an overall decline in global output, growth and efficiency.

It is difficult to evaluate to what degree the international trading system underpinned by the GATT started down the path to these consequences and to what extent the journey is irreversible. The fact that the present trading system has been overhauled now the Uruguay Round of multilateral trade negotiations has been brought to a successful conclusion is a positive sign of a reversal of this decline. Nevertheless, the pressures which have built up within this system under the governance of the GATT may prove awkward for the new World Trade Organisation to control.

Hopefully, the following will provide guidance to the defects which must be remedied to bring the United States and the European Union back into the fold of the international trade legal system. At a minimum it will reaffirm the need, already implictly recognised by the creation of the WTO, fundamentally to reorganise the international trading system, especially at the institutional level, but also by creating norms based on a proper consensus among the international community or

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[4] Hence it is not surprising that the policies of trade liberalisation and the reduction of trade barriers have been endorsed by developing countries in other legal instruments unconnected with the GATT. See, for example, Article 14 of the Charter of Economic Rights and Duties of States, G/A Resolution 3281 (XXIX), reproduced at 14 ILM 251 (1975).

at least its major players.

### (2) The Parameters of the Present Study

To set up the context for the forthcoming investigation, it is necessary to define in more detail the parameters within which the analysis will be conducted. As discussed earlier, the demarcation of the study is defined relative to two main parameters, namely:

(a) The institutional structure for international trade created by the GATT and the fundamental norms of this system together with the specific international rules selected for examination; and
(b) The state and the regional organisation chosen for closer examination of the impact of the international norms stated in (a) above, namely the United States and the European Union.

Without defining these parameters in more detail, the present study would be in danger of having a lack of focus.

### (A) The GATT Institutional Structure, Its Fundamental Principles and the Specific International Rules Selected for Examination

Quite clearly, the institutional structure created by the GATT for imposing international obligations on states is critical to any evaluation of the impact of the relevant norms on the behaviour of states. Logically, therefore, the next chapter of this work is devoted, in part, to an examination in detail of the nature of this institutional framework.

Similarly, it is equally appropriate to analyze the fundamental principles which this institutional structure was designed to protect, apply and enforce. This linkage helps explains why the normative influence of even these fundamental principles was limited in terms of substance as well as by the institutional framework.

The GATT was a peculiar international organisation even in international terms. It was seized of a particularly insipid institutional framework which lacked organs to effectively supervise the regulation of international trade practices. Of course, generalities such as this infrequently serve to further any accurate understanding of the processes of international decision-making. But, organisational deficiencies were the root cause of the limited normative impact of the rules created through the decision-making processes inside the GATT. There are in fact three general themes which will be developed in the next chapter in this respect.

First, the theoretical basis for both the organisation itself and its fundamental principles will be considered with a view to deciding whether these principles, valid immediately after the Second World War, had the same degree of relevance as the international trading system matured over the course of time. The purpose of this part of the study will be to decide whether the simple economic assumptions on which the system was originally conceived continued to apply until December 1994 or whether a new form of economic theory - in particular that of managed trade - supplanted the original maxims.

Second, I shall concentrate on the institutional fabric of the organisation to identify the structural defects which existed in the legislative, dispute-settlement and enforcement procedures of the GATT. This will require

taking into account some of the measures to rectify some of the deficiencies accepted as part and parcel of the Uruguay Round of MTNs because these were implemented in advance of the final settlement (ie. the 1989 Dispute Settlement Understanding).

I shall then move on to analyze the objectives and purposes sought to be achieved through the operation of the fundamental principles of the system. To what extent did these principles act as restraints on the trade policies of contracting parties to the GATT? Further, an attempt will be made to evaluate why both the United States and the European Union frequently justified their actions in terms of these principles and rules. However, it is unlikely that a satisfactory answer to this question will emerge until I proceed in later chapters to examine the objectives and shapes of their respective trade policies.

Perhaps the most controversial aspect of the investigation is the selection of specific international rules for examination to assess their normative impact on the trade policies of the United States and the European Union. Three sets of rules have been picked for this purpose. These are:

(a) the international rules for the identification of permissible and impermissible subsidies;

(b) the rules regulating the use of national measures to counter the commercial practice of dumping; and

(c) the rules governing the use of countervailing duty (or anti-subsidy) measures.

An explanation is clearly required to justify the choice

of these three sets of principles as opposed to the rules established to regulate other aspects of trade policy such as the setting of tariff rates, the reduction of technical barriers to trade or the regulation of government procurement practices.

At the most basic level, the three groups of rules chosen highlight the reluctance of states properly and accurately to transpose international measures into their domestic (or supranational) legal systems. Each of these three sets required positive action on the part of states to alter their pre-existing legislative or administrative practices. Therefore, collectively, these present the best vehicle for evaluating the degree to which international rules influence state behaviour.

The juxtaposition of international rules and national (and supranational) rules provides an excellent model for comparing and contrasting the parallel rules and practices at the international and national levels. We can therefore assess the degree to which the two subjects selected complied with their international obligations.

Consistency between these two levels would indicate a high degree of conformity to international obligations and that the normative impact of these rules was substantial. Conversely, discrepancies, inadequacies and inconsistencies are evidence that the international rules were being ignored and circumvented.

### (B) The Selection of the United States and the European Union for Examination

It is not the contention of this thesis that all the states, or even a majority of the states, participating in the present international trading system ignored the

legal principles and rules which are the subject of this investigation. If this were true then the system of rules regulating trade could not be described as a legal order. A complete disregard of the existing rules would, at least in theory, indicate that international trade was conducted in a legal vacuum.

On the contrary, this thesis will not establish that the rules of international trade prescribed by the GATT were absolutely ineffective but, rather, will demonstrate that two important international players - the United States and the European Union - were, in certain circumstances, flouting these rules in the pursuit of their own trade policy agendas.

The trade policies of the United States and the European Union have been selected because they were functioning, to a significant extent, outside the realm of regulation prescribed by the GATT. They treated many of these rules with a certain degree of impunity and, when certain interests were deemed paramount, considered themselves able to act outside the generally-accepted norms.

Why the United States and the European Union behaved in this fashion is the essence of this thesis as is the identification of the circumstances and non-legal factors which the United States and the European Union saw as justifying such behaviour. Their reasons for non-compliance are at the heart of the present investigation as is the internal decision-making processes through which this behaviour was fashioned.

Coincidentally, the United States and the European Union are also two of the most accessible subjects for conducting the present analysis. Both leave a paper trail in the form of legislation, administrative practice and decisions which can be followed, at least

to a limited extent, to evaluate the impact of international norms on their internal policy-making.

In any event, it is the simple importance of the trade policies of the United States and the European Union which is much of the raison d'etre for the present work. If these two subjects were of less significance in economic terms, there would be less concern about the impact of their unilateral activities on the world trading system. But the economic magnitude of the United States and the European Union and the economic implications of their respective trade policies on the international community raise legitimate concerns for the future legal framework for international trade. They have both, to different extents, taken advantage of their respective economic mights to avoid certain of their international obligations.

The impact of these selected rules of the GATT were, on occasion, a secondary consideration and the international rules often only of use when these facilitated the achievement of their own policy objectives and goals. When these rules frustrated these objectives, or impeded them to such a degree that certain self-interests were adversely affected, the normative impact of these rules was most limited.

This investigation is not therefore an examination of the United States-European Union trade relationship although frequent reference will be made to trade disputes between these parties since these are relatively common. It is a study into the two separate and independent trade policies of this state and this organisation vis-a-vis all their trading partners assessed in terms of the applicable international norms.

Nor is this study intended to be a comparative analysis

of the respective trade policies of these subjects. When useful to serve to further the principal investigative aims of the study, limited comparisons will be made. But again this is not a primary objective of the work.

The United States and the European Union disregarded the accepted norms of international law regulating subsidies, anti-dumping measures and countervailing duties for different rationales and reasons. This is clear from an analysis of the internal decision-making processes within each. While the United States is a federal sovereign state, the European Union is a supranational organisation in which the interests of Member States have a discernible influence countered, to some extent, by the Union's own institutional framework.

Their respective responses to these international rules were also different. Again while both subjects are considered together, it should be borne in mind that this is not an attempt to assimilate their behaviour in any way. Rather, this investigation is an attempt to understand why the United States and the European Union believed that, in certain circumstances, they could shrug off their international responsibilities.

### (3) The Methodology Adopted in the Present Study

Since the unique feature of this study is the attempt to identify the influence of international norms on the behaviour of the United States and the European Union towards trade policy matters, it is important to concentrate on why deviation from these norms occurred and to ascertain the non-legal factors as well as the processes which shaped their respective trade policies. The methodology adopted in the pursuit of this objective must be appropriate to this aim. It is therefore necessary at this point to outline briefly the

methodological approach which will be employed.

The fundamental question being considered is the efficacy of the selected norms of international trade regulation. As a preliminary matter it is essential to establish the institutional framework and the fundamental principles which regulated international trade. This will involve an analysis of the GATT legal system, focusing on a number of specific issues.

First, the GATT superstructure rested on a number of economic assumptions which perpetuated a particular economic philosophy, namely that of liberal free trade. Historically, this paradigm served the interests of the larger, richer and most technologically advanced states more than those of others. International society has evolved considerably since the GATT's conception. It is therefore critical to assess, as a preliminary step, the continued relevance during the period of investigation (1947-1994) of the economic philosophical basis on which the GATT rested to ascertain whether the organisation itself represented a model for international trade which was superseded by the evolution of the international economic system.

After examining the theoretical basis for the GATT, I shall proceed to consider the institutional framework which was established to achieve this paradigm. Although the GATT was the principal organ for the regulation of international trade, the legislative, executive and judicial processes within the organisation were primitive. This limitation became more pronounced in contemporary times and it is clear that the GATT failed to evolve in step with the international economic community. This is obviously a matter of serious importance to this study and warrants detailed examination.

The overall purpose of the initial part of the study is to explain the framework within which the regulation of international trade was conducted. There seems little point in proceeding to analyze the effects of any international rules without having first placed them within their proper systematic context. Once an examination of the international process has been concluded, I shall be in a position to examine the nature and content of those substantive rules selected for particular attention.

The bulk of the first part of the study - namely chapters two and three - will be devoted to a detailed study of what, for present purposes, are the most important rules, namely those pertaining to subsidies, anti-dumping and countervailing duty measures. The rationale for selecting those particular rules is not simply because they were the most controversial rules of the international trading system although this is arguably the case. It is because they embodied international standards which impinged directly on the trade policies of all states, including those of the United States and the European Union.

Four particular themes will be pursued when examining these international standards. Most importantly, their content will be assessed. Did these rules serve the interests of some states more than others? Second, the degree of efficacy of these rules will be gauged in terms of their detail and comprehensiveness. Third, the manner in which these rules were used by states to press international claims and to alter policies of other states will be considered. Finally, it is also relevant to evaluate the degree of consensus which underpinned these rules.

This allows me to place the lack of effective control

imposed by these rules on the laws and policies adopted by the United States and the European Union in its proper context. It will also help to explain why frequently international rules on this topic were of insufficient or inadequate detail to enforce effective regulation of trade policy.

The second part of the work is devoted to consideration during this period of the direction and shape of the trade policies of the United States and the European Union. This is essentially an account of the interaction of the international system with the national and supranational trade policies of the subjects, as assessed through the formally stated trade objectives of both parties measured in terms of their international activities.

In the third part of the work I shall analyze the internal institutional and decision-making processes within the United States and the European Union. Here, the analysis will be conducted at two separate levels. First, the internal institutional processes which facilitated the formulation of trade policy will be examined. The second level is the impact of different interests groups and other pressure groups on the decision-making processes. This will entail an analysis of how commercial, political and social interests influenced the content of the internal decision-making processes. In addition, the means whereby private individuals sought redress, or were denied remedies, in the event of violation of a norm of international law during the formulation of policy, is a matter worthy of detailed consideration.

The fourth and final part of the study before reaching conclusions will be a review of the trade protection laws of the United States and the European Union in

light of the chosen international rules and obligations. This, of course, will require an assessment of the laws, administrative procedures and decisions which existed prior to the reforms introduced to implement the Uruguay Round Final Act. It is at this level that the normative value of international obligations can be assessed in the starkest terms, namely the application of the black-letter substantive international rules versus the black-letter laws, decisions and practices of the United States and the European Union.

Trade protection laws were acutely relevant to the study since they functioned in a pivotal role in the operation of the trade policies of the United States and the European Union. These measures will be examined for compliance with the international standards at three separate behaviour levels. First, there is the political level which concerned the policy objectives which were to be achieved in the enactment and operation of trade protection laws. Second, there is the legislative level. On this plane, the primary concern was the degree to which the internal legislation of these subjects was compatible with the international standards.

Even the most rigorous analysis of internal laws would not provide a complete picture of the normative impact of international standards without taking into account the true manner in which these were implemented. Administration of national rules frequently allowed agencies considerable scope to deviate from the established rules or to invent rules where lacunae exist. The degree of bias in the administration of these standards was directly relevant to determining the asymmetry of rights between national and non-national producers. Hence, on a third plane, I shall also carefully review the administration of the trade protection laws of the United States and the European

Union in an effort to evaluate their objectivity and fairness.

In this assessment, as we shall see, there are three shades of compliance where international rules exist to regulate counterpart domestic laws. At the highest gradient there is compliance. Evidence of total compliance, or at least an effort to comply, directly translates to proof of the efficacy of the international rule. At the medium level there is the situation where the international rules are circumvented either because these rules are imprecise or because they fail to regulate a practice that has developed since the rules were negotiated. The lowest level is where international rules are ignored or disregarded. Such behaviour is indicative of the breakdown in normative value of an international rule. It is a manifestation of the greatest threat to the preservation of the normative efficacy of the legal system serving the international trading order.

Of course, it is difficult to assess the overall rate of compliance by the United States and the European Union with the international rules when some rules were obeyed while others were not. Nor is there a balance which can be introduced in this assessment. However, two statements may be made which, if proved correct, would conclusively establish that the United States and the European Union were frequently operating their trade protection laws during this period outside the ambit of the relevant GATT rules.

First, both the United States and the European Union unilaterally developed and refined their trade protection laws to protect their domestic industries and these actions often could not be justified as being compatible with the spirit and letter of the law of

international trade regulation. Second, the trade protection laws permitted by the GATT - anti-dumping and countervailing duty measures - were not operated with the degree of objectivity required to balance the interests of domestic and foreign producers. The implications of both these statements are self-evident.

**(D) The Proposition**

After these matters have been deliberated, I will be in a position to assess the normative impact of the international legal standards on the trade policies of the United States and the European Union. From this it can be concluded that the primary reason for the lack of compliance by the United States and the European Union was self-interest coupled with a fundamental lack of consensus behind many of the international rules, standards and procedural safeguards.

Nevertheless, it is interesting to note that there are different reasons for the lack of normative influence of the rules on the behaviour of the United States and the Union. While the United States had relatively efficient and consistent procedures for formulating trade policy, its motives for non-compliance related to its own perception of its economic and trade policy objectives. It genuinely believed its national external trade policy to be a paragon of how such a policy should be managed. This perception ignored the fact that the United States had one of the largest economies in the globe and that its interest in preserving the liberal trade order often was at odds with the objectives of its international competitors.

The commercial policy of the European Union, on the other hand, was more passive and more defensive than that adopted by the United States. This contrast, as we

shall see, has caused volatile exchanges. But, the European Union's rationales for non-compliance were more because of its uncertain view of its role in the international economic community and its half-hearted attempts to formulate a viable trade policy among its own Member States.

These uncertainties must also be placed against a background where the diversity of Member States' interests frequently frustrated the adoption of a consistent and realistic trade policy. The policy of the European Union was, at the same time, inconsistent, confused, fragmented and fragile. It is therefore little wonder that implementation and compliance with international rules frequently took a secondary role in the formulation of the European Union's trade policy.

As observed earlier, it is too early to judge whether or not the reforms brought to the international trading system by the Uruguay Round Agreement will allow the United States and the European Union to continued to behave in this manner. However, the radical overhaul of the system, and especially the creation of the WTO and its institutional structure, offers hope that a new era of normative efficacy will be created. The closure of the GATT era opens a new chapter in international trade relations in which the prospect of the rule of law in international trade looks far more promising.

# PART A

# INTERNATIONAL CONTROLS ON THE BEHAVIOUR OF STATES

## 1 A Defective Mechanism for Regulation: The GATT System for the Creation and Enforcement of International Trade Obligations

Since the General Agreement on Tariffs and Trade (GATT)[5] lay at the heart of the 1947-1994 international trading order, it is a logical assumption that the root cause of the lack of normative influence of international obligations on the behaviour of the United States and the European Union during this period lies in the functioning of this mechanism.[6]

An examination of the GATT as a legal institution begs the question how the system did not disintegrate given the tremendous forces exerted on it especially in recent times. It was created to regulate a much smaller international society of states within which there existed a meagre commonality of interest. International society has however undergone a dramatic transformation and this commonality of interest has dissipated exposing this structure as an ineffective regulatory mechanism.[7]

This transformation did not occur overnight. Rather, it

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[5] The GATT has force by virtue of the Protocol of Provisional Application (PPA), 55 UNTS 194 (1947). The amended version of the GATT is reproduced in the GATT BISD, Vol. IV, 1 (1969). On the PPA, see M. Hansen & E. Vermulst, "The GATT PPA: A Dying Grandfather?", (1987) 27 Col. J. Trans. Law 263.

[6] There are two other important international trade organisations: the Organisation for Economic Co-operation and Development (OECD) and the UN Conference on Trade and Development (UNCTAD). However, the OECD is mainly composed of Western industrialised states while the UNCTAD is a UN subsidiary agency which, in practice, is identified most closely with developing countries although technically its membership is open to all UN members.

[7] For a view that the GATT even sold out on its most fundamental principles, see G.N. Horlick, "How the GATT Became Protectionist", (1993) 27:5 JWT 418.

occurred gradually over the course of the last forty years, with spectacular pace over the last fifteen years. Unfortunately the GATT contracting parties were, until recently, unable - or unwilling - to make the necessary adaptations to the system to facilitate its evolution. The result was that the GATT no longer effectively regulated the international trade relationship among its contracting parties and that at least two - the United States and the European Union - frequently acted outside its control.

This situation arose for a variety of reasons, but there are at least five primary defects in the fabric of the GATT legal order in terms of both the institutional framework and the economic objectives which the organisation was originally set up to achieve.

The first is that, bearing in mind its unfortunate conception, the organisation failed to evolve in relation to the changes in the environment with which it interacted. This environment became far more sophisticated than that when the organisation was conceived. Similarly, the needs of the trading system have moved away from the simple requirements of regulating basic import/export transactions towards far more complex exigencies such as the protection of intellectual property, the liberalisation of trade-related investment and the necessity of tackling the myriad of non-tariff barriers that have come to exist. While some of these barriers have now been addressed as part of the Uruguay Round of multilateral trade negotiations, their impact has required regulation for at least a decade and a half.

The second deficiency arose from the failure of the organisation adequately to circumscribe the rights of contracting parties to interfere with patterns of trade.

The 'soft law' regime established under the GATT, as opposed to a 'fixed-rule' regime, proved inadequate to prevent states from ignoring its provisions.[8] Attempts to address this problem by establishing black-letter side agreements to regulate some non-tariff barriers compounded this problem by being ineffective in operation.

Third, and perhaps most obviously, there was a crisis in the negotiation of trade obligations. International trade obligations impose restraints on the liberty of states to conduct economic and monetary policy. States have become increasingly unwilling to concede concessions in the absence of tangible benefits. At the same time, the whole negotiation procedure involves a play off of interests among different economic sectors within states and those groups which are the losers in this process often denigrate any benefits which will accrue to other sectors. It is an important point to note that non-economic factors have become increasingly relevant in the national decision-making processes in matters which were traditionally considered to be of purely commercial concern.

Fourth, at the root of the system itself there was the

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[8] It is interesting to note that the terms 'legality' and 'illegality' were rarely used by those officials operating within the GATT-system. Somehow, GATT-law was seen as a 'soft law' regime where these terms were inappropriate. Outside this establishment, commentators also seemed awkward with assessing practices against GATT rules in black or white legal terms. One commentator even claimed that 'the GATT has soft and loose rules, riddled with exceptions and loopholes'; H. Kitamura, "Japan and the GATT", in R. Rode (ed), GATT and Conflict Management: A Transatlantic Strategy for a Stronger Regime (1990), 47, 58. A former Director-General also observed that the GATT rules are 'dynamic and fluctuating' rather than immutable legal precepts; O. Long, Law and Its Limitations in the GATT Multilateral Trade System (1985), 7.

issue of the institutional structure of the organisation and in particular the processes established for the creation and application of obligations. Even although the Uruguay Round has been successful in procuring new agreements to regulate new subjects, unless there is an adequate institutional framework to apply and enforce these rules, the whole exercise will have been futile.

Finally, the GATT dispute-settlement procedures were notoriously complex, difficult and cumbersome. Even if one state was successful in initiating a complaint within the GATT, there was no guarantee that the decision of the panel would be implemented or, if implemented, would provide satisfactory relief. As we shall see later, the proposals, first adopted in 1988 and now contained in the Uruguay Final Act, to amend these procedures did not address the main flaws in the dispute-resolution system.

When combined, these defects largely account for the inability of the GATT to exercise sufficient normative influence on the formulation of trade policy by the United States and the European Union to require them to comply with their obligations in total. Since the central institutional mechanism for the application and enforcement of obligations was so defective it is hardly surprising that the international rules were often ignored by the United States and the European Union.

### (1) An Imperfect Surrogate for an Effective Regulatory Agency: The Origins of the GATT

Negotiations towards the creation of three international organisations to regulate the post-war economic order were originally undertaken at a series of conferences held towards the end of the war at Bretton Woods in New

Hampshire.[9] There are a number of formalistic, and rather superficial, reasons advanced for the breakdown of negotiations towards an ITO.[10] In reality, there was a fundamental lack of consensus on the terms of the ITO Charter.

The United States acted as the dynamo for a Charter embodying the primary objectives of trade liberalisation in the form of tariff reductions and the removal of non-tariff barriers to trade.[11] The U.S. government adamantly advocated a return to a liberal trade order because of the fear of a depression within its own borders if no outlet was found for the country's greatly expanded productive capacity. These principles were resisted by a broad United Kingdom-France coalition favouring import controls and financial controls to prevent an undesirable surge of foreign imports.[12]

At the heart of the struggle to draft the ITO Charter was the resistance by other states against the possible future and irreversible economic hegemony of the United States over the international trading system.[13] The United States naturally favoured a neo-liberal free trade paradigm in which obstacles to trade other than

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[9] For background, see R. Gardiner, Sterling-Dollar Diplomacy (1969); C. Wilcox, A Charter For World Trade (1949); W. Brown, The United States and the Restoration of World Trade (1950).

[10] J.H. Jackson, The World Trading System (1989), 31.

[11] See, R.E. Baldwin, Trade Policy in a Changing World Economy (1988), 21-25.

[12] See D.P. Calleo & B.M. Rowland, "Free Trade and the Atlantic Community", in J.A. Frieden & D. Lake, International Political Economy: Perspectives on Global Power and Wealth (1987), 340-349, 341-342.

[13] See A. Cassesse, International Law in a Divided World (1986), 325.

tariffs would be progressively eliminated. Given the relative strength of the United States economy against those of even its allies, such a framework obviously best served American interests.[14]

In the end the opposition to the United States agenda was crushed and the majority of the American proposals adopted into the framework of the draft ITO Charter. In essence, the system was to be based on four principles:

(a) the creation of an institutional framework to facilitate international co-operation in the promotion of trade;
(b) the gradual reduction and ultimate elimination of tariffs;
(c) the progressive elimination of non-tariff barriers to trade; and
(d) the multilateral application of the Most-Favoured-Nation (MFN) principle.

The content of these principles indicate the fiat with which the United States acted during the negotiations. Virtually all its proposals on fundamental principles were subsumed into the draft Charter and those of the United Kingdom and France rejected. Until 1950, when the U.S. Congress withdrew its support for an ITO, the American State Department aggressively pursued the attainment of these objectives within the framework of an international institution.[15]

The rationale for reiterating the history of the negotiations for an ITO is to reflect on the fact that these four fundamental principles eventually found

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[14] See J. Bhagwati, Protectionism (1989), 2-3.

[15] The forum for negotiations was initially a conference convened for the purposes of drafting an ITO Charter after a resolution of UNECOSOC in February 1946.

expression in the GATT which was adopted as a surrogate for an ITO. The GATT was therefore originally conceived as an instrument, and to a certain extent an extension, of United States trade policy. That the institution failed to materialise was merely a matter of the United States government cutting off its own nose to spite its own face.[16] In any event, to say that the principles included in the ITO Charter, or the GATT for that matter, embodied any general international consensus is wholly inaccurate.

The fact that the United States eventually buried the ITO Charter does not imply that these policy objectives were abandoned even by subsequent U.S. administrations or Congresses. The reasons for the failure to ratify the Charter stemmed from division between the Executive and Legislative branches of government as to whether the Executive had authority to adopt the Charter without the approval of the Senate.[17]

The facts surrounding the adoption of the General Agreement as a surrogate for an ITO have been elaborated

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[16] Paradoxically, in the 1980s, the same phenomenon of internal confusion inside the United States again recurred. While the Reagan and Bush administrations were protagonists of free trade, the U.S. Congress became increasingly protectionist. Each of these arms of government continually frustrated the trade policy objectives of the other. The result has been chaos not only in internal United States trade policy but also on the international stage.

[17] Original authority to engage in the negotiations had been conferred on the Executive by the Reciprocal Trade Agreements Act of 1934, as extended by the Reciprocal Trade Agreements Act of 1945. This authority extended to the negotiation of tariff concessions. But, there were concerns in Congress that the ITO was more of an international organisation and membership would have required the approval of Congress. This question of which internal government agency - the Executive or the Legislature - should have control over United States trade policy is one to which we shall return.

too many times to require reiteration in this study.[18] Only two points from this period of transition must be emphasised.

First, the GATT was intended to be an individual trade agreement operating within a broader institutional framework, namely the ITO.[19] It was intended to be a temporary measure to fill the period until the adoption of the ITO Charter. Hence, it was never a true international organisation insofar as that term is synonymous with agencies with institutional features such as plenary organs, executive organs and adjudicatory mechanisms. This defect was never rectified and was an immediate cause of the collapse in the GATT's effectiveness.[20]

Second, as mentioned earlier, the GATT also embodied many of the substantive principles forced on the international trading community by the United States. These did not necessarily represent any consensus among the original signatories as to the manner in which the international trading system should really be structured. This lack of consensus became increasingly

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[18] See J.H. Jackson, World Trade and the Law of the GATT (1969); K.W. Dam, The GATT: Law and International Economic Organisation (1970); R.E. Hudec, The GATT Legal System and World Trade Diplomacy (1988); and T. Flory, Le GATT: Droit International Et Commerce Mondial (1968).

[19] Former Director-General of the GATT, Arthur Dunkel, as part of the Uruguay Round, introduced a draft Charter for a Multilateral Trade Organisation (MTO) based on largely the same principles as the ITO. This envisaged an umbrella organisation, endowed with legal personality, to provide a common institutional framework for facilitate the conducting of international trading relations. This became the basis for the final text of the WTO Agreement.

[20] J.H. Jackson, "The Birth of the GATT-MTN System: A Constitutional Appraisal", (1980) 12 Law & Pol'y Int'l Bus 21.

apparent as the international economic environment has evolved into its present, exceedingly complex, form.

## (2) Defect 1: The Failure of the GATT to Evolve Relative to the International Environment

Over the last twenty-five years, the international environment in which the GATT functioned has become increasingly sophisticated. It must now be recognised that the regulation of trade cannot be divorced from other variables such as national economic and monetary policies. The fact that the international trading order itself became much more sophisticated is also evidence that the GATT became increasingly obsolete especially in the regulation of the trade policies of the United States and the European Union.

### (A) Changes in the International Economic Environment

The dynamics of the international economic community have fundamentally altered over the course of the last forty five years and the GATT failed to keep pace with its evolution. [21] Herein lies some of the most damming criticism of the GATT's ability to exercise a normative influence on the behaviour of states. Consider briefly some of these fundamental changes.

The structure of the international economy has dramatically changed. Instead of one single economic superpower driving the international economy, there are at least two, and arguably three, economic superpowers - the United States, the European Union and Japan. Power to control the shape of the international economy, and

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[21] See J. Bhagwati, "Multilateralism At Risk: The GATT Is Dead - Long Live the GATT", (1990) 13:2 World Economy 149.

the legal structure which regulates it, has passed from the exclusive control of the United States and has been dispersed with the principal beneficiaries being the Union, Japan and possibly Canada.

The United States has recognised this phenomenon and adjusted its trade policy in an endeavour to prevent further haemorrhaging. The European Union still has not decided how this power should be exercised. Japan has learned that the perpetuation of the existing system for international trade now serves its interest best and uses the tools within the system accordingly. Hence, the topography of the international trading system has fundamentally altered since the GATT was conceived.

National economic policy remains essentially within the sovereign prerogatives of most states[22] and hence the international economic system has no coherent or immutable basic policy objectives.[23] This lack of co-ordination in macro-economic policies is particularly acute among developed nations and hence the emergence of elitist institutions for co-operation such as the Group of 7 and the growing significance of measures adopted within the OECD.

The Group of 7 (often referred to as the Group of 8 when Russia participates) is a loose arrangement with no permanent structure but the economic policy issues which are considered in this forum are invariably important.

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[22] The notable exception to this statement is, of course, the Member States of the European Union which have transferred considerable sovereign authority to the control for these matters in terms of both the Treaty of Rome and the Treaty on European Union 1992.

[23] One exception to this general proposition is the objectives stated in the Articles of Agreement of the IMF which contain general economic policy goals such as stability in exchange rates.

Its main purpose is to introduce an element of co-ordination among each of the economic policies of the participants. Hence, for example, in the London Summit of the Group held in July 1991, issues on the agenda included interest rates, price stability, the need to tackle recession, inflation, the creation of conditions for sustainable growth and greater employment. The Members of the Group committed themselves to implement fiscal and monetary policies which would provide a basis for lowering interest rates and closely to co-operate in exchange markets.[24]

The same group of developed countries also use the OECD to formulate other economic commitments. To some extent, these rules form a second tier of international economic and commercial obligations which would be unattainable at the truly international level. The organisation is presently engaged in the negotiation of a number of proposals which will greatly affect the international economic environment including agreements or understandings on international competition and anti-trust policy[25], as well as greater disciplines for the use of subsidies[26], private and public investment and the protection of the environment. In the very existence of this organisation, the real separation of interests between the developed countries and the rest of the international trading system is most obvious.

Even during the Uruguay Round negotiations themselves, the influence of this inner sanctum of industrialised states was manifest as the negotiations headed towards

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[24] See Economic Declaration of the London Economic Summit 1991: Building World Partnership, Points 4-7.

[25] See the OECD Draft Competition Code.

[26] See for example the OECD Guidelines on Export Credit Finance 1982.

oblivion between December 1990 and mid-1992. The conclusion of the Round became a subject repeatedly placed on the agenda of the Group of Seven, first at the London meeting held in June 1991 and latterly at the Tokyo meeting in July 1993. At these meetings, and the intervening summits, repeated exhortations were made in the final declarations to ensure a successful conclusion of the Round and the resolution of outstanding matters. Indeed, at the Tokyo summit, the Group organised a sub-meeting of the four main trading groups - the United States, the European Union, Japan and Canada - during which a tariff-cutting deal largely outside the main negotiations was secured (known as the quadrilateral agreement of July 13, 1993) to maintain momentum in the negotiations.[27]

Increasingly towards the signing of the Final Act, the same quadrumvirate conducted closed sessions generally ignoring the fact that there were other participants in the process with equally legitimate interests in the negotiations.[28] These four states were able to effectively ignore these other interests which acknowledges that realpolitik exists in the negotiation of international trade obligations. In effect, these states conducted virtually independent negotiations with the tacit understanding that only a final compromise among this group would lead to a successful conclusion of the Round.

In this context, there is also the important issue of the recent industrialisation of the states described as newly industrialised which are able to produce goods at

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[27] See, Sir Peter Marshall, 'Another Chance or Last Chance?: Will 1993 See the Completion of the Uruguay Round', (1993) 328 Round Table 385.

[28] See also EC Commission, Press Briefing, April 14, 1994.

prices considerably cheaper than their Western competitors. Here the terrain is less certain. On the one hand, some economists would argue that producers in these states are able to achieve this degree of competitiveness through low labour costs, the avoidance of expenditure required to comply with health, safety and environmental protection legislation, and cheaper supplies. On the other hand, other economists would point to the principles of comparative advantage and economies of scale to justify this competitiveness.

The truth is not particularly relevant. It is more significant to note what the effect of the presence of these producers has been to the trade policies of developed states. In general, their impact has been to cause these states to employ measures of administered protection and quotas to limit imports. In turn, the imposition of such measures alters the penetration strategies of producers from these countries which affects patterns of international investment, particularly foreign investment.

Finally, it is impossible to ignore that other aspects of the international economy have increasingly impinged on the trading system. Once, exchange rates were determined largely in response to balance of trade in goods profiles. In modern times, interest rates are an important factor determining exchange rates. If exchange rates are artificially distorted by interest rates, trade relationships are similarly affected. Foreign imports become cheaper or more expensive not because goods are more or less efficiently produced but because of factors unrelated to the costs of production or the comparative advantage of a country.

Any sudden movement in exchange rates between two states, even if caused by unrelated factors such as

declining foreign investment or recession, will leave at least one state claiming that the cheaper imports from the other state amount to unfair trade. The link between exchange rates and the flow of goods was in fact the basis of the so-called Plaza Accord understanding negotiated in 1985 between the United States, Germany and Japan.[29] This understanding introduced an element of co-ordination between the macro-economic policies of both states with a view to achieving some degree of stability in their respective exchange rates and their balances of trade with each other.

(B) Changes in the Nature of the International Trading Order

There are presently more international agreements creating bilateral trade relationships and free trade areas or groups than ever before. This has led some commentators to speculate on the demise of the multilateral trade system in favour of a more fragmented and compartmentalised system of regional trading blocs.[30]

Bilateral trade agreements outside the GATT system

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[29] The Plaza Accord originated from a meeting of the major industrialised nations held at the Plaza Hotel in New York in September 1985. At this meeting, the U.S. government decided that the U.S. dollar was too strong, a view also held by the other delegates. An agreement was reached to allow the central banks of these states to intervene in the foreign currency markets to depress the value of the dollar vis-a-vis both the Japanese yen and the German mark. It was anticipated that this effective devaluation would act as a catalyst to promoting the attractiveness of U.S. exports by making them relatively more competitive. Further meetings under this framework have occurred.

[30] See J.H. Jackson, Restructuring the GATT System (1990); and F.M. Abbott, "GATT and the European Community: A Formula for Peaceful Co-existence", (1990) 12 Mich J. Int'l Law 1.

became a common means of resolving international trade problems. These trade policy measures took many forms such as unilateral private or public voluntary export restraints (VERs) administered in the country of export, voluntary restraint agreements (VRAs) and multilateral orderly marketing arrangements (OMAs).[31] Commonly, such arrangements involve a bilateral understanding to limit exports from one country to another with the consent of both states. Their existence was an anathema to the GATT-system for a variety of reasons but mainly because they fundamentally undermined the principle of multilateralism which lay at the heart of the GATT-system.[32]

However, trade in some sectors of the international economy is conducted largely in terms of these types of arrangements. For example, the steel industry[33], the textiles industry[34], the agricultural sector[35], the

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[31] See GATT, Review of Developments in the Trading System (1989), 99.

[32] See E-U. Petersmann, "Grey Area Trade Policy and the Rule of Law", (1988) 22:2 JWT 23; and I. Pogany, "Steel Wars v Star Wars: The Impact of Voluntary Export Restraints on the GATT", in D.L. Perrott & I. Pogany, Current Issues in International Law (1988), 68-88.

[33] See, for example, the Exchange of letters Between the Government of the United States and the EEC Concerning Trade in Certain Steel Products, O.J. L215/2 (1983).

[34] In this sector, arrangements outside the GATT were virtually institutionalised through the MultiFibre Arrangement (MFA), GATT BISD, 33rd Supplement 7 (1987). See H.R. Zheng, Legal Structure of the International Textile Trade (1988) and X. Tang, "Textiles and the Uruguay Round of MTNs", (1989) 23:3 JWT 51.

[35] This was due to the waiver granted to the United States in 1955 by the GATT on which other countries have relied for the de facto protection of their agricultural sectors. See Waiver Granted to the U.S. in Connection with Import Restrictions Imposed under Section 22 of the Agricultural Assistance Act, GATT BISD, 3rd Supplement

footwear industry, motor vehicles[36] and much of the consumer electrical goods industry are heavily regulated by these arrangements. Many of them serve as barriers to trade for goods entering the markets of the developed countries, particularly the United States and the European Union.

The second dramatic transformation in the shape of the international trading system has been the tendency towards regional groups.[37] Naturally, the European Union is the most obvious - and successful - example of economic and commercial integration, but other groupings have been created for this purpose. The point is that, since the 1980s, the tendency has become more marked. The most significant recent development has been the negotiation of the North American Free Trade Agreement (NAFTA) among the United States, Canada and Mexico.

At the most basic level, this arrangement was a reaction by the United States to the intransigency within the international trading system towards agreeing new rules and a belief that the principle of reciprocity is now defunct.[38] The agreement itself is relatively comprehensive covering tariff and non-tariff barriers, investment and services. It is therefore an

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32 (1955).

[36] See the Exchange of Letters Between the United States and Japan on Auto-Exports 1985, reproduced in J.H. Jackson & W.J. Davey, Legal Problems of International Economic Relations (Second edition, 1986), 619-622.

[37] See generally, N. Hopkinson, Completing the GATT Uruguay Round: Renewed Multilateralism or a World of Regional Trading Blocks (1992); and D. Lal, 'Trade Blocs and Multilateral Free Trade', (1993) 31:3 J. Comm. Market Studies 349.

[38] See J.H. Jackson, "Reflections on the Implications of NAFTA for the World Trading System", (1993) 30:3 Col. J. Trans. Law 501.

unsatisfactory precedent for the international trading system since the agreement was not completely consistent with the terms of the GATT and the arrangement was not integrated into the GATT structure.[39]

A fragmentation of this kind may produce two results. First, the existing regional organisations will increase their protectionist tendencies in response to the creation of new trading blocs. Second, other groups of states, such as the Pacific Rim states, will be encouraged to form such groups, further stifling international trade.[40]

The dramatic increase in the significance of trade in services has also changed the face of the international economy. In 1947, it was not considered appropriate to include trade in services within the terms of the GATT. According to recent statistics, as much as twenty percent of the gross domestic product (GDP) of some states is derived solely from the provision of services as opposed to goods.[41] Trade in services is therefore an important, but neglected element in the international economy.

The General Agreement on Trade in Services (GATS) agreed at the Uruguay Round attempts to bring trade in services within the remit of the WTO-system.[42] This agreement is

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[39] The participating states are presently seeking a waiver, or some other form of GATT approval to legitimise the arrangement.

[40] Note also the newly rejuvenated Organisation For Pacific Co-operation embracing the United States and the Pacific Rim states in an institutionalised forum for conducting negotiations.

[41] Eurostat, Structural Data Report to the European Commission (1992), 6.

[42] Final Act of the Uruguay Round MTNs, GATT Doc. MTN/FA II AIB (December 1993).

based on the need progressively to liberalise trade in services on the basis of the principle of national treatment. The supply of services is also subject to the principles of MFN and non-discrimination insofar as these concepts can be applied to trade in services. However, there remains problems in the text of the agreement relating to the operation of the concepts, principles and rules themselves as well as the mechanics of liberalisation. In addition there are institutional problems to resolve as well as the problem of accommodating the interests of developing countries.[43]

Finally, the international trading system has been penetrated by notions which essentially lie in the field of competition policy or anti-trust law. Reference to unfair trade practices, abuse of positions, counterfeit goods, and similar concepts have effectively introduced notions which relate not to international trade practice but the maintenance of a fair competitive environment. Nevertheless, in trade disputes such terminology is frequently replete.

This penetration has engendered two main problems. First, the application of essentially national (or supranational) competition rules may in itself create inequitable barriers to trade. This is particularly so as regards the extraterritorial application of national competition law which has the effect of imposing alien anti-trust concepts on companies which may be subject to quite different regimes.[44] Bilateral agreements between states on anti-trust enforcement do not go enough of the

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[43] See generally J. Bagwati, The World Trading System at Risk (1990).

[44] See In Re Woodpulp Cartel Case 89/85 [1988] 4 CMLR 901; and United States v Aluminium Company of America, 148 F.2d 416 (2d Circuit 1945).

way towards settling this issue.[45]

Second, the absence of an international framework for the regulation of anti-trust matters exacerbates this problem.[46] Discussions for the negotiation of an international agreement within the context of the OECD have been conducted in recent years and a draft code established but not yet published. However, even such an agreement would have a limited scope and may even take the form of a guideline or recommendations.

A preferred solution is for an agreement of anti-trust to be reached in a multilateral context. The European Commissioner responsible for trade matters, Leon Brittan, has called for such an agreement. The Commissioner called for world-wide competition rules covering subsidies, cartels, merger policy and public monopolies at the GATT level.[47] However, he also acknowledged that an effective mechanism to impose controls was not feasible at this stage bearing in mind the pressures on the then existing GATT system.[48]

Even from a brief overview of these developments, it is clear that the international trading system itself has evolved from the simple system which operated at the time the GATT was conceived. The fact that the Uruguay Round Final Act takes a much more comprehensive approach

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[45] See for example, Agreement Between the United States and the European Community Regarding the Application of Competition Law, Council Decision 95/145/EC, ECSC, O.J. L95/45 (1995).

[46] See M.M. Mendes, Anti-Trust in a World of Interrelated Economies (1991), 33-53.

[47] Speech by Sir Leon Brittan, World Economic Forum, Davos, Switzerland, January 30, 1993.

[48] See also B.M. Hoekman & P.C. Mavroidis, "Competition, Competition Policy and the GATT", (1994) 17:2 World Economy 121.

to the regulation of many of the changes which have occurred to the international trading system is itself confirmation of the need to radically overhaul the pre-existing system. It is in itself proof that the GATT became obsolete in relation to the shifting international economic background against which it operated.

### (3) Defect 2: The Failure Adequately to Circumscribe the Authority of States to Interfere with Patterns of Trade

From a legal perspective, the central function of the various obligations contained in the GATT obligations was to circumscribe the degree to which national governments were permitted to interfere in commercial transactions between private individuals situated in different states.[49] Contracting parties should only increase 'bound' tariffs if particular criteria were met and should not impose quantitative restrictions on foreign imports unless a number of conditions were satisfied. Nor should they engage in arbitrary discrimination between foreign and domestic goods. The substantive principles of the GATT tried to draw a distinction between permissible and prohibited government intervention.[50] Unfortunately, the vagueness

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[49] On the economic theory behind the GATT, see P. Moser, The Political Economy of the GATT (1990), especially 61-86; and R.E. Baldwin, "The Economics of the GATT", in P. Oppenheimer (ed), Issues in International Economics (1978), 82-93.

[50] On the role of legal principles within the GATT structure, see J.H. Jackson, "Strengthening the International Legal Framework of the GATT-MTN System: Reform Proposals for the New GATT Round", in E-U Petersmann & M. Hilf (eds), The New GATT Round of Multilateral Trade Negotiations (1988), 3-23. In contrast, see also O. Long, Law and Its Limitations in the GATT Multilateral Trade System (1985).

of many of these rules often did not allow a clear cut distinction to be drawn.

The establishment of this environment, in which states were under a legal obligation to refrain from particularly disruptive forms of governmental interference was frequently referred to, in policy terms, as the 'level playing field'.[51] This referred to the mutually agreed limitation of government interference in commercial transactions to certain levels and, in particular, to the requirement that states should refrain from indulging in, or permitting, trading practices which created disharmony.

During the first twenty years of its operation, the multilateral trade system achieved limited success in limiting government interventions by reducing average global tariff levels.[52] Although in the subsequent two decades significant tariff reductions continued[53], this success was eroded by the proliferation of interventionist measures, mainly in the form of non-tariff barriers introduced by developed nations, the existence of which undermined the liberalisation of trade brought about by tariff reductions.[54]

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[51] J.H. Jackson, The World Trading System: The Law and Policy of International Economic Relations (1989), 217-247.

[52] See R. Pomfret, Unequal Trade: The Economics of Discriminatory International Trade Policies (1988), 68-74.

[53] See, Supplementary Report of the Director-General of the GATT on the Tokyo Round of Multilateral Trade Negotiations (1980), 3-7.

[54] See generally D. Salvatore (ed), The New Protectionist Threat to World Welfare (1987); and R.E. Baldwin, Trade Policy in a Changing World Economy (1988), 32-35.

The failure of the GATT to respond to the dramatic growth in non-tariff barriers was primarily responsible for the growth in the use of measures of administered protection by contracting parties, most notably the United States and the European Union.[55] Such measures allowed powerful states to respond immediately to particular forms of conduct deemed undesirable without resorting to the cumbersome and inefficient multilateral dispute resolution procedures created by the GATT. For example, the United States administration acknowledged that section 301 of its trade legislation was an explicit attempt to create an effective remedy in order to avoid using the current GATT dispute settlement procedures.[56]

The GATT attempted to respond to the challenges of the myriad forms of non-tariff barriers by negotiating side-agreements or protocols dealing with these issues. [57] But these agreements suffer from too many short-comings. They did not cover the majority of types of non-tariff barriers in existence and they were of insufficient depth, in terms of the detail provided in their provisions, to exert sufficient normative influence on the behaviour of states.[58]

No consensus was forthcoming at the Tokyo Round on a plethora of subjects for which regulation at the

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[55] D. Greenaway, International Trade Policy: From Tariffs to the New Protectionism (1983).

[56] GATT Focus, No. 63, 6-8 (July 1989).

[57] Report of the Group on Quantitative Restrictions and Other Non-Tariff Barriers, GATT BISD, 31st Supplement, 211 (1985).

[58] On this point, see the excellent article, P.B. Edelman, "Japanese Product Standards as Non-Tariff Barriers: When Regulatory Policy Becomes a Trade Issue", (1988) 24:2 Stan. J. Int'l Law 389.

international level was prescribed. No multilateral framework was established to integrate agricultural policies, particularly as regards subsidies (other than those contained in the Subsidies Code).[59] No agreement was reached on the means of treating imports from non-market economy states. The issue of safeguard measures was left unresolved. The memorandum prepared embodying the understanding reached on dispute settlement was little more than a public relations exercise.[60]

The agreements which materialised from the Tokyo MTNs were merely a veneer to maintain the appearance of a successful consensus. In reality, virtually by the time the agreements had been signed, states were already developing laws and procedures outpacing the terms of the agreements, particularly the Subsidies and Anti-Dumping Codes. The repercussions of this deception were felt for the subsequent fifteen years.

More fundamentally, the negotiation of these agreements outside the central GATT system created a fundamental inconsistency within the whole order. These protocols represented a regression from the unconditional MFN principle since each agreement was an independent treaty in its own right and did not involve amendments or modifications of the GATT. Many of these agreements established reporting or surveillance procedures which function autonomously, free from the institutional structure of the GATT in all but coordination requirements.

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[59] GATT, Les Negociations Commerciales Multilaterales Du Tokyo Round (Rapport Additionnel) (1980).

[60] See J. Steenbergen, "Trade Regulation After the Tokyo Round", in J.H.J. Bourgeois, Protectionism and the European Community (1983), 181.

The shift in focus therefore moved away from unconditional MFN towards conditional MFN.[61] Contracting parties which did not sign these agreements were not entitled to the benefits that they conferred. Since participation was required in order to obtain benefits, it can hardly be said that the obligations imposed on the contracting parties to extend any advantage, favour or privilege as regards charges imposed in connection with importation was absolute.

At least at a formal level, the Uruguay Round Agreement does not suffer from the same shortcomings since the whole package of agreements has been approved as a single treaty.[62] But, the issue remains whether the Final Act embodies an adequate international consensus to ensure the effectiveness of the new measures. This may be possible subject to one lingering doubt.

The negotiating parties engaged in a host of trade-offs in interests to secure certain trade objectives. The United States, for example, conceded concessions on stricter industrial subsidy guidelines in return for agreement on trade in services, the protection of intellectual property rights and trade-related investment measures.[63] The European Union gave tariff concessions in a number of areas in order to avoid

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[61] G.C. Hufbauer, J.S. Erb & H.P. Starr, "The GATT Codes and the Unconditional Most-Favoured-Nation Principle", (1980) 12 Law 1 Pol'y Int'l Bus., 59.

[62] The Final Act makes a distinction between 'Multilateral Trade Agreements' and 'Plurilateral Trade Agreements'; see Article II(2)9-(3) WTO Charter. Multilateral Trade Agreements are those to which all members of the WTO have adhered. These are not optional. Plurilateral Trade Agreements are optional agreements and it is open to all Members to decide whether or not to participate in them.

[63] See J.H. Bello & A.F. Holmer, "The Uruguay Round: Where Are We Now?", (1991) 25 Int'l Lawyer 723.

tighter disciplines on agricultural subsidies.[64] The Cairns Group had the reduction of agricultural subsidies as its primary interest and was prepared to sacrifice other concessions in pursuit of this objective. Japan pursued stricter controls on anti-dumping and countervailing measures in order to protect its industries from the threat of administered protectionism. The newly industrialised countries, the Caribbean states, the Latin American group and the rest of the developing world each pursued separate policy agendas. Many subjects have been covered in the negotiations in many fields which raises the question whether a true consensus on some of the most important issues has been engendered.

### (4) Defect 3: The Competing Forces Impinging on the Negotiation of International Trade Rules

In the implementation of trade commitments, it is impossible to exclude the influence of non-economic variables (or externalities) in the equation that ultimately determines behaviour because these factors influence the formation of national economic and commercial policy.

For instance, a state may consciously and deliberately adopt policies which increase employment by protecting certain industries for social reasons or in the interests of national security. The Common Agricultural Policy (CAP) of the European Union is a clear illustration of such a preference.[65] Often such non-economic interests cannot be completely reconciled with

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[64] European Commission, Background Report on GATT Negotiation Objectives, Doc ISEC/B6/91 (1991), 3.

[65] Article 39, EC Treaty.

adherence to a genuine policy of complying with trade obligations.[66]

In reality, the accommodation of non-economic factors into the formulation of national economic policy is a fact of political life. Governments are continuously subject to political pressures exerted by interest groups representing particular industries, sectors, regions or consumers.[67] These groups are generally unreceptive to arguments that, by refraining from measures of protectionism, absolute global welfare is increased.[68]

While multilateral trade agreements may limit the choices of behaviour available to a state they do not remove the pressure on a government to provide a solution to the economic problems of ailing industries. Rather, they merely change the nature of the remedy sought by struggling industries. Hence the reason that intervention in the form of administered protection has become more frequent.

Other aspects of national policy also interact - or interfere - with a state's ability to comply with its international trade obligations. For example, most states have adopted industrial policies which are at odds with international obligations. At least one

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[66] See GATT, Trade Policy Review Mechanism for the European Community (1989).

[67] See generally, G. Lembruch, "Interest Groups, Government and the Politics of Protectionism", in H. Hauser (ed), Protectionism and Structural Adjustment (1986); and B. Frey, "The Political Economy of Protection", in D. Greenaway (ed), Current Issues in International Trade (1985), 139.

[68] See K.W. Abbott, "The Trading Nation's Dilemma: The Functions of the Law of International Trade", (1985) 26:2 Harvard Int'l Law Journal, 501.

respected international economist has argued that, within the United States, the dictates of pursuing an industrial policy are fundamentally inconsistent with the laissez-faire principles of free trade.[69] The promotion of high-technology industries within that country requires selective investment and, accordingly, the pursuit of industrial policy is not so much a 'matter of natural endowments as it is a matter of chosen investment'. This is a rejection of the basic principle of comparative advantage which underpinned the laissez-faire trade system of the GATT.

Another illustration of an area in which the policy objectives of governments were frequently inconsistent with the trade obligations contained in the GATT is environmental protection laws. Again using the United States as an example, the Marine Mammal Protection Act of 1972 imposes an embargo on imported tuna from any nation which uses nets of a mesh size which trap dolphins and porpoises.[70] This embargo is absolute and was imposed in response to legitimate environmental protection concerns.

Mexico challenged this statute as being inconsistent with Article XI of the GATT and the panel report on the matter concluded that the measures could not be justified under the GATT exceptions.[71] The United States refused to repeal the measure and instead offered to resolve the matter within the context of the NAFTA discussions which, to a degree, implements international

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[69] R. Reich, "Beyond Free Trade", (1983) 61 Foreign Affairs 773.

[70] 86 Stat. 1027 (1972).

[71] United States Restrictions on Imports of Tuna, 30 ILM 1594 (1991).

measures to protect these species.[72] However, the dispute aptly illustrates that the normative effect of international trade commitments can be circumscribed by internal national domestic policy considerations unrelated to trade.[73]

Other national policy matters which can come into conflict with trade-related obligations include monetary policy, employment policy, protection of infant industries, foreign investment policy and the protection and safety of workers and the consumer. In each of these cases, national officials may be required to make a trade-off between these interests and international trade obligations.

International commitments under the GATT were therefore not the single factor in determining the behaviour of states. The importance of non-economic factors was also significant and the spectrum of such factors remains extensive. Political, social, cultural and ideological factors influence the shape and content of national trade policy.[74] The international trading system is now composed of states which vary immensely in terms of geographical size, wealth of resources, political constitution, social stratification and economic development.

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[72] See A.F. Holmer & J.H. Bello, "Trade and the Environment: A Snapshot From Tuna/Dolphins to the NAFTA and Beyond", (1993) 27:1 Int'l Lawyer 169.

[73] See also T. Lang & C.Hines, The New Protectionism: Protecting the Future Against Free Trade (1993).

[74] See J.M. Culbertson, "A Realist View of International trade and National Policy", (1986) 18 New York University Journal of Int'l Law & Politics, 1119.

## (5) Defect 4: Compounding the Problems: The Reliance on an Inadequate Institutional Structure

### (A) The Pre-1995 GATT Structure

The pre-1995 GATT was a highly pragmatic instrument with little formal organisational structure. The sole original provision expressly dealing with institutional framework was Article XXV(1) which allowed for the periodic convening of representatives from the contracting parties to give effect to those provisions of the agreement that required joint action and generally to facilitate the functioning of the organisation. This provision was supplemented by a decision of the CONTRACTING PARTIES establishing a Council to coordinate the work of the GATT committees, which later extended to those created under the Tokyo Round Codes.[75]

In 1975 the institutional framework of the organisation was supplemented by the creation of the so-called 'Consultative Group of Eighteen' which acquired permanent status in 1979. It was an advisory body with a representative membership drawn from both developed and developing countries and was composed of senior

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[75] GATT BISD, 9th Supplement 8 (1961). The Council had authority: (a) to consider questions arising between sessions of the CONTRACTING PARTIES which may require urgent attention and to report on these questions with an appropriate recommendation for action; (b) to establish and supervise subsidiary bodied such as committees and panels; (c) to prepare for sessions of the CONTRACTING PARTIES; (d) to deal with such other matters as the CONTRACTING PARTIES may deal with and to exercise such functions as may be delegated to it by the CONTRACTING PARTIES.

government officials of these states.[76] In addition, there were various committees set up throughout the history of the organisation.[77]

Notwithstanding the creation of this organ and its related committees, there was no executive, legislative of effective judicial agencies to regulate international trade relations. Consequently, the GATT could not claim to provide a constitution for an efficacious legal order to regulate trade insofar as that concept is synonymous with a system that enacts rules to regulate the behaviour of its subjects, that provides objective methods for identifying applicable rules and applying these to the relevant facts, and which enforces decisions against subjects found to have violated the prescribed rules.

If effective rules were to be established to stem deviation by contracting parties - particularly the United States and the European Union - from the accepted norms of conduct in international trade relations, the efficacy of these procedures had to be radically improved. These procedures had to be reinforced to permit the imposition of penalties, sanctions, compensation or redress in order properly to regulate international behaviour.

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[76] This Group was charged with: (a) keeping trade developments under review and, where possible, to anticipate disturbances in the multilateral trading system; and (b) giving advice on the co-ordination of GATT policies with those of the IMF.

[77] The most important of these were: (a) a Balance-of-Payments Committee; (b) a Budget, Finance and Administration Committee; (c) a Quantitative Restrictions and Non-Tariff Measures Group; (d) a Safeguards Committee; (e) a Tariff Concessions Committee; (f) a Trade in Agriculture Committee; and (g) a Trade and Development Committee

The rule-making function of the GATT was largely performed within the context of the multilateral trade negotiations mechanism.[78] There was no express institutional framework stated in the GATT for the holding of such rule-making sessions. Each Round was conducted on an ad hoc basis where rules of procedure and organisation were made up as the negotiations progressed.[79]

The GATT initially responded to the deficiencies in its institutional structure by developing a more horizontal structure revolving around the use of subject-matter committees to regulate particular issues. This horizontal decentralisation of institutional responsibilities was almost invariably unsuccessful. This can be demonstrated from closer examination of one of these committees, namely the Subsidies Committee.

The 1979 Subsidies Code was intended to create a more effective structure for the scrutiny and supervision of international obligations relating to subsidies. A Committee on Subsidies and Countervailing Measures was established with a number of responsibilities. Its membership was therefore confined to a subset of the Contracting Parties and, in reality, was largely composed of the Western industrialised nations.

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[78] See generally, GATT, The Tokyo Round of Trade negotiations, Report of the Director-General (1980); and D. McRae & J. Thomas, "The GATT and Multilateral Treaty-Making: The Tokyo Round", (1983) 77 AJIL 51.

[79] At the Uruguay Round discussions, for example, individual negotiation groups were made up on the basis of subject-matter with separate groups for issues such as Trade in Services, Trade in Goods, Trade-Related Investment Measures (TRIMs), Trade-Related Intellectual Property (TRIPs) and the Functioning of the GATT system (FOGS). Originally fifteen individual negotiating groups were established. This was reduced to seven after the failure of the Brussels Ministerial meeting in December 1990.

This Committee was given three main responsibilities: (a) surveillance responsibilities; (b) rule-making capacities; (c) dispute settlement functions. In none of these roles did the Committee demonstrate conspicuous effectiveness.

The surveillance responsibility revolved around the requirement that signatories submitted periodical reports on their subsidisation programmes for scrutiny by the other committee members.[80] But, signatories tended to refrain from submitting reports because of the self-incriminating effect of these in any subsequent litigation.[81] This practice culminated in a breakdown of the reporting procedure because the Committee decided that it was unable to proceed with detailed examination of individual notifications until all signatories had fulfilled their obligations.[82] Thereafter, there was a noticeable deterioration in notifications, and despite an attempt to establish to draft guidelines for notification procedures[83], there existed no clear political will to strengthen these obligations.

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[80] This obligation was originally created through a Decision of the CONTRACTING PARTIES. See GATT BISD, 11th Supplement, 58 (1963). The form of the questionnaire is reproduced at GATT BISD, 9th Supplement, 193-194 (1961).

[81] In the DISC Case, the Community alleged that the United States had violated the obligation of notification by failing to register information relating to U.S. tax legislation which was alleged to confer export subsidies; GATT BISD, 23rd Supplement, 98 (1977). Although the investigating panel held that the legislation in question conferred a prohibited subsidy on manufactured products in violation of Article XVI, the panel was sympathetic to the argument that the notification of a subsidy constitutes an admission that a particular practice might fall within the scope of more restrictive obligations.

[82] Annual Report of the Subsidies Committee, GATT BISD, 31st Supplement, 259, 262 (1985).

[83] Annual Report of the Subsidies Committee, GATT BISD, 33rd Supplement, 197, 200 (1987).

The Subsidies Committee was also conferred with rule-making duties to regulate both subsidies and the application of countervailing duties.[84] The procedure adopted by the Committee to discharge this function was to set up Groups of Experts to examine particular topics, to report to the Committee with recommendations and for these recommendations to form the basis of additional obligations. The first such group constituted was the Group of Experts on the Calculation of the Amount of a Subsidy[85] which was followed by one other similar group.[86] Some guidelines were adopted by the Committee on the basis of reports and proposals submitted but these were very few.[87] In fact, in 1987, the Group of Experts on the Calculation of the Amount of a Subsidy notified the Committee that it intended to suspend its work temporarily which later became a permanent decision.[88]

The rule-making function of the Subsidies Committee was therefore a disaster, a phenomenon which was repeated in a number of other Committees with the notable exception of the Anti-Dumping Committee which was successful in procuring a considerable number of reports, guidelines and recommendations.[89] But even the Anti-Dumping

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[84] Article 4(2), 1979 Subsidies Code.

[85] Annual Report of the Subsidies Committee, GATT BISD, 29th Supplement 42 (1983).

[86] The Group of Experts on the Definition of the Word 'Related'.

[87] See Guidelines on Amortization and Depreciation, GATT Doc. SCM/64 (1980); and Guidelines on Physical Incorporation, GATT Doc. SCM/68 (1980).

[88] Annual Report of the Subsidies Committee, GATT BISD, 34th Supplement, 185, 189 (1988).

[89] (1) Report on the Definition of the Term 'Related' as Employed in the Code, GATT BISD, 28th Supplement 33 (1982); (2) Understanding on the

Committee's measures were merely recommendations and not binding on signatories. Implementation of recommendations was achieved on a voluntary basis. On the whole, there was no positive reaction to these recommendations and signatories were reluctant to incorporate these guidelines into their national laws. Hence, rule-making through this process had become inherently defective.

The Subsidies Committee was also primarily responsible for conciliation and dispute resolution in the event of disagreements among the signatories and was authorised to impose countermeasures for violations of the terms of the Agreement.[90] The primary defect in the dispute resolution procedure was that it was not enforcement-oriented. The procedures were designed to promote 'mutually satisfactory solutions' to conflicts between signatories. Thus, the four stage dispute settlement process of the Code - consultations, conciliation, dispute settlement, and countermeasures - emphasised negotiation as opposed to adjudication. Time and time again this technique had proven insufficient for resolving international trade disputes, yet contracting parties were reluctant to abandon it in favour of more vigorous procedures.

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Application of Article 8(4) of the Agreement, GATT BISD, 28th Supplement 52 (1982); (3) Recommendation Concerning the Transparency of Anti-Dumping Procedures, GATT BISD, 30th Supplement 24 (1984); (4) Recommendation Concerning Procedures for On-the-Spot Investigations, GATT BISD, 30th Supplement 28 (1984); (5) Recommendation Concerning Time-Limits Given to Respondents to Anti-Dumping Questionnaires, GATT BISD, 30th Supplement 30 (1984); (6) Recommendation on the Application of the Best Information Principle in Article 6(8), GATT BISD, 31st Supplement 283 (1985); (7) Recommendation Concerning Determinations of Threat of Material Injury, GATT BISD, 32nd Supplement 182 (1986).

[90] Article 13, 1979 Subsidies Code.

Even the dispute settlement aspect of the process required panels to seek 'mutually satisfactory solutions', stressing the influence of negotiation. This non-litigious procedure aggravated trade disputes, delayed reconciliation, perpetuated frustration and substantially contributed to the erosion of the confidence of contracting parties in the viability of the Code itself.

Further, the absence of a mechanism to facilitate the automatic adoption of panel reports allowed signatories to block the adoption of adverse reports. Since the Code did not specify any rules of procedure for the Subsidies Committee, decisions were taken by consensus. This allowed any one of the four main trading signatories to prevent the adoption of panel reports. Initially, the European Union impeded the adoption of panel reports on subsidies on exports of wheat flour and exports of pasta products.[91] A subsequent panel report on the United States definition of industry for the purpose of imposing duties on wine and grape products was blocked by the United States on the ground that the Union had obstructed the adoption of the earlier reports.[92] Canada then refused to allow an adverse panel report relating to its countervailing duty law to be adopted unless the other two signatories refrained from this behaviour.[93] None of these reports has yet been adopted and only two disputes, both settled on a bilateral basis, were resolved under the dispute settlement procedure of the

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[91] Annual Report of the Subsidies Committee, GATT BISD, 32nd Supplement, 158, 162 (1986).

[92] Annual Report of the Subsidies Committee, GATT BISD, 33rd Supplement, 201 (1987).

[93] Report of the Panel on the Imposition by Canada of Countervailing Duties on Imports of Boneless Manufactured Beef From the EEC, GATT Doc. SCM/85.

1979 Subsidies Code.[94]

To summarize, the experiment involved in the movement towards decentralisation through subject-matter committees proved disastrous in its first stage, the Tokyo Round arrangements. While the Anti-Dumping Committee was slightly more successful in its activities that the other Code Committees, the committees were unable to contain the forces of national interest exerted predominantly by the United States and the European Union.

The surveillance mechanism was a failure as was the dispute settlement process. Only a few cases were ever submitted to the Committee for resolution.[95] Of these, a considerable number of reports on complaints remain unadopted.

(B) The Birth of the World Trade Organisation: Phoenix or Phantom?

The successful conclusion of the Uruguay Round of MTNs in December 1993 raises the question whether or not the demise of the GATT and the resurrection of a World Trade Organisation (first mooted in 1946 as the International Trade Organisation) will provide the much needed institutional framework for the international trading order. In this context, the main question is whether the

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[94] Annual Report of the Subsidies Committee, GATT BISD, 36th Supplement 451, 454 (1990).

[95] European Community Subsidies on Exports of Wheat Flour, GATT Doc SCM/42 (1983); European Community Subsidies on Exports of Pasta Products, GATT Doc. SCM/43 (1983); United States Definition of Industry Concerning Wine and Grape Products, GATT Doc. SCM/71; United States Countervailing Duties on Non-Rubber Footwear From Brazil, GATT Doc. SCM/94 (1989); United States Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada, GATT Doc. DS7/R (1990).

World Trade Organisation (WTO) and the substantive rules contained in the Uruguay Round Final Act will solve the institutional deficiencies of its predecessor.[96]

The Final Act[97] contains an Agreement Establishing the World Trade Organisation intended, among other things, to take over the institutional functions of the GATT.[98] The WTO will provide a common institutional framework for the conduct of trade relations among its members.[99] Whether this equates to the creation of analogous executive, legislative (plenary) or judicial organs, such as those required for a truly effective organisation, can only be ascertained from an examination of the terms of the Agreement itself.

(1) Ministerial Conference

This is the intended plenary organ of the organisation and is composed of representatives (presumably ministers for trade) of the Members of the WTO. The Ministerial Conference is empowered with two responsibilities: (a) to carry out the functions of the WTO; and (b) to take action necessary to achieve the functions referred to in (a). The Conference has authority to take decisions on all matters under any other Multilateral Trade Agreement in accordance with the specific requirements for decision-making in the WTO Agreement and the

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[96] On the Uruguay Round negotiations in general, see N. Hopkinson, The Uruguay Round and Prospects for World Trade (1990); W.F. Avery, World Agriculture and the GATT (1993); M.H. Davenport, The GATT and the Uruguay Round: Effects of Developing Countries (1992); N. Hopkinson, Completing the GATT Uruguay Round (1992); and T. Lang, The New Protectionism (1993).

[97] GATT Doc. MTN/FA (15/12/93).

[98] The Final Act was signed by 121 countries at Marrakesh, Morocco on April 17, 1994.

[99] Article 11(2), WTO Agreement.

Multilateral Trade Agreement in question.

The Final Act draws a distinction between Multilateral Trade Agreements[100], which are integral parts of the WTO Agreement and bind all Members, and Plurilateral Trade Agreements which are part of the WTO Agreement only for those Members which have expressly agreed to their terms.[101] The authority of the Ministerial Conference does not extend to making decisions under the Plurilateral Agreements for which separate, and as yet unidentified, arrangements will be made.

(2) General Council

The General Council is composed of representatives of all the Members and will convene 'as appropriate'. It is conferred with four functions and the power to achieve these functions: (a) to perform the functions of the Ministerial Conference between meetings of that organ; (b) to carry out its own functions as assigned under the

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[100] The Multilateral Trade Agreements are as follows: (a) The General Agreement on Tariffs and Trade 1994; (b) the Uruguay Round Protocol GATT 1994; (c) the Agreement on Agriculture; (d) the Agreement on Sanitary and Photosanitary Measures; (e) the Agreement on textiles and Clothing; (f) the Agreement on Technical Barriers to Trade; (g) the Agreement on Trade-Related Investment Measures; (h) the Agreement on Implementation of Article VI; (i) the Agreement on Implementation of Article VII; (j) the Agreement on Preshipment Inspection; (k) the Agreement on Rules of Origin; (l) the Agreement on Import Licensing Procedures; (k) the Agreement on Subsidies and Countervailing Measures; (l) the Agreement on safeguards; (m) the General Agreement on Trade in Services; (n) the Agreement on Trade-Related Aspects of Intellectual Property Rights; (o) the Understanding on Rules and Procedures Governing the Settlement of Disputes; (p) the Trade Policy Review Mechanism.

[101] The Plurilateral Trade Agreements are: (a) the Agreement on Trade in Civil Aircraft; (b) the Agreement on Government Procurement; (c) the International Dairy Arrangement; and (d) the Arrangement Regarding Bovine Meat.

WTO Agreement; (c) to discharge its responsibilities in relation to the Dispute Settlement Body as ascribed under the Understanding on Rules and Procedures Governing the Settlement of Disputes; and (d) to discharge the responsibilities under the Trade Policy Review Mechanism.[102]

The General Council is instructed to supervise the operations of three different types of agencies: specialised councils, special committees and plurilateral trade agreement bodies.

Specialized councils are established to regulate trade in goods (and the Agreements in Annex 1A of the Final Act), trade in services (Annex 1B of the Final Act) and trade-related aspects of intellectual property rights (Annex 1C of the Final Act). The Ministerial Conference is instructed to establish committees on trade and development, balance of payments relationships and budget, finance and administration. In addition, the General Council is authorised to establish ad hoc bodies for particular purposes.

(3) Panel Procedure

The basic panel procedure operated under the original GATT is retained in the new Agreement as the means of adjudicating disputes between Members. This Agreement is considered in detail later in the text.[103]

(4) Observations

The main criticism of the institutional framework of the GATT was that it lacked effective legislative, executive

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[102] Articles VI(2)-(4) WTO Agreement

[103] See text, infra, pp.70-74

or judicial agencies. The same criticism cannot be sustained against the revised organisation. These revisions represent a major move away from the soft law regime of the GATT and are, at the very least, a step in the right direction towards the creation of a constitutional framework for an efective legal order for the regulation of international trade relationships.

## (6) Defect 5: The Deficiencies of the Dispute Resolution Processes

### (A) The Substance: Unnecessary Complications

The substantive requirements for initiating a trade complaint through the central GATT structure were contained in Article XXIII. This allowed a contracting party to initiate a complaint if it considered that a benefit accruing to it, directly or indirectly, was being 'nullified or impaired', or, alternatively, if the contracting party believed that an objective of the GATT was being impeded as a consequence of any one of three circumstances.[104]

In GATT practice, the concept of 'nullification or impairment' became central. A party initiating a complaint had to demonstrate the existence of this condition if the complaint was to be successful. Since this was the central concept in the functioning of the GATT-system, it is not surprising that it was adopted in most of the dispute-settlement provisions of the 1979

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[104] (1) the failure of another contracting party to fulfil its GATT obligations; (2) the continued application by another contracting party of any measure, whether or not it conflicts with the terms of the GATT; or (3) the existence of any other situation.

Codes.[105]

Unfortunately, not only was this concept both vague and ambiguous but its application was particularly complex. The nullification or impairment concept was largely responsible for the blurring of the distinction between legal and illegal conduct, and compliance or violation of the GATT. The concept was not limited to instances of violations of legal obligations, leading one commentator to label the term as 'non-violation nullification and impairment'.[106] In other words, the principle behind the concept was not that of legal obligation but rather that of 'mutual and reciprocal benefit'.

Since 1979 there were three important measures designed to clarify the operation of the GATT dispute resolution process, yet none of these attempted to clarify the key concept of nullification and impairment.[107]

It should also be noted that regional arrangements for conducting trading relations enshew any reference to such a concept as a means of settling disputes and, for that matter, similarly vague notions. For example, the European Union, when functioning as the European

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[105] See for example, Article 8(3) 1979 Subsidies Code and Article 15(2) 1979 Anti-Dumping Code.

[106] See R.E. Hudec, "Regulation of Domestic Subsidies Under the MTN Subsidies Code", in D. Wallace (ed), Legal Treatment of Domestic Subsidies (1984), 1-18.

[107] These instruments were: Understanding Regarding Notification, Consultations, Dispute Settlement and Surveillance 1979, GATT BISD, 26th Supplement, 216 (1980); Ministerial Declaration on Dispute Settlement, GATT BISD, 29th Supplement, 13 (1982); and Decision Relating to Improvements to the Dispute Settlement Rules and Procedures, GATT BISD, 36th Supplement (1990), 61. See also the Mid-Term Review Agreements of April 21, 1989, reproduced in K.R. Simmonds & B.H. Hill, Law and Practice Under the GATT (1989), Release 89-1, 23-30.

Community, contained four freedoms which had the objective of liberalising trade framed in strict legal terms and these obligations were imposed directly on the Member States to restrict interference in commercial activities. Similarly, in the NAFTA, this principle was passed over in favour of a more workable legalistic formula for dispute resolution. Panels convened under the NAFTA are instructed to apply the black letter law of that agreement to ascertain violations.[108]

(B) The Procedure: Passive Dispute Resolution Versus Active Dispute Resolution

There was no single comprehensive provision in the GATT for the processing of complaints other than Article XXIII which concerned referral of complaints to the CONTRACTING PARTIES.[109] Instead, the organisation relied more on the process of consultation rather than adjudication. Only when these processes were exhausted did the need for a procedural remedy arise.[110]

Contracting parties were implored to engage in consultations in the event of a conflict, providing 'adequate opportunity' for such consultations and affording 'sympathetic consideration' to such overtures. Nineteen separate clauses of the agreement obliged

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[108] See generally, G.N. Horlick & F.A. DeBusk, 'Dispute Resolution under the NAFTA', (1993) 27:1 JWT 21.

[109] See generally, I. V. Bael, "The GATT Dispute Settlement Procedure", (1988) 22:4 JWT 67; R. Plank, "An Unofficial Description of How A GATT Panel Works and Does Not", (1987) J. Int'l Arbitration 53; and P. Pescatore, "The GATT Dispute Settlement Mechanisms", (1993) 27:1 JWT 5.

[110] See S.A. Ingersoll, "Current Efficacy of the GATT Dispute Settlement Process", (1986) Texas Int'l Law Journal, 87.

contracting parties to enter into dialogue given the existence of particular circumstances.[111] Similar requirements were contained in many of the 1979 Codes.

This emphasis on the mechanism of consultations, while appropriate for the resolution of disputes among a small group of states with similar interests, was wholly inappropriate for the conduct of modern economic relationships and constituted a primary deficiency in the regulatory system. While an argument may be sustained to the effect that these clauses encourage communication and dialogue, thereby promoting diplomatic solutions to trade problems, they were an inefficient means of resolving disputes when diplomacy failed.[112]

In the absence of explicit provisions concerning the procedure to investigate a complaint, the CONTRACTING PARTIES established an informal procedure which gradually acquired greater customary significance. A contracting party which failed to achieve a suitable solution to a trade problem could request the appointment of a panel to investigate the issue.[113] If the Council decided to investigate the matter, terms of reference were given to a panel, the composition of which was determined by the Director-General. Contracting parties involved in the dispute had a right to be consulted regarding the composition of the panel

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[111] For two rare examples of settlements through consultations, see Panel Report on the Investigation into Softwood Lumber Products From Canada, GATT BISD, 34th Supplement 194 (1988) and Panel Report on the Investigation into Japanese Measures on Imports of Leather, GATT BISD, 27th Supplement 118 (1981).

[112] R.E. Hudec, "Reforming GATT Adjudication Procedures: The Lessons of the DISC Case", (1988) 72 Minnesota Law Review 1443, 1506-1508.

[113] This procedure is fully described in W.J. Davey, "Dispute Settlement in the GATT", (1987) 11 Fordham Int'l Law Journal, 51.

and could reject appointments if compelling reasons for doing so could be proven.[114]

The non-legal nature of this process is evident once the composition of such panels is considered.[115] In the first place, panel members were generally national officials and rarely independent experts. While in theory panel members acted in their own individual capacity and not as representatives of their governments, it is irrefutable that national allegiances played a significant role in final determinations.

In one case concerning European Union subsidies on exports of pasta products, the Union-appointed panel member went to the unprecedented length of issuing a dissenting opinion defending the Union position in the dispute.[116] Nor were panel members generally legally qualified, usually being career diplomats, civil servants or economists. This was a major handicap when a panel was engaged in investigations involving legal issues, such as the interpretation of a provision or the application of principles to facts.

The inefficacy of the panel procedure is further underlined by the fact that, while a panel could

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[114] Article 6, Annex to the Understanding Regarding Notification, Consultations, Dispute Settlement and Surveillance, GATT BISD, 26th Supplement, 216 (1980).

[115] Regarding criticism of the present system, see generally, GATT, Report of Eminent Persons on the Problems Facing the International Trading System (1984), reproduced in 24 ILM 716 (1985); E-U. Petersmann, "Strengthening the GATT Dispute Settlement System", in M. Hilf (ed), The New GATT Round of Multilateral Trade Negotiations (1988), 323; and R.S. Whitt, "The Politics of Procedure", (1987) 21:3 JWTL, 603.

[116] European Economic Community - Subsidies on Exports of Pasta Products, GATT Doc. SCM/43 (May 1983), not yet adopted.

recommend retaliation as an ultimate sanction, this course of action was not, in reality, a feasible option.[117] In fact, the only example of the GATT approving retaliation occurred when the Netherlands was authorised to retaliate against certain United States agricultural products in response to a violation of the GATT.[118] Practically speaking, this remedy became no longer available since the Council adopted panel reports, not on the basis of a formal vote, but by consensus and a major trading state could prevent the formation of such a consensus. This substantially undermined the credibility of the whole dispute-resolution process.

The requirement that a report had to be adopted to have effect also permitted the major trading nations to obstruct the adoption of adverse reports.[119] If a party obstructed the formation of a consensus, the adoption of the report could be delayed indefinitely. Despite the Ministerial Declaration of 1982 which acknowledges that such obstruction was contrary to the spirit of the GATT, certain states, including the United States and the European Union, continued to engage in such practices.[120]

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[117] But see the panel decision in European Community Production Aids to Oilseed Producers (No.2), infra.

[118] Netherlands Measures of Suspension of Obligations to the United States, GATT BISD, 1st Supplement, 32 (1953).

[119] P. Pescatore, "The GATT Dispute Settlement Mechanism: Its Present Situation and Its Prospects", (1993) 27:1 JWT 5.

[120] Ministerial Declaration on Dispute Settlement, GATT BISD, 29th Supplement, 13 (1982).

## (C) The Future of International Trade Dispute Resolution

Much has been written on the subject of whether the GATT dispute resolution process should have been based on the notions of adjudication, arbitration or negotiation, and there is little need for re-elaboration of the basic points behind each of these views given the widespread academic publicity they have enjoyed.[121] For present purposes, however, it is necessary to consider how effective the GATT system of dispute resolution was and whether the reforms to the system made by the WTO Agreement will create a more efficacious process.

A gradual recognition of the limitations of the diplomacy-based GATT dispute settlement process had in fact materialised even before the WTO reforms. The Punta del Este Ministerial Declaration of September 15, 1986, included a passage concerning the improvement and strengthening of the rules and procedures of the GATT.[122]

The crisis in international trade relations demonstrated that the processes of diplomacy and negotiation were insufficient to effectively regulate the behaviour of states. The lack of effective means to settle

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[121] Among the most significant contributions are the following: R.E. Hudec, Adjudication of International Trade Disputes (1978); R.E. Hudec, The GATT Legal System and World Trade Diplomacy (Second edition, 1990); E. McGovern, "Dispute Settlement in the GATT - Adjudication or Negotiation", in M. Hilf (ed), The European Community and the GATT (1986), 73; J-G. Castel, "The Uruguay Round and the Improvements to the GATT Dispute Settlement Rules and Procedures", (1989) 38 ICLQ, 835; and R. Ostrihansky, "The Future of Dispute Settlement Within the GATT", (1990) 3:3 Leiden Journal of Int'l Law, 125.

[122] GATT Activities Report 1986, 15 (1987).

international trade disputes greatly contributed to the chilling of trade relations between the European Union, the United States and Japan in the 1980s.

The improvements brought to the international trade dispute settlement process by the WTO Agreement represent a step towards a more legal formula for the resolution of disputes. These arrangements were adopted by the CONTRACTING PARTIES, on a trial basis, by a Council Decision taken on April 12, 1989.[123] This decision implemented a number of changes in the pre-existing panel procedure such as: (a) the fixing of time limits for consultations; (b) pre-set time limits for panel investigations; (c) the introduction of standard terms of reference for panels; (d) the limitation of delays caused by disagreement regarding the appointment of panels; (e) surveillance procedures to ensure the implementation of panel decisions; and (f) express acknowledgment of arbitration as an alternative means of dispute settlement.[124]

The Understanding on the Interpretation and Application of Articles XXII and XXIII of the GATT (the Dispute Settlement Protocol), part of the Uruguay Round Final Act, continues the process of augmentation by elaborating some formal rules for the settlement of disputes.[125] For example, the Protocol established a

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[123] GATT Doc. L/6489 (April 1989); reproduced in GATT BISD, 36th Supplement 61 (1990). See also M.M. Mora, "A GATT With Teeth: Law Wins Over Politics in the Resolution of International Trade Disputes", (1993) Columbia J. Trans Law 103.

[124] E-U Petersmann, "The Mid-Term Review Agreements of the Uruguay Round and the 1989 Improvements to the GATT Dispute Settlement Procedures", (1989) 32 German Yearbook of Int'l Law, 280.

[125] Final Act of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. MTN.TNC/W/35.

standing appellate body to review the decisions of panel cases sitting at first instance. This suggests the dispute settlement process is evolving into a hierarchical structure similar to those existing in the domestic legal systems of states.

Unfortunately a number of matters were not resolved during the Uruguay Round as regards dispute settlement. The procedure for Council decisions relating to the adoption of panel reports, the adoption of appellate reports and the authorization of retaliation have not been adequately addressed. Equally, the proposed inclusion of passages requiring contracting parties 'not to resort to unilateral measures or the threat of unilateral measures inconsistent with the GATT rules and procedures' and 'to adapt their domestic trade legislation and enforcement procedures in a manner ensuring the conformity of all measures with GATT dispute settlement procedures' was rejected.

In the final analysis, the Protocol may not be the 'quantum leap forward for effective and expeditious resolution of international trade disputes' proclaimed by some commentators.[126] It seeks to remedy a defective system by building on the same foundations and relying on the same institutional framework. Further, although the mechanism came into force in 1990, there was no noticeable increase in the use of the GATT dispute-settlement procedures by contracting parties.[127]

However, regardless of the alterations made by the Dispute Settlement Protocol, individuals and private persons will continue to be denied direct access to the

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[126] J.H. Bello & A.F. Holmer, "GATT Dispute Settlement Agreement: Internationalisation or Elimination of Section 301", (1992) 26 Int'l Lawyer 795.

[127] GATT, Activities Report 1991 (1992), 51.

dispute resolution processes of the WTO. Traditionally the GATT did not provide an effective remedy for individuals aggrieved by the trade practices of foreign states for a number of reasons.[128]

First, the pre-1995 GATT was an international treaty between states and therefore private complaints were inadmissible in the absence of a state-sponsored official complaint. It was necessary for the aggrieved individual to persuade its national government to initiate a complaint on its behalf. But the merits of an individual's claim were never the sole consideration in raising a complaint. A government may have been reluctant to initiate a complaint because of political reasons, or the general desire of states to maintain friendly international economic relations.

Even when a government could be persuaded to initiate a complaint, the requirement of engaging in consultations prior to the lodging of a complaint meant that it could take two or three years before an investigation was conducted. A favourable decision by a panel did not, of course, automatically ensure that the state would accommodate the interests of the individual behind the complaint. Finally, even after a favourable decision, a panel could not award compensation to an individual or company for losses sustained as a result of conduct incompatible with the GATT.

Then, of course, there was no guarantee that a decision of a panel, duly passed by the Council, would be fully implemented by the recalcitrant contracting party. In fact, the history of the process indicates that

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[128] See E-U. Petersmann, "Strengthening the Domestic Legal Framework of the GATT", in E-U. Petersmann (ed), The New GATT Round of Multilateral Trade Negotiations (1988), 345.

countries used partial implementation as a pretext for avoiding compliance with adopted panel reports.

For example, in the DISC Case[129] involving tax relief for companies setting up subsidiaries for exportation purposes, the repealing legislation was drafted in accordance with the findings of the panel in such a manner as to come as close as possible to the permitted rules and, some would say, overstepped this mark.[130]

When the GATT ruled against the United States in the Customs Users' Fees Case[131], the United States did abandon proposals to extend the imposition of the charges for the use of customs services. Nevertheless, the Customs and Trade Act of 1990, which actually terminated the system - which incidentally was a gross violation of the terms of the GATT - did not authorise the return or reimbursement of users' fees charged prior to the panel ruling.[132]

These were only a few of the most obvious cases where contracting parties ducked their obligations under the GATT. As a general observation, it can readily be said that in the overwhelming majority of cases, an unsatisfactory resolution of the dispute is obtained even after panel investigation from the perspective of the complaining contracting party. The GATT quite simply failed complaining countries even when the basis of the

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[129] GATT BISD, 23rd Supplement 98 (1977). Adopted with reservations, GATT BISD, 28th Supplement 114 (1982).

[130] B. Caplan & M. Chametzky, "DISCs and Foreign Sales Corporations", (1986) 12:1 Brooklyn J. Int'l Law 1, 7-14.

[131] GATT BISD, 35th Supplement 245 (1989).

[132] See GATT, Focus, No. 74, 3 (1990).

complaints were well-founded.[133]

**(7) Observations**

Cumulatively, each of these deficiencies contributed towards emasculating the normative efficacy of the GATT in the regulation of international trade. Not only did the GATT fail to evolve relative to the economic environment in which it operated but, in addition, it failed to grapple with some of the major problems facing the international trade system at that time.

Responsibility for this ineffective mechanism does not however lie with the GATT as an institution. The GATT was simply an organisation composed of individual state contracting parties which collectively contributed towards the failure to realign the organisation to correspond with the policy objectives which were set before it. It was the member states which rejected the attempt to rectify the institutional deficiencies of the organisation and it was the same states who consistently failed to negotiate effective imperative substantive legal obligations.

The experiment at the Tokyo Round discussions into the negotiation of protocols to regulate non-tariff barriers demonstrates the half-hearted approach adopted by many of the contracting parties towards the effective regulation of international trade. Neither the United States nor the European Union really desired to place fetters on their discretion to regulate their respective trade policies. This message was one of the most obvious

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[133] Whether the WTO suffers from the same shortcomings is examined in P.T.B. Kohona, "Dispute Resolution Under the WTO - An Overview", (1994) 28:2 JWT 23.

conclusions from an analysis of the attempt to create new regulatory mechanisms.

Therefore, in conclusion, the GATT system of trade regulation started from an inappropriate premise and failed to evolve relative to its circumstances. In part this was due to the fundamental lack of consensus between the major trading nations responsible for the drafting of its terms. However, once the organisation had been constituted, it also failed in its task of true and effective trade liberalisation which was the central objective of the agency.

As a consequence, the international legal regime for the regulation of trade became fragmented and non-responsive to even the most pressing problems presented to the international community.

Whether or not the new system put in place by the WTO Dispute Settlement Protocol depends on the willingness of the international trading community - and in particular, the United States, the European Union and Japan - to respond positively to the new framework introduced and to the new substantive obligations imposed.

The WTO dispute settlement must find a means to prevent these nations from manipulating the new international rules to perpetuate the continuation of their existing trade policies, certainly as far as primary objectives are concerned. At this stage, it is impossible to determine if the alterations made to the institutional mechanisms of the organisation will allow the system to respond to this challenge and the fundamental problems will remain. The struggle to contain the pressures exerted by the competition of interests among the major players will therefore continue.

## 2 The Evolution of International Legal Restraints on the Use of Subsidies

Prohibitions on the right of states to grant financial assistance to national industries directly trespass on the sovereign right of states to conduct national economic policy. Trade complaints against subsidisation programmes involve intense diplomatic activity at the government-to-government level. The same element of interest has plagued attempts to establish an international regime for the regulation of subsidies.

An analysis of the pre-1995 GATT regime for the regulation of subsidies discloses two interesting revelations. First, there is little evidence that any state, including the United States and the European Union, has ever curbed its use of subsidies in light of the GATT rules. Second, no sanction has ever been applied for a violation of the rules prohibiting or restricting the use of subsidies.

In the context of the present discussion, the rules regulating subsidies provide an extremely useful model for examining some of the intricacies of the breakdown in the normative influence of GATT rules on state behaviour. While the focus of the following discussion remains firmly on the conduct of the United States and the European Union, the total breakdown in this system has interesting and profound repercussions for the rest of the international trading system. Here we have an ideal subject to examine: a system of rules with virtually no normative efficacy.

In this chapter, the following questions will be considered. What has happened in the formulation and evolution of these rules to render these rules so ineffective? How have the United States, the European Union and other contracting parties responded to

attempts to enforce these rules? Why do the United States and the European Union effectively ignore the GATT rules on subsidies when setting up the parameters of their policies in this field? How do these players use the GATT rules in their dialogue and negotiations?

The fact that the Second Subsidies Code has now been adopted as part of the Uruguay Round Final Act also provides an opportunity to examine the rules contained in that understanding with a view to comparing and contrasting the efficacy of the earlier rules. The contents of many of the new rules are recognition that the pre-existing system was fundamentally flawed. However, it is not possible to say at this point how effective the new rules will be because of their relative recent nature.

### (1) The Root of the Problem of Negotiating Restraints: A Conflict of Economic Ideology

A deep rift exists between the positions of the United States, the European Union and many other states as regards permissible and impermissible government assistance to industry and agriculture.

The United States' position is broadly that the majority of subsidies are inequitable because they confer an unfair advantage and distort the natural equilibrium established by the principle of comparative advantage. On the whole, this argument has substantial support in economic theory.[134] The economic argument runs as follows. Subsidies constitute governmental interference

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[134] G. Denton, Trade Effects of Public Subsidies to Private Enterprise (1970), 96-120; R.E. Baldwin, Non-Tariff Distortions of International Trade (1970); and H.B. Malmgren, International Order for Public Subsidies (1977).

in the self-regulating processes which allocate global resources on the basis of supply and demand.[135] This interference diverts resources into relatively less efficient sectors of production which causes a decline in absolute global welfare.[136] Since most types of subsidies distort patterns of trade and upset the principle of comparative advantage, the United States has been relatively successful in stigmatising the granting of subsidies as an unfair trade practice which can, in certain circumstances, justify the appropriate unilateral response.

This radical view of the function of subsidies is not, however, shared by all industrialised trading nations, and in particular the European Union and Canada.[137] Although the United States can rely on economic theory to support its argument that the preponderance of subsidies contravene the basic economic assumptions behind the present global trading system, the issue of regulation is not one solely of economics. Nations assist industrial, agricultural and commercial activities for a number of reasons, many of which fall within the scope of national economic policy. Claims that all subsidies are ipso facto inequitable ignore the importance of the many legitimate non-economic purposes of subsidies. Quite clearly, rules based solely on economic principles inevitably will be over-simplified

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[135] See generally, G.C. Hufbauer & J.S. Erb, Subsidies in International Trade (1984).

[136] See G. Denton & S. O'Cleireacain, Subsidy Issues in International Commerce (1972), 5-22.

[137] See R.R. Rivers & J.D. Greenwald, "The Negotiation of a Code on Subsidies and Countervailing Measures: Bridging Fundamental Policy Differences", (1979) 11 Law & Pol'y Int'l Bus., 1447, 1448-1449, and R. deC. Grey, "Some Notes on Subsidies and the International Rules", in D. Wallace, Interface III: Legal Treatment of Domestic Subsidies (1984), 61-70.

which can be demonstrated by considering this theoretical basis for a moment.

Economic theory quantifies the misallocation of resources caused by subsidisation, not by taking into account the relative social value of the alternative deployment of resources, but according to the opportunity costs, in monetary terms, of alternative choices in the decision-making process. The relative social value of a subsidy differs from the opportunity costs according to the volume and quantity of the externalities involved in the decision to subsidise a particular economic activity.[138]

It is therefore feasible that an individual nation, or group of nations, might opt to calculate the material value of a particular programme, not by reference to the monetary costs of the scheme, but on the basis of the social advantages which may accrue.[139] However, it is notoriously difficult to quantify such advantages. In any event, since states are permitted under international law to introduce non-economic considerations into negotiations, discussions on limitations for the use of subsidies are artificial when confined to the parameters of economic theory.

Nevertheless, the United States has, especially in the late 1980s and early 1990s, consistently advocated drastic reductions in levels of subsidies, particularly in the agricultural sector, to allow substitutable goods

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[138] W.F. Schwartz & E.W. Harper, "The Regulation of Subsidies Affecting International Trade", (1970) 70 Michigan Law Review, 831; and J.J. Barcelo, "Subsidies and Countervailing Duties - An Analysis and Proposal", (1977) 9 Law & Pol'y Int'l Bus., 779, 786-794.

[139] See E.J. Rowbottom, "Dumping and Subsidies - Their Potential for Achieving Sustainable Development in North America", (1993) 27:6 JWT 145.

to compete in the international market-place. This explains why at the Brussels Ministerial meeting in December 1990, the United States maintained the position that a 75% reduction in domestic subsidies and a 90% in export subsidies were required in the agricultural sector as a precondition to the conclusion of the Uruguay Round.[140]

Prior to agreement at the Uruguay Round, the United States adopted a two-pronged strategy for tackling foreign subsidies. First, the United States attempted to persuade trading partners to remove subsidies through negotiations at both multilateral and bilateral levels. Increasingly, emphasis was placed on bilateral discussions. For example, the Canada-United States Free Trade Agreement established a bilateral Working Group on Subsidies to negotiate a mutually acceptable catalogue of permissible subsidies.[141] Failure to reach agreement on this matter gave grounds for either the United States or Canada to terminate the application of the Agreement.[142]

Similarly, the bilateral agreement between the United States and Mexico to end the problem of American countervailing duties on certain Mexican products eliminated subsidies on certain types of manufactured

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[140] GATT Activities Report 1990, 35 (July 1991).

[141] 27 ILM 281 (1988).

[142] According to Article 1906 of the Canada - United States Free Trade Agreement, the countervailing laws that pre-existed the agreement will continue for a period of five years, and if necessary for seven years. During this period, mutually agreed trade rules are to be developed including a definition of subsidy. If no system of rules has been agreed within this period, either party may terminate the agreement on six month notice.

products flowing between the two countries.[143] The North American Free Trade Agreement (NAFTA) is, of course, the most recent illustration of this bilateral approach.[144]

The second prong of this strategy is an active policy of imposing countervailing duties which, if properly calculated, are designed unilaterally to restore the competitive position, in strictly economic terms at least, between domestic and foreign goods prior to the introduction of a subsidy.

No state or group of states has employed its countervailing legislation to the same degree as the United States. Indeed, in the decade prior to 1990, the United States initiated more than three hundred countervailing duty investigations, a considerable rise on the figure of less than one hundred for the previous ten year period. In contrast, the European Union initiated less than ten such investigations between 1980 and 1990, while Canada and Japan together commenced less than thirty. But there are more sinister objectives of the United States countervailing duty policy than this.

Examining the statistics for United States countervailing investigations, there should be a degree of proportionality between the volume of trade between the United States and countries on the one hand and the number of investigations brought against those countries on the other hand. However, as one recent study has pointed out, the incidence of countervailing duty actions against the European Union is substantially

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[143] Understanding Between the United States and Mexico Regarding Subsidies and Countervailing Duties of April 23, 1985. See Smith, "The United States-Mexico Framework Agreement: Implications for Bilateral Trade", (1989) 20:4 Law & Pol'y Int'l Bus., 655.

[144] 32 ILM 289 (1993).

disproportionate to the volume of its trade with the United States.[145] Between 1980 and 1988, a total of 177 countervailing actions were brought against products originating in the European Union which translates to almost fifty percent of the total number of investigations initiated by the United States authorities. Trade with the European Union only constituted twenty percent of merchandise imports.

Trade with Japan accounted for a similar share of imports, yet only five cases were initiated against Japanese goods. Trade with Canada constituted eighteen percent of imports into the United States, but only fourteen countervailing investigations were conducted. These figures reflect, to a large degree, United States reaction to the liberal subsidisation regime within the European Union and the growing intolerance of the United States government towards its policies.

In contrast to the U.S. position, the European Union views the subsidisation of production, most notably agricultural production through the Common Agricultural Policy (CAP), as an indispensable tool for achieving social and economic objectives. Article 39 of the EC Treaty cites the growth of productivity, the guarantee of a fair standard of living among the farming community, and the assurance of adequate supplies at reasonable prices, as the main underlying tenets of the policy.[146]

Equally, while Article 92 of the Treaty restricts the

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[145] J.M. Finger & T. Murray, "Policing Unfair Imports: The United States Example", (1990) 24:4 JWT, 39.

[146] On the CAP, see generally, J. Usher, The Common Agricultural Policy of the European Economic Community (1988).

freedom of Member States to provide assistance to national industries, the impact of this general provision is substantially eroded by the considerable number of exceptions to the rule together with the evolution of a centralised aid policy at the European Union level.[147] State aid is not incompatible with the principles behind the common market if the aid has a social character and is granted without discrimination.[148] Similarly, aid to promote economic development in regions where the standard of living is abnormally low may also be permissible.[149]

In legal terms, the conflict over the issue of subsidies illustrates the clash between the right of states to regulate their own domestic economic development, subject to the rules of international law, and the legitimate interest of other states to mitigate, or avoid, injury which might be sustained as a consequence of other states exercising their rights to formulate such policies. Clearly, these conflicting principles are best reconciled by negotiating a series of rules which would delimit the respective boundaries of these rights. This regime must preserve the rights of individual states to determine internal commercial policy while at the same time restricting practices which cause injury disproportionate to the benefits which accrue.

Such a framework would allow a distinction to be drawn between justifiable economic development policies and

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[147] J. Steenbergen, "Trade Regulation After the Tokyo Round", in J.H.J. Bourgeois (ed), Protectionism and the European Community (1983), 181, 189-190; and C. Norall, 'State Aid in the European Community', a paper presented at the Colloquim on Community Competition Law at the University of Glasgow, 5 November, 1991.

[148] Article 92(2)(a), EC Treaty.

[149] Article 92(3)(a), EC Treaty.

practices which amount to little more than improper attempts to export economic problems at the expense of other nations. Of course, a significant grey area between these two polars exists which has to be settled. In addition, effective surveillance and supervision of implemented rules are required to ensure that infringements are minimised and international harmony maintained.

Article XVI of the GATT, as amended, was the first attempt to draft international rules to accommodate these opposing forces and failed because it did not strike the correct balance.[150] In many respects the Subsidies Code 1979[151] compounded this error by building a new regime on the basis of these misaligned principles. The result was an ineffective international agreement that contained too many vague obligations and not enough imperatives.

Whether or not the renegotiated Subsidies Code repeats or aggravates these deficiencies can be partially determined by examining the shortcomings of the Subsidies Code 1979 and contrasting its provisions with the new Agreement to see if mistakes have been repeated.

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[150] On the nature of the opposing positions, see W.H. Boger III, "The US-EC Agricultural Export Dispute", (1984) 16 Law & Pol'y Int'l Bus. 173.

[151] The Subsidies Code 1979 is properly termed the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade 1979.

## (2) Stage One: Scepticism Whether Restraints Were Necessary

### (A) The Original Article XVI Regime

Article XVI of the General Agreement, in its original form, consisted of one paragraph which required contracting parties to notify the GATT of the introduction of any subsidies which operated, directly or indirectly, to increase exports of any product from, or to reduce imports of any products into, its territory. If programmes having these effects were set up, the contracting party was obliged to provide information relating to the extent, nature and purpose of the subsidy, together with the estimated effect of the programme on the volume of affected products and the circumstances which necessitated the subsidy.[152]

In other words, the original obligation was little more than a reporting requirement. It was not a prohibition or even a duty to curtail subsidisation activities; the sole duty was to consult with the other contracting parties in the event that a potentially injurious subsidy was to be introduced.

No actual restraints were therefore imposed on the rights of parties to introduce subsidies. In this form, the normative effect of the provision is clearly finite and indeed the obligation to report constituted nothing more than an acknowledgment that other states may have an interest in subsidisation programmes that cause them

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[152] The CONTRACTING PARTIES subsequently issued a decision which required contracting parties to submit, every three years, questionnaires concerning notification and to update these reports for the intervening years. See GATT BISD, 11th Supplement, 58 (1963).

'serious prejudice'.

Neither the notification obligation nor the consultation mechanism of Article XVI proved successful.[153] Contracting parties have not made general use of the consultation process and in at least one study the authors concluded that there is no recorded example of any state ever having altered a subsidisation measure as a result of consultations.[154] Consequently, the self-notification and consultation procedure, so typical of the original GATT dispute resolution process, has proved to be no inhibition on the increasing use of subsidies.

This brief history illustrates two points. First, rules regulating subsidies which do not have some form of compulsion or the benefit of reciprocal advantage do not induce any effective form of compliance. Second, states cannot be relied on to refrain from taking advantage of the vagueness in rules to avoid their obligations no matter how weak these obligations might be.

Two factors help explain the inclusion of such weak normative provisions. First, when the GATT was being negotiated the contracting parties were under the impression that the Charter for the International Trade Organisation (ITO) would eventually succeed the GATT. Since the Charter contained detailed obligations regarding the use of subsidies, repetition of these provisions seemed unnecessary and might have conceivably resulted in confusion in interpretation.[155]

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[153] See K. Dam, The GATT: Law and International Economic Organisation (1970), 146-147.

[154] Rivers & Greenwald, supra note 137, 1459-1460.

[155] Working Party Report, GATT BISD, Vol. II, 44 (1952).

Second, in the immediate post-war era, a number of factors obscured both the range and effect of subsidies. Quantitative restrictions were widely maintained especially throughout Europe for balance of payments purposes and constituted the major limitation to the free exchange of goods. In contrast, subsidies were considered an integral element for economic reconstruction and, more importantly, were believed to be self-limiting. Competitive spirals of subsidisation and counter-subsidisation were considered inconceivable.

As states have progressively reduced average levels of tariff protection, the permanence and pervasiveness of non-tariff barriers, including subsidies, have been exposed.

(B) Recognition of the Emerging Problem: The 1955 Amendments to Article XVI

The original single paragraph of Article XVI was subsequently amended, in 1955, by the addition of a further three paragraphs in an attempt to impose more rigorous controls over the use of subsidies. The amendments were the consequence of a growing awareness of the disruption to the international trading order caused by the widespread use of subsidies.

The 1979 Subsidies Code codifies and elaborates on these obligations without radically departing from the basic formula contained in these amendments.[156] Hence, the amendments made in 1955 are largely of historical interest only and need not be considered in any detail.

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[156] GATT BISD, 26th Supplement, 56 (1980).

## (3) Stage Two: Restraints Based on a Failure to Reach a True International Consensus

### (A) The Fallacy of Establishing International Restraints Based on Rigid Adherence to Economic Theory

At the Tokyo Round of multilateral trade negotiations, the United States apparently succeeded in persuading states that export subsidies caused the most grievous forms of injury to other states. On the other hand, there was absolutely no genuine agreement reached on the effects of domestic (or production) subsidies.[157] Therefore, while the 1979 Subsidies Code contains elaborate substantive provisions for the regulation of export subsidies, the problem of domestic subsidies was essentially unresolved by the Code.

The terms of the Code relating to the use of domestic subsidies reflect the total absence of any consensus between those contracting parties advocating the imposition of restraints on such subsidies and those states which took the view that the social and political benefits of many domestic subsidies outweigh the adverse economic repercussions. As a result, the provisions relating to domestic subsidies add little to the terms of Article XVI as amended and in fact perpetuate, perhaps even exacerbate, the ambiguities of the original GATT provisions.[158]

At the risk of sounding repetitive, it seems clear that the failure to negotiate effective rules is a direct consequence of the polarised negotiating positions of

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[157] G.R. Winham, International Trade and the Tokyo Round Negotiation (1986), 170.

[158] See R.H. Snape, "International Regulation of Subsidies", (1991) 14 World Economy 139.

the United States on the one hand and the European Union and, to a lesser extent, Canada and other non-Union European countries on the other hand. The Unites States position in the negotiations, and the one that at least superficially prevailed, was to draw up rules based on controversial assumptions and, in particular, a distinction between the economic impact of domestic and export subsidies.

The economic rationale for distinguishing between domestic and export subsidies is derived from the perception that domestic subsidies create less distortion in the patterns of trade than export subsidies, which are intentionally designed artificially to stimulate the commercial competitiveness of specific products.[159] The effect of domestic subsidies is not to promote one product or group of products over alternative products, but to encourage economic efficiency in general. The major macroeconomic effect of such subsidies is on the national balance of payments and not individual merchandise accounts.[160]

In contrast, export subsidies are grants provided to individual industries in proportion to, and conditional on, export performance. The economic justification most frequently rendered for such programmes is the generation of a favourable balance of payments equilibrium by increasing foreign income earnings.

The Code provides a number of illustrations of

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[159] See B. Balassa, "Subsidies and Countervailing Measures: Economic Considerations", (1989) 23:3 JWT, 63; and L. Dally, "The Impact of Export Subsidies on International Trade", (1981) New Zealand Law Journal, 490.

[160] At least in theory, a balance of payments surplus caused by the use of such subsidies will be adjusted by the appropriate change in exchange rates.

particular types of domestic subsidies but no specific definition of domestic subsidies is included in the Code. Although a number of examples of domestic subsidies are identified, they are clearly intended to be non-exhaustive. No criteria were established to allow a distinction to be drawn between export and domestic subsidies. The Code does contain an illustrative list of export subsidies, the use of which is regulated by the Code provisions on export subsidies, but in general these examples are vague and often overlap and are of little guidance in ascertaining which programmes are domestic subsidies.

In order to be effective, rules which function on the basis of such a distinction must be accompanied by a formula to allow differentiation. Such a formula could have been established on the basis of any one of a number of criteria. For example, classification could be achieved according to the intentions or motives of the government conferring the subsidy. Alternatively, a determination may be made on the basis of marketing strategies or the accounting practices of the industries receiving the assistance. Another proposed basis might be the ultimate destination of a particular proportion of production manufactured with the benefit of the assistance. In any event, no such rules were established and an assessment of the nature of an individual programme remains a matter to be inferred from the circumstances surrounding the case.

Even if the economic rationale for distinguishing between these two types of subsidies is sound, which arguably it is not, such a distinction is virtually unworkable in practice. The two types of subsidies are

not mutually exclusive.[161] Equally, a production subsidy may provide an incentive for increased output which allows an industry, over a period of time, to increase its share of the world market through increased productivity stimulated by the domestic subsidy. This distinction also fails to take into account 'hybrid subsidies' which are composed of both types. The European Union, for example, has traditionally granted subsidies for the production of the primary components for manufactured products which are eventually exported.[162]

(B) Recognition of the Right to Provide Domestic Subsidies

Under the 1979 Subsidies Code, domestic subsidies, whether general or specific, are simply not actionable at the international level. Article 8(3) pathetically implores signatories to 'seek to avoid' causing certain injurious effects through the use of any type of subsidy. Closer examination of the terms of Article 8(3) reveals that in fact no actual obligation is imposed on signatories to refrain from introducing such subsidies. They are merely required to try to avoid using subsidies that create these effects. The consequences of such a norm-formulation are predictable: no state can be challenged by another for failing to attempt to prevent injury through the introduction of a subsidy. This interpretation has been substantiated by the fact that Article 8(3) has never provided the basis for a complaint by one signatory against another.

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[161] See S.J. Marcuss, "Understanding Direct and Indirect Subsidies: Are the Problems Negotiable or Incurable", in D. Wallace (ed), Interface Three: Legal Treatment of Domestic Subsidies (1984), 51-60, 52-53.

[162] See European Economic Community Subsidies on Exports of Pasta Products, GATT Doc. SCM/43 (1983), not yet reported.

The imperative nature of Article 11(2) is equally diluted to the following terms:

> "Signatories recognize...that subsidies other than export subsidies...may cause or threaten to cause injury to a domestic industry of another signatory or serious prejudice to the interests of another signatory or may nullify or impair benefits accruing to another signatory under the General Agreement, in particular where such subsidies would adversely affect the conditions of normal competition."

Notwithstanding the detailed elaboration of these forms of injury there are no guidelines for assessing injurious effects. Yet, there is little doubt that the nature of these effects is essential in the determination of the kinds of subsidies that are subject to the disciplines of the Agreement.[163]

One cannot help but wonder why these concepts have been elaborated in such detail when Articles 8(3) and 11(2) merely require states to 'seek to avoid' causing these effects. As one commentator has already observed, by employing the 'seek to avoid' terminology, the negotiators opted for a system of 'regulation without observation'.[164] Yet this was the only compromise acceptable to both the United States and the European Union delegations. The provisions are too vague to be genuine and effective legal obligations and it is

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[163] See also, J.H.J. Bourgeois, "The GATT Rules for Industrial Subsidies and Countervailing Duties", in E-U Petersmann & M. Hilf (eds), The New GATT Round of Multilateral Trade Negotiations (1988), 219, 230-231.

[164] R.E. Hudec, "Regulation of Domestic Subsidies Under the MTN Subsidies Code", in D. Wallace, Legal Treatment of Domestic Subsidies (1984), 1-18, 2.

doubtful whether they clarify or expand upon the functioning of the nullification or impairment formula originally incorporated into the Agreement.

The limited normative effect of the Code provisions on domestic subsidies is underscored by the fact that parties alleging the use of injurious domestic subsidies have opted to use the general dispute settlement procedures in their quest for a remedy. One of the most explicit examples of this was the United States complaint, supported by Australia, that production aids granted by the European Union on the manufacture of certain types of canned fruit were inconsistent with the GATT.[165] The European Union issued a number of regulations which established a common organisation for these products, consisting of, inter alia, a common tariff and levy structure.[166] According to these regulations, processors of these fruit products became eligible for a 'production aid', which was in effect a domestic subsidy, if they bought fresh produce from Union producers at the minimum specified grower price.

The United States challenged these regulations, not on the basis of Article 8 of the 1979 Code which requires signatories to 'seek to avoid' causing nullification or impairment, but under Article XXIII of the GATT. In particular, the United States claimed that the production aids given to the canned fruit products nullified or impaired tariff concessions granted by the Union in 1962, 1967, 1973 and 1979.[167]

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[165] European Community - Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes, GATT Doc L/5778 (1985).

[166] Council Regulation 516/77 (1977), OJ L73/1 (1977) and Council Regulation 1152/78 (1978), OJ L144/2 (1978).

[167] Panel Report, supra note 165, Para. 14.

In an intensely legalistic argument, the United States representative alleged that the Australian Subsidy on Ammonium Sulphate Case established a precedent according to which the introduction of domestic subsidies established a prima facie case of nullification or impairment of tariff bindings.[168] Responding, the European Union offered rather weak arguments to the effect that the mere granting of an internal subsidy did not constitute prima facie nullification or impairment, and that the United States had been unable to prove that the production aids had distorted conditions of competition between the Union products and imported products.[169]

The panel eventually held that nullification or impairment of concessions would exist if two preconditions were met: (a) that the offending measure could not have been reasonably anticipated by the party bringing the complaint at the time of the negotiation of the concession; and (b) that the measure upset the competitive position of the imported products concerned.[170] These conditions were satisfied for a number of products, including canned peaches and canned pears. The panel therefore ruled that the European Union production aids were contrary to the General Agreement because they nullified and impaired tariff concessions. In arriving at this conclusion, the sole reference to the Code was an assertion on the part of the Union that its terms should be taken into account for the purposes of 'interpreting' the concept of nullification or impairment.[171]

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[168] Ibid, Para. 15.

[169] Ibid, Para. 24.

[170] Ibid, Para. 51.

[171] Ibid, Para. 29.

In a more recent case, the United States again challenged the use of domestic subsidies by the European Union, this time payments made to Union processors of oilseeds and related animal-feed proteins.[172] Once again, the complaint was lodged under the relevant provisions of the General Agreement, this time Article III, and not Article 8 of the Code.

The common marketing regime for oilseeds was adopted in September 1966 by the Union and was subsequently supplemented by a vast range of support measures for the commodity.[173] Under the scheme, where prevailing world prices were below a predetermined target price, a subsidy was payable to processors of oilseeds as compensation for purchasing generally higher priced domestic oilseeds. The United States claimed that these afforded less favourable treatment to imported oilseeds than to products of national origin, contrary to Article III(4). European Union purchasers and producers of domestic oilseeds benefitted from subsidies paid only when they purchased oilseeds grown in the Union. Further, the calculation of the level of the subsidy was such as to provide an incentive to purchase domestic rather than imported oilseeds.

The United States further contended that the benefits conferred in the Dillon Round of tariff concessions from the European Union had been nullified and impaired by the producer and processor subsidies and that, in 1962, when the concession was negotiated, it could not reasonably have anticipated such impairment. In recent

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[172] European Community - Payments and Subsidies Paid to Processors of Oilseeds and Related Animal-Feed Proteins, GATT Doc. L/6627 (1989), also reproduced in (1990) 2:2 WTM, 5.

[173] Council Regulation 136/66 (1966), OJ L172/30 (1966).

years the higher support levels had resulted in a large surge in domestic production with a consequent decline in imports. If these allegations were proved correct, quite clearly the European Union had failed to 'seek to avoid' causing injury as required by Article 8(3).

The European Union relied on Article III(8)(b) which declares that the principle of non-discrimination does not prevent the payment of subsidies exclusively to domestic producers.

The panel accepted that the calculation of the level of subsidy payments could over-compensate processors for purchasing domestically produced oilseeds, and was therefore capable of giving rise to discrimination against imported products contrary to Article III(4).[174] The panel also took the view that the risk of such discrimination was tantamount to discrimination itself.

Nor did the panel accept the contention that the subsidy payments were covered by Article III(8)(b) since that particular exception applied only to payments made exclusively to domestic producers and not, as in this case, to processors.[175] This finding should hardly have been surprising since, in 1959, a reporting panel had previously held that, if payments were made to purchasers of domestic industrial equipment but not for purchases of similar imported equipment, a violation of the principle of non-discrimination could be upheld a fact which the European Union can be deemed to have been aware when introducing the scheme.[176]

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[174] Ibid, Paras 136-140.

[175] Ibid, Para. 137.

[176] Italian Discrimination Against Imported Agricultural Machinery, GATT BISD, 7th Supplement, 60 (1959).

It is also instructive to see how the dispute was in fact eventually resolved. In response to the United States request that the GATT Council adopt the report, the European Union expressed the view that it would not stand in the way of its adoption if a consensus in favour materialised. This position was, however, qualified by the statement that the European Union would only fulfil the panel's finding 'in the context of the implementation of the results of the Uruguay Round'.[177] The European Union also maintained that the panel's findings raised many fundamental problems relating to the interpretation of Articles II, III, XVI and XXIV, the interrelationship among which were the subject of discussions at the trade negotiations. Ultimately, compliance by the European Union with the decision was not brought about by the findings of the investigating panel, but as part of a negotiated package agreed between the European Union and the United States.[178]

The tendency of certain signatories to challenge domestic subsidies through the general provisions of the GATT rather than Article 8 of the Code reflects general dissatisfaction with both the substantive and procedural provisions of the agreement.[179] The general consensus among the negotiators of the new subsidies agreement was to abandon this structure in favour of a completely revised, and more comprehensive, scheme.

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[177] GATT Activities Report 1989 (1990), 83-86.

[178] Memorandum of Understanding on Certain Oilseeds Between the EEC and the USA within the Framework of the GATT, O.J. L147/26 (1993).

[179] See generally, R.A. Brand, "Competing Philosophies of GATT Dispute Resolution in the Oilseeds Case and the Draft Understanding on Dispute Settlement", (1993) 27:6 JWT 117.

## (C) Obligations to Restrict the Use of Export Subsidies

### (1) The Artificial Distinction Between Agricultural Subsidies and Industrial Subsidies

Export subsidies are payments made by governments in proportion to the quality, volume or value of goods exported.[180] From a theoretical economic perspective, export subsidies are considered to distort international competition. The use of alternative measures, such as currency devaluations, which are necessary to correct payment imbalances, are not considered to have the same effect.[181] Since alternative, and less distorting, solutions can be found to the problems that export subsidies are alleged to remedy, there is an economic argument, in principle, that export subsidies, as a general category, should be regulated.[182]

Despite the difficulties of distinguishing between export and domestic subsidies, which have been alluded to earlier, the 1979 Subsidies Code retained the division between these two forms of subsidies. The fatal sub-classification between export subsidies on primary products and those on non-primary products, also introduced by the 1955 amendments, was also retained in

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[180] See, P. Low, "The Definition of Export Subsidy", (1982) 16 JWTL, 375; and J.J. Barcelo, "Subsidies, Countervailing Duties and Anti-Dumping After the Tokyo Round", (1980) Cornell Int'l Law Journal 257, 261-262.

[181] This explains why countries do not usually impose countervailing duties on goods which originate in a country that has recently undergone a currency devaluation, despite the fact that both general export subsidy schemes and currency devaluation have broadly similar economic effects.

[182] J.J. Barcelo, "Subsidies and Countervailing Duties - An Analysis and A Proposal", (1977) 9 Law & Pol'y Int'l Bus., 779, 795-796.

the Code.

While an argument can be made for differentiating between domestic and export subsidies, there is no viable economic rationale for maintaining a distinction between the agricultural and industrial sectors. The real reason for the separate treatment of these two areas is political and not economic.[183] Before the Second World War, the United States maintained export subsidies on agricultural products as part of its agricultural adjustment programme.[184] During the negotiation of the Havana Charter, the U.S. Congress repeatedly insisted that the final agreement would not be ratified if its terms were inconsistent with those of the agricultural adjustment programme. The putative provisions of the Charter therefore imposed less onerous obligations on primary products, which are agricultural products, than on non-primary products. This formula therefore arose as an attempt to reconcile the formulation of restraints on the use of export subsidies with the internal policies of the United States.[185]

When the CONTRACTING PARTIES amended Article XVI of the GATT to include limited restrictions on the use of export subsidies, the United States successfully pressed

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[183] See B. Balassa, "Subsidies and Countervailing Measures: Economic Considerations", (1989) 23:2 JWT, 63, 67.

[184] J.W. Evans, The Kennedy Round in American Trade Policy (1971), 66-69.

[185] A GATT Panel recently examined the consistency of certain aspects of the U.S. Agricultural Adjustments Act which remains the basis of U.S. agricultural policy for consistency with Articles II and XI of the GATT. The findings were that the statute, and indirectly the policy, was not inconsistent with the obligations of the United States towards the GATT. See United States Assistance for Sugar and Sugar Products, GATT Doc. L/6631, reproduced at [1991] 1 CMLR 120.

for the maintenance of this distinction. During the 1950s and early 1960s, the United States, in absolute terms, undoubtedly provided substantial assistance to its farming community and the preservation of this assistance was the predominant motive for the United States negotiating position during the discussions for the 1955 amendment.

While the United States was the principal protagonist for this separation during the negotiation of the 1955 amendments, the European Union has gradually acceded to this role as the grotesque subsidisation requirements of the Common Agricultural Policy have escalated. By the early 1970s, the levels of agricultural support given by the European Union to its farmers had outstripped those given by the United States to its farmers.[186]

It must nevertheless be noted that United States financial assistance to its farming sector is far from insignificant but it has managed to down-play this assistance by comparing relative levels of export assistance to highlight the issue as a European Union-caused problem. The principal mechanism of agricultural support in the United States for exports is the Export Enhancement Programme set up in 1986. This programme offers government-owned commodities as bonuses to agricultural exporters to encourage the sale of agricultural products in international markets.[187] Approximate estimated expenditure by the U.S. government on this programme was projected at US$ 5 billion over

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[186] T.B. Curtis & R.J. Vastine, The Kennedy Round and the Future of American Trade (1971), 47-49.

[187] See generally, D.T. Fitch, "No Winners - US Agricultural Export Subsidies", (1988) Geo. Wash. J. Int'l Law & Econs 4.

the period from 1991-1996.[188]

At the same time, the Food Security Act of 1985[189] provides income support to American farmers. Under this scheme, a farmer is given a government loan for his annual income and the government obtains a pledge of the forthcoming crop as security. When the loan matures, the farmer has the option of repaying the loan or of delivering the crop to the government as repayment.

The United States also sets target prices to serve as benchmarks for determining deficiency payments. These payments equal the difference between the target price and the market price. In order to qualify under this scheme, a farmer must participate in supply management programmes and also becomes eligible to receive deficiency payments.

The effect of these programmes is to raise production independently of actual demand. Faced with the costs of continued price support, over-production and a static market, the U.S. government also engages in ad hoc export promotion programmes.

Nevertheless, the European Union negotiators have been unable to take advantage of this situation because of the overriding concerns of certain Member States to a continued Common Agricultural Policy. During both the Tokyo and the Uruguay Rounds of multilateral negotiations, the European Union negotiators have continuously repeated the view that the CAP is an inviolable cornerstone of the Union and would be protected at all costs during the negotiations.

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[188] US Congressional Quarterly, February 23, 1991, p.466.

[189] 99 Stat. 1354 (1985).

However, even from an economic perspective, it is difficult to defend the position that the agricultural community should have greater levels of support than the industrial sector or that foreign farmers should tolerate greater export competition than foreign manufacturers, unless political considerations are taken into account. Despite the artificial nature of this differentiation, the 1979 Subsidies Code places great emphasis on the separate treatment of subsidies on primary and non-primary products.

(2) Export Subsidies on Agricultural Products

Article 10(1) of the 1979 Subsidies Code reiterates the obligation of Article XVI(3) of the GATT, as amended, by stating:

> "[S]ignatories agree not to grant directly or indirectly any export subsidy on certain primary products in a manner which results in the signatory granting such subsidy having more than an equitable share of world export trade in such product, account being taken of the shares of the signatories in trade in the product concerned during a previous representative period, and any special factors which may have affected or may be affecting trade in such products."

According to Article 10(1), the test of 'equitable share' is to be applied by reference to 'the shares of signatories in trade in the product concerned' during a previous representative period. This terminology is adapted from Article XVI(3), which makes it clear that equitable share is to be determined by reference to the

relative shares of other contracting parties.[190] The concepts of 'more than an equitable share' and 'a previous representative period' are elaborated in Article 10.

The fundamental defect in the application of the concept of 'equitable share' is that insufficient guidelines or assistance has been agreed - either in Article XVI(3) or Article 10 - to facilitate its operation. When the concept was originally conceived in the Havana Charter, it was accompanied by a number of economic and factual criteria designed to facilitate its application.[191] Not surprisingly, the few panels required to apply Article XVI(3) have been required to fill the lacunae left by this omission and have relied extensively on the draft text of the Havana Charter.[192]

Article 10 of the Code attempts to clarify the application of 'more than an equitable share' by moving the concept closer towards that of 'displacement'.[193] The notion of displacement was derived from an attempt by the United States to concentrate on the more tangible concepts of the displacement of non-subsidised exports by subsidised competition, and 'price undercutting'. The phenomenon of displacement has been considered by panels in two separate investigations dealing with the pre-Code law of Article XVI.[194] In one case in particular, a

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[190] No account need be taken of the shares of non-contracting parties.

[191] ITO Charter, Article 28(4).

[192] French Assistance to Exports of Wheat and Wheat Flour Case, GATT BISD, 7th Supplement, 46 (1959).

[193] Article 10(2)(a), 1979 Subsidies Code.

[194] European Community Refunds on Exports of Sugar (No. 1), GATT BISD, 26th Supplement 69 (1979); and European Community Refunds on Exports of Sugar (No. 2), GATT BISD, 26th Supplement 290 (1979). For an analysis

panel, elaborating on displacement, stated that 'equitable share' should include situations in which the effect of an export subsidy granted by one contracting party was to displace the exports of another contracting party, bearing in mind developments in world markets.[195]

The Code also does not incorporate any provision dealing with the need to establish a causal connection. Elements other than a subsidisation programme may have caused an increase in share. Factors which affect market shares, and which operate independently of subsidisation, include the inadequacy or inefficiency of supplies from alternative sources, the imposition of voluntary restrains, climatic conditions, such as crop failure or drought, or advantages in transportation, both in speed and in relative cost.[196] Nor is the issue of cumulation of the effect of subsidised products from a number of different countries considered.

Another basic problem in the functioning of the 'equitable share' system of Article 10 arises because the concept is integrally connected with the movement away from an absolute prohibition on export subsidies towards judging prohibited subsidies according to vague economic criteria which are intended to separate permissible from impermissible subsidies according to their effects. Article 10, and for that matter Article XVI(3), fails to identify the forms and degree of interference with established trade patterns. This

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of these rulings, see J.S. Estabrook, "EC Resistance to the Enforcement of GATT Panel Decisions on Sugar Export Subsidies", (1982) 15 Cornell Int'l Law Journal 397.

[195] European Community Refunds on Exports of Sugar (No. 2), ibid.

[196] See generally, C. Phegan, "GATT Article XVI:3: Export Subsidies and 'Equitable Shares'", (1982) 16 JWTL, 251, 259.

criticism was evident in one panel report into the use of export subsidies on primary products which declared itself incapable of applying the formula because it was:

> "...unable to conclude as to whether the increased share has resulted in the Union 'having more than an equitable share' in terms of Article 10, in light of the highly artificial levels and conditions of trade in wheat flour, the complexity of developments in the markets, including the interplay of a number of special factors, the relative importance of which it is impossible to assess, and, most importantly, the difficulties inherent in the concept of 'more than an equitable share'."[197]

This is a clear endorsement of the view that the test itself is unworkable in light of the complex interplay of economic factors in the international market-place.[198]

In fact, this panel made a number of recommendations for the revision of the terms of Article 10 itself. After consideration of the artificial levels and conditions of trade in wheat products, the panel suggested that certain of these problems could be reduced by improving the transparency of the provision and through cooperation in international trade circles.[199] Further, it was deemed necessary to establish a clearer and more

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[197] European Community Subsidies on Exports of Wheat Flour, GATT Doc. SCM/42, Para. 5.3 (1983).

[198] On this report, see M. Coccia, "Settlement of Disputes in GATT Under the Subsidies Code: Two Panel Reports on EEC Export Subsidies", (1986) 16 Geo. J. Int'l & Comp. Law 1.

[199] Supra note 197, Para. 5.9.

comprehensive understanding of the concept of 'more than an equitable share' in order to render the operation of the test feasible. Neither of these proposals was ever adopted.

### (3) Export Subsidies on Industrial Products

Article 9(1) of the 1979 Subsidies Code declares the deceptively simple principle that "Signatories shall not grant export subsidies on products other than certain primary products." The Code does not define the concept of an export subsidy, but contains an Illustrative List in Annex I to the Code as a source of reference.[200] It must be conceded that Article 9(1) is a marked improvement on Article XVI(4) of the GATT, as amended, which merely forbid contracting parties from introducing export subsidies on non-primary products when they resulted in the sale of export products at a price lower than that charged for the same product in the domestic market. This standard was generally referred to as the 'bi-level price' or the 'dual pricing' requirement.[201]

The legal consequences of the prohibition on these export subsidies should be the obligation not to grant such subsidies and, in the case of a violation, to remove the offending measure. If, after being found in violation, a subsidising state refuses to remove a

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[200] Article 9(2), 1979 Subsidies Code.

[201] On the difficulties of applying dual pricing, see United States Tax Legislation on Domestic International Sales Corporations, GATT BISD, 23rd Supplement, 98, Para. 72 (1977); French Indirect Taxation Practices, GATT BISD, 23rd Supplement, 114 (1977); Belgian Indirect Taxation Practices, GATT BISD, 23rd Supplement, 127 (1977); and Netherlands Indirect Taxation Practices, GATT BISD, 23rd Supplement, 137 (1977). See also the Report of the Panel on Export Inflation Insurance Schemes, GATT BISD, 26th Supplement, 330 (1980).

measure, compensation should be provided, or, alternatively, the state should be the subject of retaliation authorised under the GATT. Since the use of a prohibited subsidy would be a violation of the express terms of the GATT, a prima facie case of nullification and impairment arises, and no proof of injury is necessary.

Not surprisingly, the normal consequences of a legal obligation have not followed from this prohibition. The normative influence of this rule has been completely undermined in its application. This is best illustrated by considering the jurisprudence of the GATT panels on the application of the rule. However, it should also be noted that despite the absolute nature of the prohibition, few investigations have been conducted into allegations of export subsidies on manufacturing goods under the Code.

In the most significant case to date - the European Union Subsidies on Exports of Pasta Case[202] - the United States alleged that European Union refunds on pasta products violated the commitments made in Article 9. The panel concluded that the Union regulations in question, which created a system for granting refunds to exporters of pasta, conferred an export subsidy. This was due not only to the fact that the system was financed from public revenue, but also because the system operated to increase exports of this product from the European Union. In making its final determination, the panel was of the opinion that the application of the legal obligation under Article 9 was clear and capable of unambiguous application. As a result, the European Union was found in violation of its commitments under the 1979 Code.

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[202] GATT Doc. SCM/43 (1983), not yet reported.

One might think that this was a successful application of the prohibition. In fact the procedural mechanism accompanying the application of the rule demonstrates how the decision was devalued in terms of normative efficacy. The European Union immediately adopted a hostile approach to the findings of the panel. It blocked the adoption of the report in the Council, which ultimately led to complete blockage of panel reports in the Subsidies Committee. The matter was only resolved through a bilateral arrangement between the United States and the European Union.[203]

A second complaint against European Union subsidies was also lodged by the United States in 1991 against the financial assistance provided to Airbus Industrie.[204] The programme is an example of the kind of cooperation that the European Union seeks to foster and has created an aerospace company with the potential to break the near-monopoly presently held by American companies in the production of medium and long-haul civil aircraft.[205] Nevertheless the success of the Airbus programme has been achieved only with substantial financial assistance for the governments of the

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[203] See Settlement in the Form of an Exchange of Letters Between the EEC and the USA on Community Exports of Pasta Products to the United States, OJ L275/37 (1987).

[204] The Airbus programme involves a consortium of four separate aircraft manufacturers from different Member States of the European Union: Deutsche Airbus (Germany), a subsidiary of Daimler-Benz; Aerospatiale (France), a state-owned corporation; British Aerospace (United Kingdom), and Alenia (Italy), also a state-owned enterprise. The project was launched in 1968, originally in an attempt to coordinate the commercial activities of the various European aeronautics industries and to stimulate cooperation.

[205] See Commission Proposal, COM(88) 294 (1988) and Resolution of the European Parliament, 16 November 1987, OJ C 305 (1987).

participating states. This so-called 'launch aid' was required to defray the costs incurred in the research and development of suitable aircraft models.[206]

It is the provision of launch aid that has give rise to the dispute between the United States and the European Union. The United States argued that the quantity and form of launch aid given to the Airbus programme amounted to subsidies because the repayment terms were too liberal.[207] In reply, the European Union argued that, without launch aid, no aeronautical endeavour would be viable since the costs of such programmes are prohibitive and the payback periods too long to finance the development of new aircraft from the private sector or the capital markets.

The complaint stemmed from a failure to negotiate a limit on the amount of direct subsidies to assist in the development of aerospace programmes. The United States proposed a ceiling of twenty-five percent on government launch aid for new aircraft programmes, but this was rejected by the European Union which argued for a limit of forty-five percent.[208]

Throughout the history of the Airbus programme, the provision of state assistance has been regularly scrutinised by the Commission and indeed substantial

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[206] For the background to the programme, see D. Stevens, "Industrial Cooperation: The Take-Off of Airbus", (1986) 1 Schuman Journal, 43.

[207] According to a recent United States Department of Commerce Report, the Airbus project has received $13.5 billion in financial assistance, the interest on which would amount to more than $25 billion had the funds been derived from commercial private sources; see The Economist, June 15, 1991, 76.

[208] Oxford Analytica, Report No. 910513 (August 1991).

consideration was given by the European Commission to the German government assistance to Deutsche Airbus[209], the principal cause of the complaint lodged by the United States with the Subsidies Committee.[210] Although the European Commission has no mandate to review state assistance against international standards, the Commission review raised a number of interesting points.

First, the aid awarded to the firm formed part of the German government's policy of ending direct public aid for the Airbus programme and was intended to promote the restructuring of the German civil aviation industry in order to improve its efficiency and international competitiveness. Second, the governmental assistance in the programme was tied to the Airbus programme and could not be used for any other purpose. Third, in view of the economic and technical importance of the aviation industry to the Union, cooperation in this sector was to be encouraged, particularly as the project itself involved production and marketing in cooperation with several Member States. As a result, the Commission concluded that the German aids qualified for exemption under Article 92(3)(b), as being an important project of common European interest.

In contrast, in the United States complaint, it was alleged that the German exchange rate insurance scheme for Deutsche Airbus violated the GATT Subsidies Code.[211] From the nature of the complaint, the United States

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[209] See, for example, First Commission Report on Competition Policy (1971), points 176-178; Second Commission Report on Competition (1972), points 100-103; and Fifth Commission Report on Competition Policy (1975), points 113-115.

[210] Nineteenth Commission Report on Competition Policy (1990), point 172.

[211] GATT Focus No. 80, 8 (April 1991).

government clearly perceives that the subsidies in question constitute export subsidies since the complaint itself refers to item (j) in the Illustrative List of export subsidies which identifies as an export subsidy, 'the provision by governments...of exchange risk programmes, at premium rates, which are manifestly inadequate to cover the long-term operating costs and losses of the programme'.

A dispute-settlement panel was established by the Subsidies Committee to investigate the complaint which alleged that the German exchange rate insurance scheme for Deutsche Airbus violated certain provisions of the Subsidies Code. The panel eventually concluded that the programme was an exchange-risk scheme within the meaning of Item (j) of the Illustrative List as it conferred a net benefit on the company since not all costs and losses were recouped by the reimbursement mechanisms included in the programme.[212] It also considered that the components delivered by the German company to Airbus Industries were exported from Germany to France. Therefore the scheme applied to exports and was prohibited by Article 9 of the Subsidies Code. The panel's conclusion was that the exchange rate guarantee scheme 'should be brought into conformity with Article 9 of the Subsidies Code'.

The panel report was considered at a Committee meeting in April 1992. The European Union was highly critical of the legal argumentation in the report; in particular, the European Union asserted that the panel had applied incorrect notions of what constituted exports and export subsidies.[213] While the European Union opposed the

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[212] European Economic Community - German Exchange Rate Scheme for Deutsche Airbus, GATT Doc. SCM/142 (1992), not yet reported.

[213] GATT Activities Report 1992, 39 (1993).

adoption of the report, measures had already been taken on the future financial structure of the scheme. In fact, the German government had concluded negotiations with the company for the refinancing of the programme.

This episode illustrates the clash of principles behind the European Union's own policy objectives, in the form of industrial and economic strategic planning and its international obligations. It also demonstrates the impotency of the whole structure for regulation of subsidies. In fact the dispute, not surprisingly, was again settled by a bilateral accord between the European Union and the United States. In July 1992, the European Commission and the U.S. government reached agreement on a bilateral accord on trade in aircraft.[214] This agreement set a ceiling on direct support for production at 33% of the total development costs and an indirect support limit of 3% of turnover for the project and 4% for individual manufacturers.[215]

(D) An Obituary for the Subsidies Code 1979

The 1979 Subsidies Code, and the organisational structure that it established, sufferred from a form of paralysis brought about mainly by a lack of consensus in the formulation of its rules. The text of the agreement incorporated too many compromises during its negotiation and as a result its obligations had a limited normative effect. The complex formula which were negotiated, particularly in relation to export subsidies, relied too

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[214] European Commission, Press Briefing, July 23rd, 1992; European Commission, Press Briefing, April 2, 1992.

[215] Agreement Between the EEC and the USA Concerning the Application of the GATT Agreement on Civil Aircraft, O.J. L301/32 (1992).

heavily on the inchoate and underdeveloped principles contained in Article XVI of the GATT.

The Subsidies Committee was unsuccessful in resolving fundamental issues, particularly concerning the uniform interpretation and application of the Agreement. Indeed, no uniform approach was conceived to evolve, develop or interpret the principles behind the Code in the Subsidies Committee. This led to a divergence in opinions as to the role of the Committee in the evolution of the obligations under the Code.

Some signatories contended that the Committee had both the right and competence to undertake work to clarify the existing provisions of the Code and to make those provisions more effective.[216] Those signatories took the view that the committee had well-defined responsibilities regarding the regulation of subsidies and that other signatories had an obligation to ensure that those responsibilities were effectively discharged by it.

This view was denounced by both the United States and the European Union which maintained that the Committee had no competence to expand upon the original obligations contained in the Code and that it was an inappropriate forum for the negotiation of additional obligations. The ensuing debate ensured that the second view prevailed.

A number of technical deficiencies also plagued the functioning of the Agreement. The omission of a definition of 'subsidy' and the perplexities caused by retaining the distinction between export subsidies on agricultural and manufactured products are both obvious

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[216] Report of the Subsidies Committee, GATT BISD, 33rd Supplement, 197, 202 (1987).

shortcomings. Neither of these problems was resolved by the inclusion of the Illustrative List as an annex to the Code. Nor did the Code establish rules to quantify the amount of a subsidy, or to exclude de minimis subsidies from its scope.

The Chairman of the Subsidies Committee himself also pointed to a list of problems which had not been settled in the working groups established under the authority of the Committee. These included: the improvement of the notification process; the application of the Article 8 disciplines to prevent subsidies causing serious prejudice; the failure to establish increased disciplines under Article 10, including greater definition of 'more than an equitable share', 'special factors' and a 'previous representative period'; and the application of Article 9 to primary components of processed products.[217]

All these problems were compounded by the failure of the notification and consultation procedure to establish a more friendly environment. Clearly the four stage process of consultations, conciliation, dispute resolution and countermeasures did not provide an effective procedure to remedy violations of the substantive rules. Both the dearth of complaints and the failure to prevent the obstruction of adverse reports support this view.

In fact, the agreement seems to have served to highlight the divisions between the United States and the European Union rather than to have encouraged reconciliation, cooperation, dialogue and integration between them. Complaints alleging violations of the Code were regularly met with counterclaims accusing the

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[217] Report of the Subsidies Committee, GATT BISD, 33rd Supplement, 197, 203 (1987).

complaining state of equivalent practices in different guises. For example, the United States complaint against Union subsidies on wheat flour was immediately followed by a Union complaint against the United States alleging unlawful subsidisation of wheat sales to Egypt.[218] Another illustration is the complaint by the United States against the Airbus programme which was met by a counterclaim that American companies receive equal indirect support through government-financed military and space research programmes.[219] These tactics caused a stalemate within the consultation scheme of the Code, a condition which has been aggravated by the prevention of the adoption of reports.

The impact of this failure on the increased use of unilateral measures of administered protection was considerable. The negation of these rules encouraged a more vigorous use of national countervailing duty measures. Certain states, particularly the United States, demonstrated a propensity to resort to such procedures in accordance with Track I of the Code (countervailing measures) at the expense of recourse to the forums for dispute settlement established under Track II. A greater willingness to counter subsidies with countervailing duties has emerged because Track II failed to define those subsidies against which remedial action could taken and because it imposed the burden of proof on the complaining party.[220]

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[218] Report of the Subsidies Committee, GATT BISD, 30th Supplement, 39, 42 (1984).

[219] Report of the Subsidies Committee, GATT BISD, 35th Supplement 185 (1991).

[220] See J. Terry, "Sovereignty, Subsidies and Countervailing Duties in the Canada-United States Trading Relationship", (1988) 46 University of Toronto Faculty of Law Review, 48.

After 1990, efforts to amend the failures and ambiguities in the 1979 Code were abandoned as the emphasis of negotiations shifted to the Negotiating Group on Subsidies and Countervailing Measures at the Uruguay Round discussions.[221] Indeed, the European Union expressed the view that it considers the continuation of the status quo established under the 1979 Code as 'unhealthy for the multilateral system'.[222] Clearly, the lack of precision in the existing rules raises the spectre of continuing tensions and harassment through unilateral measures.

Whether or not the negotiators at the Uruguay Round discussions learned through the mistakes made in the 1979 Code can only be ascertained by an extensive examination of the terms of the new Agreement on Subsidies.

### (4) Stage Three: Starting Again After Learning From Past Misconceptions and Mistakes?

#### (A) The Scale of the Difficulties in Reaching a Viable Consensus on Restraints on Subsidies at the Uruguay MTNs

Almost immediately after the publication of the text of the 1979 Subsidies Code, there was widespread criticism that its provisions would be insufficient to tackle the problem of subsidies at the international level.[223]

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[221] GATT Activities Report 1989 (1990), 119.

[222] Communication of the Permanent Representative of the European Community to the GATT Director-General, GATT Doc. MTN.TNC/W/36 (November 26, 1990).

[223] See, J.H. Jackson, "The Constitutional Problems of the International Economic System and the MTN Results", (1979) Proc. ASIL, 56-64; and J. Tarullo, "The

Gradually, as signatories sought alternative means to resolve their grievances, the complete absence of any working consensus behind the operation of the agreement became apparent.[224] The GATT contracting parties therefore displayed little hesitation in placing the issue of the international regulation of subsidies, only six years after the Code's conclusion, on the agenda for the Uruguay Round of multilateral trade negotiations.[225]

The task facing these negotiators was immense in light of the volume of subsidies provided by developed nations to both the agricultural and industrial sectors. In June 1991, the Organisation for Economic Cooperation and Development (OECD) estimated that subsidies to the agricultural sector in the developed nations amounted to $US 176 billion, equivalent to forty-four percent of the value of the crops and livestock produced in these countries.[226]

At the same time, despite the prohibitions on export subsidies in the 1979 Code on non-primary goods, subsidies to encourage industrial production were common particularly in the United States and the European Union. The steel industry, the motor vehicle industry and ship-building were a few of many examples where international competition was artificially maintained by government intervention. Between 1986 and 1988, the

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MTN Subsidies Code: Agreement without Consensus", in S. Rubin & G. Hufbauer (eds), Emerging Standards of International Trade and Investment (1984), 63-99.

[224] This rift was particularly noticeable in the area of agriculture. See M.A. Echolos, "The United States - EEC Agricultural Export Stand-Off", (1983) 77 Proc. ASIL, 119.

[225] Ministerial Declaration on the Uruguay Round, GATT BISD, 33rd Supplement, 19 (1987).

[226] OECD, Agricultural Policies, Markets and Trade: Monitoring Outlook (1991).

European Commission estimated that approximately four percent of the gross value of manufactured goods made in the European Union consisted of state aid.[227] This average increased according to the sector under consideration, and in many instances, the Member States. For example, in the shipbuilding sector, the percentage of gross value added by subsidies in this period averaged 68% for France, 28% for Italy, 25% for the United Kingdom, 17.5% for Spain and 16.6% for Germany.

After more than four years of intensive negotiations, the Trade Negotiation Group on Subsidies and Countervailing Measures produced an Agreement on the Interpretation and Application of Articles VI, XVI and XXIII of the GATT, which was submitted for adoption at the Brussels meeting in December 1990.[228]

The main source of disagreement at the negotiations related to reductions in agricultural subsidies, a related matter, but one which was discussed in the Trade Negotiation Group on Agriculture, not the Group on Subsidies and Countervailing Duties.[229] Originally, at the Brussels Ministerial meeting in December 1990, the European Union was prepared to offer a 30% cut in agricultural support over a ten year period, using 1986 as the base year for computing reductions[230], while the

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[227] Second Survey on State Aids in the European Community in the Manufacturing and Certain Other Sectors (July 1990), 10.

[228] Draft Final Act on the Uruguay Round Multilateral Trade Negotiations, GATT Doc. MTN.TNC/W/35 (November 1990).

[229] GATT Activities 1989, 49-52 (1990).

[230] Notably, the European Parliament differed from the Commission on negotiating strategy. The External Affairs Committee of the Parliament observed that:

> "The European Parliament supports the Commission's proposal for a 30% reduction in

United States and the Cairns Group wished cuts of 75% in domestic support and 90% in export subsidies, using 1990 as the base year.[231]

The European Union proposals were rejected, resulting in the suspension of discussions. After the negotiations were recommenced, the European Union expressed the intention of significantly revising the Common Agricultural Policy. The decision by Commissioner MacSharry to advance 'complete and detailed proposals' on reforming the Common Agricultural Policy, although ostensibly unrelated to the negotiations in Geneva, publicised the fact that the European Union was prepared to reorganise the policy in line with its obligations under the GATT.[232]

While the reform of the CAP was ostensibly proposed as a European Union own-initiative, the momentum for change also came from the multilateral trade negotiations themselves.[233] Quite clearly, the European Commission was placed in a difficult position; it was required to agree to new international rules on agricultural subsidies while at the same time accommodating the interests of the Member States when reforming the shape

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> agricultural subsidies in order to help make a success of the Uruguay Round, but believes that consideration should also be given to phasing out export subsidies."

Stavrou Report on the Stage Reached in the MTSs Within the Uruguay Round of GATT, point 56 (September 1990).

[231] See C. Yeutter, "The U.S. Negotiating Proposal on Agriculture in the Uruguay Round", in Petersmann & Hilf, supra. On the economic impact of these proposals, see B.J. McDonald, "Agricultural Negotiations in the Uruguay Round", (1990) 13:3 World Economy, 299-327.

[232] See European Commission Press Briefings - Council of Agricultural Ministers, 15 July 1991.

[233] European Commission, The Development and Future of the Common Agricultural Policy, COM(91) 100 (1991).

of the Common Agricultural Policy. The consistency of the reformed CAP and the international rules will be considered in detail later in this work.[234]

## (B) The Key Concepts Behind the New Restraints on Subsidies Negotiated in the Uruguay Round Agreement

The Second Subsidies Agreement is a more legalistic document than its predecessor.[235] It contains complex formula for determining whether subsidies are prohibited, actionable or non-actionable. Detailed rules are also established for identifying those subsidies that fall within the scope of the agreement, for assessing the effects of subsidisation programmes and for quantifying subsidies. Different remedies are also specified, depending on the nature of the subsidy that forms the basis of the complaint. More importantly, many of the inherently defective and artificial distinctions embodied in the 1979 Subsidies Code have been discarded.

No distinction is made in the Second Subsidies Agreement between export subsidies on agricultural commodities and subsidies on industrial products. Nor does the Agreement place as much emphasis on the distinction between domestic and export subsidies for the purpose of imposing restrictions. It contains a more flexible and adaptable structure to regulate the treatment of different categories of subsidies.

The Second Subsidies Agreement represents a significant movement towards the promotion of legalism and adjudication in international economic affairs and a

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[234] See text infra, pp.442-451.

[235] Agreement on Subsidies and Countervailing Measures, GATT Doc MTN/FA II-A1A-4 (December 1993).

regression from the diplomacy-oriented system that characterised the first three decades of the functioning of the GATT.[236] Whether this is sufficient is another matter and one that can only be ascertained by examining the content of the Agreement itself.

(1) Defining the Concept of Subsidy

No definition of subsidy was provided in the original text of the GATT, despite the fact that the term was employed in both Articles VI and XVI.[237] Nor was any definition added by the amendments to Article XVI. Agreement on the nature and concept of a subsidy was unattainable during the Tokyo Round of multilateral trade negotiations and hence the 1979 Code did not remedy this defect.[238]

The absence of a definition was originally portrayed as not presenting an insurmountable obstacle to the

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[236] GATT Secretariat, Final Act of the Uruguay Round - Press Summary, reproduced at [1994] 17:3 World Economy 365.

[237] Further, it is not clear whether this term is used interchangeably in these two provisions. See G. Horlick, R. Quick & E. Vermulst, "Government Action Against Domestic Subsidies", (1986) 1 Legal Issues of European Integration, 1, 9-10.

[238] Note 22 to Article 7 of the 1979 Code merely states:

> "In this Agreement, the term 'subsidies' shall be deemed to include subsidies granted by any government or any public body within the territory of a signatory."

This statement merely reaffirms that subsidies are creatures of government intervention rather than clarifies the nature of a subsidy for the purpose of the Code.

regulation of subsidies.[239] In retrospect, it is reasonably clear that the omission of a definition in the 1979 Code was a substantial contributing factor to the demise of the codification and progressive development of the terms of that Agreement. The inability of the signatories to agree on the essential elements of this concept also retarded progress towards the negotiation of obligations concerning the application of the terms of the Code itself.[240]

At the Uruguay negotiations, there was general consensus among the participants that a definition of subsidy was required as a foundation for regulation. Hence the Second Subsidies Agreement contains a detailed formula for identifying those subsidies that fall within the scope of the agreement. Article 1(1) of the agreement contains the following definition:

> "[A] subsidy shall be deemed to exist if there is a financial contribution by a government or any public body within the territory of a Member...or there is any form of income or price support in the sense of Article XVI of the GATT 1994 and a benefit is thereby conferred."[241]

The definition itself concentrates on the factual aspects of a particular measure. Unlike many of the

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[239] GATT Report on the Use of Subsidies, GATT BISD, 10th Supplement, 201, 208 (1962). More recently, see the views of the GATT Secretariat in Tokyo Round of Multilateral Trade Negotiations, Report by the Director-General (1979), 53-54.

[240] J.H.J. Bourgeois, "The GATT Rules for Industrial Subsidies and Countervailing Duties", in E-U. Petersmann & M. Hilf, The New GATT Round of Multilateral Trade Negotiations (1988), 219, 228.

[241] Emphasis added.

earlier proposed definitions, in both the Havana Charter [242] and the suggestions of experts[243] , no reference is made in the definition to the macro-economic or micro-economic effects of a particular practice as a means of identifying it as a subsidy. This avoids the undesirability of creating rules based on economic data. In addition, this formulation also evades reference to the intentions or motives of the government in providing the assistance.

Instead, Article 1(a)(1) of the Second Subsidies Agreement identifies several forms, or types, of practices which are deemed to constitute subsidies, although this is clearly an non-exhaustive list. First, direct transfers of funds from governments in the form of grants, loans or equity infusions, as well as potential direct transfers or liabilities, such as loan guarantees, are considered subsidies. Second, government revenues that are due, but which have been forgiven or remain uncollected such as, for example, tax credits, fall within the scope of the definition.[244] Third, the supply of goods and services by the government, other than by way of establishing a general infrastructure, is specifically included. Fourth, and finally, any direct or indirect payments made by a government to private

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[242] Reproduced in W.A. Brown, The United States and the Restoration of World Trade (1950), 516-517.

[243] For example, compare the two academic definitions in the following textbooks; H. Malmgren, International Order for Public Subsidies (1977), 22; and E. McGovern, International Trade Regulation (2nd edition, 1986), Para. 11.12.

[244] In accordance with the Interpretive Note to Article XVI of the GATT, the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.

bodies for the purposes of providing the functions elaborated in these other three illustrations constitute subsidies. In addition to these four types of subsidies, any form of income or price support in the sense of Article XVI of the GATT 1994 is deemed a subsidy.

These illustrations are examples of the formal transactions which constitute subsidies according to the Agreement, and do not relate to the purpose for which these forms of assistance are granted. The purpose of a measure is relevant only for classifying a subsidy as prohibited, actionable or non-actionable.

These measures do not fall within the scope of the agreement unless they satisfy two additional requirements. First, they must confer a benefit on a recipient and, second, they must be specific within the meaning of Article 2 of the Agreement.

(2) Financial Contribution/Transfer of a Benefit

Article 1(b) of the Second Subsidies Agreement requires that a benefit must be conferred upon a recipient before financial assistance qualifies as a subsidy for the purpose of the Agreement. The existence of a benefit is the sine qua non of a regulated subsidy, since the rationale for disciplining subsidies is the artificial competitive advantage that such assistance confers on the beneficiary. However, unlike the related provisions for assessing the quantum of a subsidy for the purposes of defining serious prejudice under Article 6(1)(a), the Agreement does not provide means to quantify a subsidy. Obviously, where the subsidy takes the form of a direct grant, it is relatively simple to quantify the benefit. Equally, the benefit of a tax credit can be ascertained by means of a simple calculation. But loan guarantees,

for example, cause greater problems because of the difficulties of calculating the cost for providing the service.

The requirement that a benefit is bestowed by the subsidy does not indicate whether the benefit is to be calculated on the basis of the value to the recipient or the cost to the government.[245] Since there is no reference in the provision to the 'cost' of a programme, a strong case may be made supporting the proposition that the cost to the government is not the critical consideration.[246] It is more likely that this requirement will be construed to mean that a commercial enterprise must be in a more advantageous economic position compared to its situation prior to the grant of the benefit.

### (3) The Specificity Standard

The origins of the specificity test, as it applies to the differentiation between actionable and non-actionable subsidies, lies in the administration of United States countervailing legislation.[247] Nevertheless, since its conception, the principle has been increasingly embraced by other GATT contracting

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[245] Submissions by the European Community on the Elements of the Negotiating Framework [hereinafter the European Community Submissions], GATT Doc. MTN.GNG/NG/W/31, 4-5 (1990).

[246] See J.H. Jackson, The World Trading System: Law and Policy of International Economic Relations (1989), 264-265.

[247] The specificity test was first applied by the United States in the Certain Steel Products from Belgium Case, Appendix 4, 47 Federal Register 39,304 (1982). See also Cabot Corporation v United States 620 F. Supp. 722 (1986).

parties, including the European Union.[248] The Union has in fact been an enthusiastic convert to the standard, and during the Uruguay Round discussions, actively promoted the need for such a test to distinguish between general measures designed to stimulate economic activity as a whole and specific programmes that are designed to assist identifiable beneficiaries.[249] This would, of course, assist the European Union to protect most Union-wide programmes of assistance.

The fundamental purpose of the specificity test is to isolate those practices which are prohibited or actionable under the Agreement from those which, although qualifying as subsidies in terms of Article 1, do not fall within the regulatory provisions of the Agreement.[250] The specificity test does not relate to the definition of subsidies per se, but is an additional criterion for identifying those subsidies that are regulated by the imperative parts of the Agreement.[251]

In practice, the application of the specificity test is confined to distinguishing between specific and non-specific domestic subsidies, since all export subsidies - both direct and indirect - are deemed specific by express terms in the Agreement.[252]

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[248] See Imports of Soya Meal Originating in Brazil, Decision of the European Commission, Decision 85/223, OJ L/106/19 (1985); and Fediol v EC Commission, Case 188/85 [1988] ECR 4193.

[249] Communication from the Permanent Representative of the European Community to the Director-General, GATT Doc. MTN.TNC/W/36 (1990).

[250] Article 1(2), Second Subsidies Code.

[251] Namely, Parts II, III and V of the Second Subsidies Code.

[252] Article 2(3), Second Subsidies Code. See K. Adamantopoulos, "Subsidies in External Trade of the EEC: Towards a Stricter Legal Discipline", (1990) 15:6

Four rules have been established to assist in the determination of whether a domestic subsidy is specific to an enterprise or industry, or a group of enterprises or industries.

**Rule 1:** A subsidy is not specific if the government authority or the legislation introducing or maintaining the programme establishes objective criteria or conditions governing the eligibility for such programmes, provided that the eligibility is automatic and these criteria and conditions are respected by the administering authorities.[253]

**Rule 2:** Specificity shall not be deemed to exist if a programme which is prima facie discretionary has in fact been administered in such a fashion as not to limit access to the subsidy to certain enterprises nor to award amounts of subsidies so as to direct the subsidy to particular enterprises.[254]

**Rule 3:** If access to a subsidisation programme is limited to certain enterprises, either by the implementing legislation or the administering agency, such a programme is deemed to be specific.[255]

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European Law Review, 427.

[253] Article 2(1)(b), Second Subsidies Code. In addition, the criteria or conditions regulating the programme must be set out in law, or must be capable of verification.

[254] Article 2(1)(c), Second Subsidies Code. Such an assertion must be supported by a clear indication, substantiated on the basis of positive evidence, that the programme has not in fact been administered in a restrictive manner.

[255] Article 2(1)(a), Second Subsidies Code.

**Rule 4:** A subsidy which is available to all enterprises located within a designated geographical region is deemed specific, irrespective of the nature of the granting authority.[256]

In the past, one of the major concerns, certainly of the European Union, is that subsidies that are de jure generally available may in fact be distributed in a selective manner and in effect constitute de facto specific subsidies.[257] Both rules one and two recognise this possibility and establish anti-circumvention provisions that, in the event that a de jure generally available subsidy is administered in such a discriminatory manner as to constitute a specific subsidy, this will be sufficient to identify the subsidy in question as specific.

Numerous factors are relevant to establishing the existence of de facto specificity, including the degree of discretion enjoyed by the administering agency and the presence, or absence, or 'objective criteria' or conditions for exercising this discretion. Objective criteria implies standards that are neutral, which do not favour particular enterprises, and which are economic in nature and horizontal in application.[258] Examples of such factors include levels of unemployment, average per capita income, the number of employees, and the size of individual enterprises.

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[256] Article 2(1)(d), Second Subsidies Code. However, this provision is inapplicable to regional subsidies which are non-actionable under Article 8 of the Agreement. The conditions for differentiating these two categories are not expressly stated.

[257] See European Community Submissions, supra note 249, 5.

[258] Interpretative note 1 to Article 2(1)(b), Second Subsidies Code.

The specificity test does, however, fail to give detailed consideration to the problem of the treatment of products which have been constructed or manufactured from components or inputs that have been manufactured with the benefit of subsidies. These 'input' or 'upstream' subsidies constitute indirect forms of financial assistance to finished products, and create problems when the final product enters the international market.[259] Should the specificity test apply to the final product as well as the component product, or should products that have merely indirectly, and even unintentionally, benefitted from such assistance be exempt from the scope of the test? The Code itself is silent on this matter, although logic suggests that action should only be taken against products on which a demonstrable specific subsidy has been conferred.

A related matter is the issue of the pricing of natural resources, particularly fuels. Many countries provide natural resources to their own domestic industries at prices lower than those made available, if ever, to foreign industries or purchasers. For example, in 1982, the Mexican government used its nationalised oil industry to sell carbon black feed-stock to Mexican producers of carbon black at a fraction of the world price.[260] Mexican producers could therefore sell their final product at a substantially reduced price, thereby undercutting foreign competition.[261] Frequently, natural resources are maintained at a low price for domestic

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[259] See generally, S-L. Hsu, "Input Dumping and Upstream Subsidies: Trade Loopholes Which Need Closing", (1986) 25 Columbia Journal of Transnational Law, 137.

[260] This issue was considered in Cabot Corporation v United States, 620 F.Supp 722 (1985).

[261] See J.M. Bradham, "The Natural Resources Subsidy Bills: Should They Be Adopted?", (1987) 20 Cornell Int'l Law Journal, 197.

producers to provide indirect assistance. Such subsidisation benefits both domestic producers and exported goods. How does the specificity test handle products that have benefitted for such advantages without specific provisions?

(4) Assessment of the Viability of the Subsidy Definition

The definition of subsidy contained in the Second Subsidy Code is no doubt a considerable improvement on the pre-existing situation. The absence of a definition naturally retarded the ability of the Subsidies Committee in the progressive interpretation of the international rules relating to subsidies.

At the same time, the definition itself and its related provisions are neither unambiguous nor completely precise. For example, the definition does not answer the question whether or not a failure or an omission on the part of a government to regulate a particular activity would constitute a subsidy for the purposes of the Agreement.[262] If, for example, one state refuses to impose minimum standards of acceptable pollution control, while all others enter into an international obligation to do so, is the failure to regulate the country's industries a subsidy conferring a competitive advantage to domestic producers?[263]

Similarly, is the failure of a government to impose minimum safety, employment conditions, social security

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[262] See K.S. Komoroski, "The Failure of Governments to Regulate Industry: A Subsidy Under the GATT?", (1988) 10:2 Houston Journal Int'l Law, 189.

[263] See T.K. Plofchou, "Recognising and Countervailing Environmental Subsidies", (1992) 26 Int'l Lawyer 763.

benefits, or minimum wage conditions, a subsidy? Clearly, from the definition provided, it would be difficult to establish that such omissions satisfied the test of specificity.

(C) The New Restraints on Subsidies Under the Second Subsidies Agreement

Fortunately the new Agreement abandons many of the artificial distinctions which served to retard the proper functioning of the regime established under the 1979 Subsidies Code. The distinction between domestic and export subsidies is continued, but it no longer serves a pivotal role in the new order. Similarly, the distinction between export subsidies on primary products and non-primary products passes into history.

Instead, a more workable formula has been proposed whereby subsidies are classified, according to their form or effect, into one of three categories: prohibited subsidies, actionable subsidies, and non-actionable subsidies. This classification creates three distinguishable 'baskets' of subsidies and is more generally known as the 'red, yellow and green light' approach.[264]

Prohibited subsidies are subsidies that cause international concern and in addition to being the subjects of prohibitions on use also justify the imposition of countervailing duties (red light). Actionable subsidies are subsidies that cause international concern only when they produce certain economic effects, such as serious prejudice or

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[264] See J.H. Jackson, The World Trading System: Law and Policy of International Economic Relations (1989), 262.

nullification and impairment (yellow light). Finally, non-actionable subsidies are subsidies which rarely give rise to international apprehension and which do not appreciably distort the natural patterns of international trade (green light).[265]

Naturally, the success or failure of this scheme depends on whether the international community is able to agree on the classification of the broad spectrum of subsidies that exist in international trade. Indeed, at present, there is no consensus as regards the classification of subsidisation practices.

Separate remedies have been provided for complaints alleging each of these three different types of subsidies. These remedies are graduated in intensity depending on the seriousness of the alleged practice. But on the whole, the Agreement maintains the theme of requiring signatories to engage in consultations prior to dispute resolution, although stricter time limits have been placed on these efforts.

(1) Prohibited subsidies

Two types of subsidies are prohibited by Article 3(1) of the Agreement. These are:

(a) Subsidies contingent, in law or in fact whether solely or as one of several other conditions, upon export performance, including those enumerated in the illustrative list of export subsidies; and
(b) Subsidies contingent, whether solely or as one

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[265] See generaly, G. Klienfeld & D. Kaye, "Red Light, Green Light? The 1994 Agreement on Subsidies and Countervailing Duty Measures, Research and Development Assistance and U.S. Policy", (1994) 28:6 JWT 43.

of several other conditions, on a preference for domestic goods over domestic goods.

Signatories are absolutely prohibited from granting subsidies which fall within the scope of either of these rules.[266]

The relationship between the prohibition of Article 3(1)(a) and practices that are specifically excluded in the illustrative list from being export subsidies is clarified by an interpretative note which declares that measures referred to in the list as not constituting export subsidies are not prohibited under Article 3.[267]

Article 3(1)(a) of the Agreement is the counterpart provision of Article 9 of the 1979 Subsidies Code. The prohibition applies to all export subsidies - on both agricultural products and non-agricultural (ie. manufactured) products - if they confer a benefit to a firm or industry contingent on export performance.

The provision also distinguishes between de jure and de facto export subsidies. A de jure export subsidy occurs when a signatory enacts legislation or regulations specifically intended to confer a subsidy. A de facto export subsidy is created when the legislation or regulation under which the programme is maintained was not prima facie designed to confer an export subsidy, but which has this effect when the legislation is implemented or administered in a particular manner.[268]

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[266] Article 3(2), Second Subsidies Code.

[267] Interpretative Note 2, Article 3(1)(a), Second Subsidies Code.

[268] Numerous examples of the distinction between de jure and de facto non-tariff barriers exist in the jurisprudence of GATT panels. An example of a de jure non-tariff barrier is the enactment of standards for the

The extension of the prohibition to government practices that are in fact subsidies is an anti-circumvention device designed to discourage the introduction of disguised export subsidies and therefore promotes the principle of transparency.

Unfortunately, the Agreement does not establish clear guidelines for identifying de facto export subsidies. In its submissions during the negotiation of the Agreement, the European Union offered the following proposal:

> "De facto export subsidies are those where facts which are known - or should clearly have been known - to the government when granting the subsidy demonstrate that the subsidy, without having been made expressly contingent upon export performance, was indeed intended to increase exports"[269]

But, introducing the element of intention on the part of governments conferring subsidies would itself require placing reliance on uncertain and indeterminate factors. The process would involve imputing intentions to governments which may differ from the stated intentions of the same authorities, given either in public or when

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manufacturing or sale of products intended to discriminate between foreign and domestic goods contrary to Article III of the GATT; Canadian Import, Distribution and Sale of Alcoholic Drinks by Provincial Marketing Agencies, BISD, 35th Supplement, 37 (1989). In contrast, an example of a de facto non-tariff barrier is where, without express statutory authority, a government agency adopts a policy of requiring foreign companies to purchase minimum quantities of domestic goods in order to secure permission for direct investment; Canadian Administration of the Foreign Investment Review Act, BISD, 30th Supplement, 140 (1984).

[269] Elements of the Negotiating Framework, Submissions by the European Community, GATT Doc. MTN.GNG/NG10/W/31 (November 1989).

notifying a programme to the Subsidies Committee under the notification obligation. This would inevitably foster diplomatic tension and ill-will.

A more constructive proposal would be to place greater emphasis on the factual circumstances surrounding the administration and application of the programme. Evidence of a de facto subsidy could include, for example, increases in the volume of exports attributable to the programme, the proportion of production exported by recipient undertakings, the eligibility criteria upon which the subsidy was administered, the existence of conditions relating to export performance and the policies pursued by the administering agencies.

Article 3(1)(b) of the Code addresses the problem of programmes that perpetuate or increase discrimination between imported and domestic products. It will be recalled that Article III(4) of the GATT requires that contracting parties shall accord 'treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.' However, this otherwise comprehensive obligation is subject to the proviso that it 'shall not prevent the payment of subsidies exclusively to domestic producers'.[270] The terms of Article 3(1)(b) appears to be an attempt to close this loophole as far as subsidies which favour domestic products over imported products is concerned.

Yet it is unclear how much further this provision extends the existing obligations of the contracting parties under the terms of the GATT, particularly in

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[270] Article III(b), GATT.

light of recent panel decisions. In two cases, domestic subsidies which favoured nationally-produced goods over imports were held contrary to the general obligations of the GATT.[271]

A proposal from the U.S. delegation to clarify which domestic subsidies would be subject to the prohibition was rejected by the negotiating group on subsidies. The United States had proposed to identify such subsidies by form and suggested the following list: grants to cover operating losses by businesses; the direct forgiveness of debt; loans at subsidised rates; the provision of equity capital where the expected rate of return was negative; subsidised loan guarantee programmes; and subsidies contingent upon production performance.[272] The adoption of this proposal would have facilitated identification of prohibited domestic subsidies by form. But it was rejected by those delegations emphasising the importance of domestic subsidies in the development of national economies.

Whenever a signatory believes that a prohibited subsidy is being granted or maintained by another signatory, that signatory may request consultations which are to be held as quickly as possible.[273] The purpose of these consultations is to clarify the facts of the situation and to arrive at a mutually acceptable solution to the problem. The signatories have thirty days to reach a settlement through consultations, after which either

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[271] European Community - Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes, GATT Doc. L/5778 (1985), not yet reported. See also the earlier panel report in Italian Discrimination Against Imported Agricultural Machinery, BISD, 7th Supplement 60 (1959).

[272] GATT Focus No. 75, 9 (October 1990).

[273] Article 4(1), Second Subsidies Code.

party may refer the matter to the Committee on Subsidies and Countervailing Measures for review.

If the matter is referred to the Committee on Subsidies, that body is authorised to conduct a review of the evidence presented to support the allegation of the use of a prohibited subsidy, but must provide an opportunity to the accused signatory to explain the measure in terms of the Code. In deciding whether or not a measures is a prohibited subsidy, the Committee on Subsidies may refer the matter to the Permanent Group of Experts which is instructed to review the matter and to report back to the Committee on Subsidies.

In the event that an affirmative decision is rendered on the issue of prohibited subsidy, the Committee is empowered to 'recommend' that the subsidising signatory immediately withdraw the offending subsidy.[274] Signatories found to be indulging in the use of prohibited subsidies are obliged to 'promptly comply with the recommendation'. If the signatory fails to comply with the recommendation, the Committee can authorise any signatory affected by the offending subsidy to take appropriate countermeasures. It will be interesting to see how willing the Committee is to authorise this ultimate sanction.

(2) Actionable Subsidies

A subsidy is actionable if it produces adverse effects to the interests of other signatories. Actionable subsidies are not therefore defined according to either their purpose or form. Article 5 of the Agreement instructs signatories to refrain from causing, through the use of a regulated subsidy, 'adverse effects' to the

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[274] Article 4(6), Second Subsidies Code.

interests to another signatory. Three examples of adverse effects are provided:

(a) injury to the domestic industry of another signatory;
(b) nullification or impairment of benefits accruing directly or indirectly to other signatories under the GATT, including, in particular, the benefits of concessions bound under Article II of the GATT; and
(c) serious prejudice to the interests of another signatory.

Each of these concepts is elaborated upon, to a certain degree, in the Agreement with varying degrees of specification and precision.

Injury to the domestic industry of another signatory is defined as 'material injury to a domestic industry, threat of material injury to a domestic industry, or material retardation of the establishment of such an industry', and is to be interpreted in accordance with Article 15 of the Agreement.[275] The transposition of the concept of material injury from the regime governing the application of national countervailing measures was a principle supported mainly by the European Union.[276] The belief was that the concept should be developed in the subsequent jurisprudence of the GATT, and that the failure of such a development in the past was more attributable to the defects of the dispute settlement procedures than a flaw in the concept itself.

The concept of nullification or impairment of benefits

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[275] Interpretative Note 1 to Article 5, Second Subsidies Code.

[276] See European Community Submissions, supra note 245, 7.

under the GATT is, of course, not new to GATT regulatory structures.[277] While Article 5(b) specifically alludes to nullification or impairment of benefits under Article II of the GATT, this effect could, in theory, be caused by eroding any of the benefits negotiated under the GATT, including the obligations relating to the reduction on non-tariff barriers. The nullification or impairment standard is generally recognised as ambiguous and has been the subject of considerable criticism.[278]

In contrast to both these, the principle of 'serious prejudice' has been defined in considerable detail in the Agreement which suggests that this principle will play a more active role in the identification of adverse effects than the two other standards.[279]

The remedies prescribed by the Subsidies Agreement for redress against actionable subsidies are broadly similar to those established to counter prohibited subsidies. First, the parties concerned are required to engage in consultations.[280] Any request for consultations must include a statement outlining any available evidence to support the existence of an actionable subsidy, as well as proof of injury, nullification or impairment, or serious prejudice. Second, if a mutually acceptable solution has not been achieved through consultations within sixty days, the matter may be referred to the

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[277] See Australian Ammonium Sulphate Case, BISD, Vol. II, 188 (1952), and more recently, European Community - Production Aids Granted on Canned Fruits, GATT Doc. L/5778 (1985), not yet reported.

[278] See R.E. Hudec, "Regulation of Domestic Subsidies Under the MTN Subsidies Code", in D. Wallace, Legal Treatment of Domestic Subsidies (1984), 1-18.

[279] Articles 6(1) and Annex IV, Second Subsidies Code.

[280] Article 7(1), Second Subsidies Code.

Subsidies Committee.[281] However, there are no detailed provisions in the Code specifying the procedure which the Committee is to adopt for deciding that actionable subsidies exist.

If the Committee determines that a subsidy has resulted in adverse effects to the interests of another signatory within the meaning of Article 5, the signatory granting or maintaining the subsidy is required to take 'appropriate steps' to remove the offending subsidy.[282] If no such steps are taken within the prescribed period[283], and in the absence of agreement on compensation, the Committee may authorise the affected party to take 'countermeasures', commensurate with the degree and nature of the adverse effects determined to exist.

Although no elaboration on the concept of countermeasures is made in the Agreement, it is reasonable to assume that such action will take the form of retaliation by way of the suspension of concessions granted. The major guiding principle is that countermeasures must remain in proportion to the original offence.

(3) Non-actionable Subsidies

The primary reason for classifying certain types of domestic subsidies as non-actionable is because often such practices do not distort international trade, or because their effects, if any, are so negligible as to be insignificant. If the effects of a programme are minimal, naturally the injury that it will cause is

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[281] Articles 7(4) and 7(5), Second Subsidies Code.

[282] Article 7(6), Second Subsidies Code.

[283] Presently set at six months.

nominal. However, of course the main problem in defining non-actionable subsidies is to separate subsidies that cause harm from those that do not, and to derive acceptable general principles for implementing rules based on this rationale.

Article 8(1) of the Agreement is of such significant importance in this connection as to warrant reproduction:

> "Signatories agree that the following shall be considered non-actionable:
>
> (a) subsidies which are, within the meaning of Article 2, de jure generally available and which are not deemed to be specific in fact;
> (b) subsidies which are specific within the meaning of Article 2 but which meet all of the conditions provided [for exemption]."

This scheme clearly envisages two categories of non-actionable subsidies: (a) generally available, or non-specific, domestic subsidies; and (b) domestic subsidies that are specific, but which satisfy the conditions expressly provided for exemption.

### (a) Subsidies outside the scope of the definition provided in the Agreement

Naturally, measures which fail to satisfy the conditions established in Articles 1 and 2 of the Agreement for identifying regulated subsidies, for example, because a practice does not involve a financial contribution from a public source, do not fall within its scope and are not considered to fall within any of the three categories, including non-actionable subsidies. Action on the part of public authorities which does not involve

the expenditure of public funds or a charge to the public account cannot be considered subsidies and therefore a fortiori cannot be subject to the disciplines set out in the Agreement.

Similarly, if a measure is a non-trade related government activity, it is unlikely that it will qualify as a specific subsidy for the purpose of Article 2. Such measures are frequently of a general nature and concern, for example, education, culture, health, social welfare and the general infrastructure of a state. Action taken in these fields may have an indirect effect on the economy of a country, and ultimately on the international economy, but they are not regulated subsidies because they merely contribute to setting the framework for a nation's economic and business environment. They do not directly affect the competitive position of firms.

(b) Exempt Non-actionable specific subsidies

Specific domestic subsidies are deemed to be non-actionable if they have been granted for any one of four purposes: to assist research and development; to facilitate structural adjustment; to encourage the adaptation of existing facilities to stricter environmental protection standards; and to provide assistance to disadvantaged regions.[284] Individual and rigorous conditions are specified in the agreement to regulate each of these exemptions.

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[284] Article 8(2), Second Subsidies Code.

## (5) Evaluation and Assessment of the Second Subsidies Agreement

The most difficult area, which is also extremely complex, is the relationship between the Second Subsidies Agreement and the Agreement on Agriculture.[285] The Agriculture Agreement distinguishes between 'domestic support commitments' (essentially domestic subsidies) and 'export subsidy commitments'(essentially export subsidies).[286] Parties to the Agreement are required to reduce their domestic support commitments in favour of agricultural producers in accordance with a schedule negotiated as an Annex to the Agreement. The commitments are expressed in terms of Total Aggregate Measurements of Support[287] and Annual and Final Bound Commitment Levels. For both the United States and the European Union the commitment is to a reduction of 20% of each agricultural product falling within the terms of the Agreement over a period of six years.

The Agreement on Agriculture then goes on to regulate agricultural export subsidies. The regulated export subsidies are specified in the Agreement without any reference to the Annex to the Second Subsidies Code which defines export subsidies and quite clearly is not as exhaustive as the Annex itself.[288] In other words,

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[285] Agreement on Agriculture, GATT Doc. MTN/FA II-A1A-3 (December 1993).

[286] Articles 6 and 9, Agreement on Agriculture.

[287] Aggregate Measurement of Support is defined as 'the annual level of support, expressed in monetary terms, provided for an agricultural product in favour of the producers of the basic agricultural product'; Article 1(a), Agreement on Agriculture.

[288] The Agreement defines the following as export subsidies: (a) the provision by governments or their agencies of direct subsidies, including payments-in-kind, to an industry, to producers of an agricultural

agricultural export subsidies not caught under the Agricultural Agreement will be regulated by the Second Subsidies Code which is an unsatisfactory position. Again each party has a schedule containing an annex which quantified the maximum permissable levels of export subsidies each year. For both the United States and the European Union export subsidies are to be reduced by 36% over a six-year period and the actual volume of subsidised exports by 21% over the same period.

From this analysis, it is clear that agricultural export subsidies clearly fall into the prohibited category, but once the reductions are complete, it appears that they will remain in this category even although a considerable volume of export subsidisation will continue to exist. In some ways, therefore, the Agreement on Agriculture legitimises these subsidies whereas the Second Subsidies Code would prohibit them. This cross-over problem has placed these subsidies in a twilight area of regulation which will eventually lead

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product, to a co-operative or other association of producers, or to a marketing board, contingent on export performance; (b) the sale or disposal for export by governments or their agencies of non-commercial stocks of agricultural products as a price lower than the comparable price charged for the like product to buyers in the domestic market; (c) payments on the export of an agricultural product that are financed by virtue of government action, whether or not a charge on the public account is involved, including payments that are financed from the proceeds of a levy imposed on the agricultural product concerned or on an agricultural product from which the exported product is derived.; (d) the provision of subsidies to reduce the costs of marketing exports of agricultural products including handling, upgrading and other processing costs, and the costs of international transport and freight; (e) internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments; and (f) subsidies on agricultural products contingent on their incorporation in exported products.

to de facto recognition of their legitimacy.

The problems regarding domestic subsidies have been alluded to earlier but the Agriculture Agreement also legitimises those domestic subsidies which might have otherwise fallen into the actionable category. Quite clearly the result is confusing. The failure to link the two Agreements is the cause of this problem and this failure may eventually appear as a crack in the structure.

A number of technical deficiencies will also plague the operation of the Agreement. First, the Subsidies Committee, or a subsidiary organ, should have been given explicit authority to elaborate on the existing Illustrative List of Export Subsidies, particularly in light of the modern developments in this sphere. Second, the product coverage of the Agreement remains to be decided, taking into consideration other work being carried out in the Uruguay Round negotiations. Third, no general de minimus rule has been established, below which the effect of a subsidy may be deemed non-actionable.

However, the main technical source of contention is the types of subsidies which will be included in the so-called 'green box' and which will therefore be non-actionable. There is little doubt that this issue has not been satisfactory resolved and the vagueness of the category has allowed both the European Union and the United States to take unilateral interpretations of this category.

The European Union vigorously lobbied for direct payments to its farming community to be placed in this category. The position of these negotiators was that

such assistance did not distort trade.[289] Only if this proposal was accepted could the European Union introduce the necessary cuts in its farm price support system through which it could meet the targets for dismantling subsidies agreed in the Agriculture Negotiation Group. However, the Agreement does not expressly confirm that this position was accepted by the other parties.

### (6) Observations

From a global perspective, there are a number of genuine grounds why rules regulating subsidies are desirable. It was legitimate that certain states, including the United States, has reacted to the waste of global resources which accompanied the proliferation of subsidies which served little social or economic purpose. The gross excesses of production, particularly in agricultural products, penalised developing countries which have a legitimate expectation in the establishment of an equitable environment for conducting trade.

At the same time, the motives of countries supporting the reduction of levels of subsidisation were not altruistic. Their negotiating positions were extensions of their domestic policies and were designed to achieve political objectives. No developed state advocated the reduction of subsidies for the benefit of developing countries. In fact, in much of the negotiations, the predicament of developing states was largely ignored and their delegations excluded from the negotiations.

More fundamentally, perhaps, rules of international law must be based on a minimum degree of consensus. If states cannot reach this minimum consensus, the result

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[289] European Commission, Press Briefing, January 16, 1992.

will be an ineffective rule. In other words, the subjects of the legal system must at least passively acknowledge or agree that compliance with the rule is in their long-term strategic interests. This provides the primary motivation for abiding by the terms of the rule.

The evolution of the international rules for the use of subsidies, at least until the Second Subsidies Agreement, illustrates that this consensus was non-existent. The rules contained in the 1979 Subsidies Code embodied too much compromise and not enough genuine agreement among the parties. The United States, on the one hand, clearly believed that the rules could be employed to attack subsidisation policies of many states, most notably the European Union, when these were not in line with its perception of proper forms of international behaviour. The European Union on the other hand entered into negotiations with the overall objective of diluting the ability of other states to attack its subsidisation policies. It was therefore no surprise that the 1979 rules fragmented within a few years of their coming into effect.

It was also a mistake to base international rules regulating subsidies on economic theory. Such an approach ignored the profound non-economic interests which remain a legitimate factor in this formulation. It was highly unlikely that a state would be willing to abandon a proposed programme of financial assistance when national interests were involved solely in deference to international rules. Quite simply, the degree of compunction imposed by such a body of rules was insufficient to override the pressures imposed from inside that state by the various diverse national interest groups and even the government itself to grant such assistance.

The failure of the Subsidies Code 1979 at the technical level can also be attributed to the artificial nature of the concepts on which its principles were based. For example, the distinction between export and import subsidies and between agricultural and industrial subsidies cannot be implemented without effective guidelines to classify a particular programme into a specific category. The result was that there was always grey areas between these categories.

Similarly, the non-actionable/actionable/prohibited classification being introduced by the Second Subsidies Agreement was a primary weakness in this structure. There were insufficient rules to categorise particular programmes into each of these baskets. This situation was not alleviated by an effective organisational structure to develop rules over time to classify these programmes. This forum became a battle ground for a number of developed states. It was here that we saw the fragmentation of the system when there existed no international consensus underpinning the formulation of the rules.

On the other hand, the ditching of the various unworkable formula contained in the 1979 Code is to be welcomed in the Second Subsidies Agreement. For example, the 1979 Code relied too heavily on the archaic concept of nullification and impairment. This formulation was never effective and substantially contributed to the 'soft law' perception of the GATT. It is welcome that the new Agreement moves away from these vague notions to a more black and white legalistic model since it is a necessary quality in an effective rule that there is a distinction between legal and illegal conduct. Certainly the Second Subsidies Agreement formulations improve on the pre-existing structure; the question remains whether or not these improvements are enough.

It is also a welcome development that the concept of subsidy itself has been more clearly defined in the Second Subsidies Agreement. This was a recurring deficiency in the regulation of subsidies since the conception of the GATT. It has been a factor which has allowed the system to be opened to ridicule. At the same time, the specificity standard will be a critical aspect in the functioning of an effective definition of subsidies. The present writer has reservations as to whether or not the rules as formulated in the Second Subsidies Code will be sufficient to allow the proper identification of specificity.

It must also be questioned whether or not the international community has learned from the problems in the resolution of disputes which emerged in the very early stages of the operation of the 1979 Code. The panel process should have been abandoned in favour of direct arbitration or adjudication and failure to have done so will have consequences in the future. The desirability too of having a more effective enforcement mechanism is obvious.

The litmus test of the effectiveness of the new rules can be judged when we turn to examine at a later stage the internal decision-making processes within the United States and the European Union. If, for example, the European Union decides that the formulation of the future Common Agricultural Policy will be determined with a view to adhering to the new international rules then this would be an overwhelming endorsement of these rules. Conversely, if the European Union is bombarded by complaints to reform the CAP by states such as the United States or the Cairns Group, we shall quickly see a revulsion manifested by the European Union for future compliance with the international rules. The same perspective can be applied to industrial subsidies such

as those in ship-building and aerospace sectors.

If the new Subsidies Code is effective, we shall see a progressive change in patterns of subsidisation from the use of illegal measures introduced without reference to the international rules towards more carefully formulated policies drafted in terms of the international rules. This may not necessary mean a progressive reduction in the present global levels of subsidies but rather a trend towards the use of domestic subsidies instead of export subsidies.

# 3 The Negotiation of International Restraints on Measures of Administered Protectionism

One of the most important observations from the last chapter was that international rules appear to increase in normative efficacy in proportion to the degree of consensus underpinning the content of such rules. This consensus materialises as a consequence of a perception of mutual or reciprocal benefit among the states formulating the rule. Unfortunately, when the international restraints on measures of administered protectionism are reviewed it is apparent that this consensus evaporates especially when the interests of the United States and the European Union conflict. Why this phenomenon occurs will be examined in detail in this chapter.

In this chapter three specific questions will be addressed. To what degree have effective international disciplines to regulate this type of behaviour been negotiated? What has been the influence of the United States and the European Union in the negotiation of these rules? How effective are these rules at restraining unilateral interpretations and applications by the United States and the European Union of their terms?

Measures of administered protection consist of national laws and regulations which allow domestic producers to seek protection from the effects of foreign competition by establishing procedures which permit national officials to grant relief against foreign imports, generally in the form of temporary increased duties. The GATT expressly permits mechanisms of administered protection to counter dumping and to neutralise foreign subsidies.[290] These two forms of protection provide

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[290] Article VI, General Agreement.

relief against certain trading practices on the part of foreign manufacturers, producers or exporters.

Although measures of administered protection take different guises, and are designed to counter different forms of behaviour, they do have a number of important features in common. First, they are creatures of national (or supranational) law and function on the basis of national (or supranational) legislative authority. Although international rules have, in the past, been agreed under the auspices of the GATT to limit the most disruptive forms of administered protectionism, each of these devices is applied by national officials and is primarily subject to review by national or supranational courts.

Of course, any over-compensation in the application of these measures attributable either to the illegal application of these measures (ie. in a manner not in conformity with the international standards) or the liberal provision of relief, would penalise foreign producers and manufacturers. It is this discrimination that raises the spectre of the prejudicial application of administered protection.

Second, these measures influence the behaviour of foreign manufacturers or producers either by neutralising any competitive advantage which might have accrued or by requiring them to refrain from certain practices.

Third, each of these measures can be directed against a specific country, product, or even, under certain circumstances, against a single foreign producer. Thus, administered protection allows states to circumvent the general prohibitions against national discrimination

contained in many GATT provisions.[291] These measures are ideal for private companies to harass foreign competitors a fact which has even been acknowledged in governmental circles. For example, a recent report by the U.S. Congressional Budget Office concluded:

> 'Many of the legal provisions and procedures that have evolved (in anti-dumping and subsidy laws) - especially those used for calculating dumping margins - are biased against foreign exporters and against U.S. consumers of foreign goods.'[292]

Finally, and most significantly, all forms of administered protection involve the pursuit of unilateral solutions to international problems at the expense of the multilateral dispute resolution processes. Seeking unilateral solutions to trade problems is fundamentally inconsistent with both the spirit and many of the principles of the GATT which is designed to encourage the use of multilateral trade diplomacy and, when the states involved are the United States and the European Union, places the international trading system under immense pressures.

The scope and volume of instances where administered protection has been granted, especially in the 1980s and early 1990s, strongly suggest that these devices now play a significant role in influencing the shape and content of United States and European Union trade

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[291] C.H. Nam, "Export-Promoting Subsidies, Countervailing Threats and the GATT", (1987) 1:4 World Bank Economic Review, 727.

[292] U.S. Congressional Office, Report on Anti-Dumping and Countervailing Duty Laws (June 1994), 5.

policy.[293] The number of petitions lodged in the United States and the European Union seeking such protection is prima facie powerful evidence that commercial transactions are now substantially affected by such measures.[294]

Throughout the 1970s, the United States was the principal protagonist of the development and use of measures of administered protection. While American anti-dumping and countervailing legislation predates the coming into force of the GATT, investigations were infrequently conducted into practices alleged to violate these rules prior to 1970.[295] In contrast, since the late 1970s, there has been a progressive increase in the use of such measures - particularly anti-dumping and countervailing duty actions. In the 1980s and 1990s, the use of such mechanisms has become commonplace.[296]

The European Union has in fact followed a parallel course and since the early 1980s has increasingly resorted to administered protection - particularly anti-dumping actions - as a means of limiting imports. However, the use of anti-subsidy measures by the Union

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[293] See J.M. Finger & J. Nogues, "International Control of Subsidies and Countervailing Duties", (1987) 1:4 World Bank Economic Review, 707.

[294] Substantial evidence supporting this proposition has existed since the early 1980s. See J.M. Finger, H.K. Hall & D.R. Nelson, "The Political Economy of Administered Protection", (1982) 72 American Economic Review, 452.

[295] See E.B. Butler, "Countervailing Duties and Export Subsidisation: A Reemerging Issue", (1968) 9 Virginia Journal of International Law, 82; and for earlier, P.D. Ehrenhaft, "Protection Against International Price Discrimination: United States Countervailing and Anti-Dumping Duties", (1958) 58 Columbia Law Review, 44.

[296] P. Van Phi, "A European View of the GATT", (1986) Int'l Business Lawyer 152.

has been considerably more restrained compared to similar action by the United States.

In reality, the phenomenal growth in the number of anti-dumping investigations initiated by developed states poses a greater problem to international trade than the growth in countervailing duties. Unlike countervailing duties, in which the United States is the greatest advocate, there is a greater proliferation in the adoption of anti-dumping measures by countries such as Australia and Canada as well as the European Union.

For example, between July 1991 and June 1992, the United States commenced 45 investigations, while between January 1992 and December 1992, the European Union opened 39 new cases. However, during the same period there were over 200 anti-dumping orders in force in the United States and over 150 in the European Union.[297]

Another disturbing phenomenon is that there is also substantial evidence that anti-dumping measures are being used both by the European Union and the United States as a substitute for the legitimate safeguards procedure authorised by Article XIX of the GATT.[298] The decline in resort to safeguard measures stems from the fact that these actions require applicants to establish serious injury while anti-dumping actions require the lesser standard of material injury.[299] Since material injury is easier to prove, there has been a noticeable shift in applications from safeguard actions to anti-dumping actions.

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[297] Annual Report of the Anti-Dumping Committee, GATT BISD, 38th Supplement 297, 301 (1993).

[298] See J. Bhagwati, Protectionism (1989), 44-53.

[299] B.M. Hoekman & M.P. Leidy, "Dumping, Anti-Dumping and Emergency Protection", (1989) 23:5 JWT 27.

Further, there is little doubt that the use of anti-dumping measures has become a serious threat to the continued process of trade liberalisation and international attempts to arrest this growth have been relatively ineffective. It seems pointless to continue the process of binding tariffs and reducing tariff levels if the liberalisation being brought about by such reductions is being undermined by allowing states to unilaterally impose additional tariffs in the form of anti-dumping duties.

But the trade distorting effect of measures of administered protection is not confined to the actual imposition of duties. Even the very lodging of a complaint requesting measures of administered protection has a significant harassment effect. Although such complaints may eventually be dismissed, the expense of answering allegations of subsidies in terms of legal expenses, translation costs, costs for analyzing, collating and providing the necessary information, means that many exporters are deterred from continuing to export either because of the uncertainty created by the existence of the allegation or because the costs of defending the action outweigh any possible profit.[300]

Although it is true that lodging a complaint also incurs expense for producers, it is unlikely that these will be equal to those incurred by foreign suppliers fighting allegations of subsidies. First, generally, imports account for a smaller proportion of domestic consumption than national production and therefore the additional

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[300] The legal costs alone in defending an allegation of anti-dumping in the United States is estimated between $60,000 and several million dollars by the GATT Secretariat. The average costs in defending such cases range from between $151,000 and $553,000; Trade Policy Review Mechanism of the United States 1989 (March 1990), 289.

expense will often be distributed over a greater number of production units for domestic firms than foreign companies. Second, foreign exporters will generally have to instruct lawyers in the country in which the allegation is made which, more often than not, requires instructions from lawyers in the home country, thereby multiplying costs.

At least one study by an economist in this field has provided evidence that the econometric identification of the element of harassment caused by the lodging of such complaints proves that the rate of growth of imports into the United States was significantly reduced in the case of products that had been subject to contingent protection investigations.[301]

## (1) The Theoretical Basis for Anti-Dumping and Countervailing Duty Measures and Conceptual Problems in Their Application

### (A) Anti-Dumping and the Concept of Dumping

The concept of dumping is deceptively straight-forward. The Anti-Dumping Code 1979 provides the following definition:

> "[A] product is to be considered as being dumped, ie. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another, is less than the comparable price, in the

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[301] J.M. Finger, "The Industry-Country Incidence of Less-Than-Fair Value Case in United States Import Trade", (1981) 21:2 Quarterly Review of Economics and Business, 21.

ordinary course of trade, for the like product when destined for consumption in the exporting country."

If products are deemed to have been dumped, the importing state is entitled to impose a duty equal to the difference in prices. This is known as an anti-dumping duty, and is measured in terms of the margin of dumping, which is merely the difference in price.[302]

Dumping has been characterised as an 'unfair commercial practice' since the early twentieth century, despite the fact that it occurs as a purely private commercial phenomenon and that the hand of the state is not present in the process. Many economic rationales have been advanced to justify counter-measures.[303] The following are the most common justifications for the imposition of anti-dumping duties and yet the persuasiveness of none of these is compelling.

(1) International price discrimination

A frequently voiced justification for anti-dumping measures is that dumping causes price discrimination.[304] Within a national market, price discrimination occurs when suppliers of goods charge different prices to different customers for the same goods. For a variety of reasons, one customer may be willing to pay more for a particular item than another. Suppliers often take advantage of this distinction to charge the consumer in

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[302] Article VI(2), General Agreement.

[303] G. Yarrow, "Economic Aspects of Anti-Dumping Policies", (1987) Oxford Review of Economic Policy 66.

[304] This was one of the main arguments adduced by Mr Neumann, Director-General DGIC1, European Commission, in his presentation entitled "The Justification for Anti-Dumping", unpublished manuscript, April 1993.

greater need more than the consumer who needs the products less.

On the other side of the equation, purchasers charged higher prices are placed at a disadvantage compared to those charged lower prices when the goods are either resold or incorporated into another product and then sold. At the same time, price discrimination fragments markets, a phenomenon discouraged in most states by competition or anti-trust law.[305] In the absence of such segmentation, a customer could merely purchase the products at a lower price and sell them to customers prepared to pay the higher price.

Dumping is deemed to cause price discrimination at the international level and therefore anti-dumping measures are justified to prevent inequitable trading conditions.[306] Since this practice is prohibited at the national level, the international consensus among developed states is that it should be discouraged at the international level.[307] If producers in one country acquire goods at prices less than those paid in another, they will acquire a competitive advantage in the manufacture or distribution of products incorporating those goods.[308] There are two main flaws in this justification.

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[305] B.S. Fisher, "The Anti-Dumping Law of the United States: A Legal and Economic Analysis", (1973) 5 Law & Pol'y Int'l Bus., 85-93.

[306] See A.V. Deardorff, "Economic Perspectives on Anti-Dumping Law", in J.H. Jackson & E.A. Vermulst, Anti-Dumping Law and Practice (1990), 23-39.

[307] P.D. Ehrenhaft, "Protection Against International Price Discrimination: United States Countervailing and Anti-Dumping Duties", (1958) 58 Columbia Law Review, 43.

[308] See M.S. Knoll, "United States Anti-Dumping Law: The Case for Reconsideration", (1987) 22 Texas Int'l Law Journal, 265-290.

First, even within national markets there are rarely uniform price levels for specific products.[309] Why should such market conditions be assumed in the international market-place, and in particular between importing and exporting countries in anti-dumping investigations? Economic analysis suggests that uniform pricing of products only exists when four conditions are present:

- the products are perfectly interchangeable and consumers have no reason, other than personal preference, to prefer one product over another;
- there is no large scale purchasing of the products in question that could disturb the supply and demand relationship for the products;
- both buyers and sellers have sufficient knowledge of pricing and conditions of sale in order to respond quickly to price changes by competitors; and
- there are no permanent barriers to entry and export of the products in question.

Since these conditions rarely, if ever, exist in a domestic market, they are unlikely to exist in the international market, other than perhaps for trade in commodities.

The second major inconsistency is that the country imposing the anti-dumping duty is the one that would otherwise benefit from the price discrimination.[310] It

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[309] J. Hagelstam, "Some Shortcomings of International Anti-Dumping Provisions", (1991) 25:5 JWT 99, 100-101.

[310] See M.D. Rowat, "Protectionist Tilts in Anti-Dumping Legislation of Developed Countries and the LDC Response", (1990) 24:5 JWT 5.

is the country of origin that would suffer loss as a result of its firms dumping goods in foreign markets. If a domestic manufacturer sells goods to foreign companies at a price less than to domestic customers, then, all things being equal, the foreign company will be able to undercut the prices of the domestic company.

Realistically, states imposing anti-dumping duties infrequently, if ever, do so to redress the imbalance between domestic and foreign manufacturers caused by their producers acquiring a competitive advantage.

(2) Disposal of surplus production

Plants and manufacturing facilities are designed for certain levels of production. During periods of economic stagnation within one country, it may be economically viable for an industry to continue to manufacture at a particular level and to dispose of its surplus production at a reduced price in another state.

The economic explanation for this phenomenon is complex, but basically, according to economic theory, in the short term, a firm can continue to function economically as long as the prices charged cover the variable costs of manufacturing the goods.[311] In the calculation of the cost of producing a particular good, there are two types of costs. Fixed costs are charges that do not vary with output, for example normally rent, interest on capital, etc. These costs are fixed because no matter the volume of output, these charges must be met. Variable costs are charges that alter relative to production, and commonly include labour, raw materials, power, etc.

During periods of slack demand, a company can continue

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[311] J.H. Barton & B.S. Fisher, International Trade and Investment (1986), 276-277.

production if it can sell its goods at a price that will cover its variable costs. This is because, any amount obtained over the variable costs will contribute towards the fixed costs that have to be paid in any event.[312] The point is that, the production of goods in such circumstances requires the disposal of excess surplus in markets that are separate from that in which the production takes place. Otherwise the manufacturer would not be able to sell any goods at all other than at a price to cover variable costs. The result is that dumping, in the technical sense of the term, occurs. Yet, it arises as nothing more than an accepted form of commercial practice that is often necessitated by the economic climate in which a producer finds itself.[313]

(3) Promotional pricing

Promotional pricing arises when a manufacturer or exporter is introducing a product onto the foreign market for the first time. In order to compete with existing products, the goods are sold at a loss to encourage changes in consumer preferences.[314]

Obviously, this form of dumping is a short-term strategy since its utility diminishes as customers experience the product. If the manufacturer has not managed to attract a sizeable volume of consumers during the promotional campaign, it is unlikely that he will be able to

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[312] See C.T. Horngren, Cost Accounting: A Managerial Emphasis (Fourth edition, 1977), 259-293.

[313] See J.H. Jackson, "Dumping in International Trade: Its Meaning and Context", in Jackson et al, supra note , 1-22, 20-22; J.H. Jackson, The World Trading System (1989), 218-221; and J.H. Jackson & W.J. Davey, International Legal Relations (Second edition, 1986), 650-653.

[314] See R. Boltuck, "An Economic Analysis of Dumping", (1987) 21 JWTL, 45.

continue to charge such prices over the long-term. Again, it would seem that this reason for dumping is not particularly injurious to the domestic economies of the countries in which the products are destined.

(4) Predatory (or target) pricing

Together with price discrimination, predatory pricing is most frequently offered as a justification for the maintenance of anti-dumping measures.[315] Predatory pricing is a strategy by which the foreign producer intends to eliminate all domestic competitors manufacturing identical or similar products. Products are sold on the foreign market-place below the prices charged by the domestic manufacturers until all competition is eradicated. Thereafter, in the absence of other similar products to substitute, the foreign manufacturer can reap the profits from monopoly pricing.[316] Companies already in a dominant position in a market can also abuse that position by charging lower prices to discourage potential rivals from entering that market.[317]

Economic analysis does not, however, support the proposition that predatory pricing is an efficient marketing strategy.[318] The profits that are acquired

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[315] See Deardorff, supra note 306, 35-36.

[316] See P. Smith, "The Wolf in Wolf's Clothing: The Problem With Predatory Pricing", (1989) 18 EL Rev., 209, 211-214.

[317] See S. Davies & A. McGuinness, "Dumping at less Than Marginal Cost", (1982) 12 Journal of Int'l Economics, 169-182.

[318] See O.E. Williamson, "Predatory Pricing: A Strategic and Welfare Analysis", (1977) 87 Yale Law Journal, 284; P.L. Joskow & A.K. Klevorick, "A Framework for Analyzing Predatory Pricing Policy", (1979) 89 Yale Law Journal, 213; and J.L. Goldstein, "Single Firm

once the domestic competition has been removed will infrequently cover the costs of sustaining low prices until all competition is removed. Equally, unless the product is one of a particularly high specification, once prices are increased to an artificially high level to recoup the costs of eliminating the competition, it is likely that new domestic manufacturers will reenter the market.

The proposition that predatory pricing is economically unviable is supported by the evidence gathered from investigations into such alleged practices. As the U.S. Supreme Court itself has acknowledged "...predatory pricing schemes are rarely tried and (are) even more rarely successful."[319] It therefore seems that the fear of predatory pricing is considerably greater than the possibility or reality of it actually occurring.

Even if the contention was accepted that predatory pricing is economically viable, the statistical evidence does not support the proposition that foreign enterprises engaging in dumping in fact possess a sufficient share of the market to exercise the dominance required to exploit their market position. More than half the anti-dumping actions brought in the European Union are against exporters with less than 5% of the Union market for the product in question. In 90% of cases, the total share of the countries whose exporters are targeted for anti-dumping measures is less than 25%.

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Predatory Pricing in Anti-Trust Law", (1991) 91 Col. Law Rev 1757.

[319] Matsushita Electric Industry Co. v Zenith Radio Corporation, 475 U.S. 574, 589 (1986).

(5) Exploitation of a domestic monopoly

The final justification for the imposition of anti-dumping duties is to prevent foreign firms abusing dominant positions in their own markets by charging excessive profit margins in the home market and using these sales to subsidise lower prices in export markets.[320] The foreign manufacturer in this situation leverages the lower priced export sales with the high profit margins made through domestic market sales.

But, three conditions must exist before this practice is feasible. First, there must be barriers to prevent the reimportation of the cheaper goods into the home market (this process is known as arbitrage).[321] Second, the foreign manufacturer must exercise substantial control in the home market. Third, the manufacturer must face a more elastic demand curve in the export market than in the home market. If these conditions exist, long run dumping can occur.[322]

Yet, there is nothing novel about the proposition that a company enjoying a dominant position in a protected market can maximise profits by charging different prices in foreign markets. The selling price of a particular good in such a case is equal to the marginal revenue which, naturally varies in each market according to the

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[320] S.J. Powell et al., "Current Administration of U.S. Anti-Dumping and Countervailing Duty Laws", (1990) 11 Northwestern Journal of Int'l Law & Bus., 177.

[321] This is one of the reasons that dumping is, in theory, considered infeasible in the European Community where technically barriers to trade have been eliminated, or at least substantially reduced.

[322] See M. Knoll, "An Economic Approach to the Determination of Injury Under the United States Anti-dumping and Countervailing Duty Law", (1989) 22 Int'l Law & Politics 39, 43.

elasticity of supply and demand in the particular market.

In any event, the relative economic strengths of some of the countries against which charges of dumping have been levelled against that of the European Union belie this argument. For example, in 1991, anti-dumping investigations were initiated against products from countries such as Macao, Albania, Indonesia, Trinidad and Tobago. To say that producers in these small countries are using their domestic profits to subsidise exports to the European Union is quite simply ridiculous.[323]

Further, in such a situation, dumping inevitably raises the welfare level of the importing country. Nevertheless there is no trade off between these factors in imposing anti-dumping duties.

Since dumping under these conditions is likely to be long-term, this may effectively suppress the domestic industry. But even in this case, the benefits to consumers may outweigh the injury caused, although long-term supplies may be unreliable.

(6) The true purpose of anti-dumping legislation

The economic reasons advanced for the imposition of anti-dumping duties in fact mask the real purpose of these mechanisms - to protect domestic industries from foreign competition. Dumping rarely results in any economic malfeasance since, in the vast majority of cases, the injury caused to domestic industries is

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[323] European Commission, Tenth Annual Report from the Commission to the European Parliament on the Community's Anti-Dumping and Anti-Subsidy Activities, SEC (92) 716 Final.

almost invariably outweighed by the benefits that accrue to consumers in the form of cheaper goods.

If a foreign manufacturer deliberately set out with the objective of permanently destroying a particular domestic industry, and subsequently dominating that sector of the economy, protection may be justified. But it is rare that any such intention on the part of foreign manufacturers can be proven. Indeed, no state operates a system of anti-dumping laws that require evidence of an intention on the part of a supplier to indulge in predatory pricing.

Yet, in applying anti-dumping levies, the motives of manufacturers or exporters are rarely taken into consideration. At least one commentator is prepared to state that in none of the more than 750 affirmative determinations reached in the United States, Canada, the Union and Australia between 1980 and 1986 was the element of predatory pricing remotely present.[324] All that is required is the factual existence of a series of circumstances that amount to dumping. The fact that these price differentials may arise through perfectly legitimate and fair pricing behaviour is effectively ignored.[325]

Given the relative economic sizes of the European Union and the United States, it is even more difficult to see how such measures can be economically justified. Perhaps it is more accurate to say that anti-dumping measures are being used to maintain an economic status quo that has not been truly in existence since the 1960s. More

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[324] N.D. Palmeter, "The Anti-Dumping Emperor", (1988) 22:4 JWT 5, 6.

[325] See J. Hagelstam, "Some Shortcomings of International Anti-Dumping Provisions", (1991) 25:5 JWT, 99, 99-100.

and more developing states are manufacturing commodities and products that compete with those made in the basic manufacturing industries in the European Union and the United States. Often these products are of a quality equal to that produced in the Union or the United States. Yet both the Union and the United States stubbornly refuse to allow these products unimpeded access to their markets.

In doing so, both nations set themselves against the fundamental tenets of trade liberalisation. Instead of investing in research and development and more efficiently creating hi-tech products, both have created artificial barriers to trade liberalisation through the excessive use of anti-dumping measures.[326]

(B) Countervailing Duty Measures

A countervailing duty is simply a monetary levy imposed on a foreign product that has been identified by national officials as having acquired a competitive advantage over identical or similar domestic products as a result of financial assistance from a foreign government in the manufacture, production or exportation of the goods.[327]

In theory, by imposing a countervailing duty equal to the benefit conferred by the subsidy, any element of unfair competition that might have accrued because of

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[326] For a possible viable model, see J. Brander & P. Kengman, "A Reciprocal Dumping Model of International Trade", (1983) Journal of International Economics 313.

[327] Article VI, Paragraph 3, GATT.

the subsidy is removed.[328] Commerce may thereafter be conducted in an environment free of any economic distortions caused by the subsidisation policies of individual governments.[329]

Achieving a 'level playing field' through the use of countervailing measures is not, however, as simple as this. Countervailing duties are applied against subsidies based on the type of assistance and not their purpose. Further, over-estimation of the countervailable subsidy will prejudice the respective competitive positions of the foreign and domestic producers. There are also strong economic arguments against the proposition that countervailing duties can effectively neutralise foreign subsidies without prejudicing foreign competitors.[330]

### (2) Article VI of the GATT: Too Few Rules to Prevent Abuse

#### (A) Anti-Dumping Measures

In a curious use of phraseology, the GATT condemns dumping without prohibiting such practices and, in common with countervailing duties, acknowledges that anti-dumping duties are legitimate measures when applied

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[328] See, R. Diamond, "Economic Foundations of Countervailing Duty Law", (1989) 29 Virginia Journal of Int'l Law 767.

[329] See generally, B. Balassa, "Subsidies and Countervailing Measures: Economic Considerations", (1989) 23:2 JWT, 63-79.

[330] See J.D. Gaisford & D.L. McLachlan, "Domestic Subsidies and Countervail: The Treacherous Ground of the Level Playing Field", (1990) 24:4 JWT 55.

consistently with Article VI.[331] Contracting parties are therefore not obliged to prevent companies or firms operating within their territories from dumping products on the markets of other states.

The draughtsmen of the General Agreement were aware of the broad similarities between countervailing duties and anti-dumping actions as measures of administered protectionism and it is not surprising that both devices are dealt with in the same article. Thus, under Article VI(4) contracting parties are required to refrain from imposing anti-dumping duties on products that have had countervailing duties imposed on them.[332]

Contracting parties may not levy an anti-dumping duty greater than the amount of the margin of dumping found to exist.[333] The margin of dumping is simply the difference between the price of the goods in the country of origin and the equivalent price on the foreign market. In other words, the object of anti-dumping duties should be compensatory and not penal.

Duties can only be imposed if the imports cause or threaten to cause material injury to an established industry in the territory of a contracting party or materially retard the establishment of a domestic

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[331] See generally, Working Party Report on Barriers to Trade, GATT BISD, 3rd Supplement 222, 222-224 (1955).

[332] Examining this provision more closely, in fact the prohibition on the imposition of both duties extends only to the application of countervailing duties to 'export subsidisation'. Presumably, therefore contracting parties are free to impose both types of duties against a product that has been dumped and also found to have benefitted from a domestic subsidy, because Article VI imposes no requirement on contracting parties to limit the application of countervailing duties to export subsidies.

[333] Article VI(2), GATT.

industry.[334] The material injury standard is identical to that established for the imposition of countervailing duties.

Even as early as 1960, a number of states believed that anti-dumping procedures were being manipulated for protectionist motives.[335] Exploitation of the shortcomings of Article VI of the General Agreement was widely perceived to be the source of this problem.[336] In these circumstances, it is not surprising that anti-dumping measures were the first non-tariff barriers to be tackled by a GATT Protocol, namely the Agreement on the Interpretation of Article VI of the General Agreement on Trade and Tariffs (the Anti-Dumping Code 1967).[337] Along with the United States, seventeen other contracting parties signed the Anti-Dumping Code 1967 including Canada, Japan, the Member States of the European Union and certain other European countries.[338] If the countries of the European Union at that time are considered one party, in fact there were only thirteen signatories.

In retrospect, the agreement was widely viewed as

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[334] Article VI(6), GATT.

[335] See P. Lloyd, Anti-Dumping Actions and the GATT System (1977), 42.

[336] See the First Report of the Group of Experts on Anti-Dumping and Countervailing Duties (May 1959), GATT BISD, 8th Supplement 145 (1960); Second Report of the Group of Experts on Anti-Dumping and Countervailing Duties (May 1960), GATT BISD, 9th Supplement 194 (1961).

[337] Agreement on the Implementation of Article VI of the General Agreement, GATT BISD, 15th Supplement, 74 (1968).

[338] On the implementation of these obligations in the European Community, see J.F Beseler, "EEC Protection Against Dumping and Market Subsidies From Third Countries", in (1968) 6 CML Rev., 327.

embodying the interests of the Western world to the exclusion of the third world and, despite original membership in the GATT of a number of major developing nations, such as India and Brazil, none was prepared to sign the Agreement.[339] This was a major setback for the Code as far as it embodied an attempt to establish truly international rules.

The other point of failure was the refusal of the U.S. Executive branch to reconcile its participation in this system with its own constitutional law. The main problem stemmed from the conflict between the Executive and Congress in the formulation of trade policy and the negotiation of trade agreements, a recurring theme throughout this study.[340] The Agreement was incorporated into United States law through the Presidential authority to negotiate Executive Agreements, but the constitutional position of this method of incorporation was the subject of much controversy.[341] A conflict therefore arose between the earlier Congressional statute - the Anti-Dumping Act of 1921[342] - and the 1967 Executive Agreement.[343]

So determined was the Congressional opposition to the purported exercise of Executive authority in this matter

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[339] On the details of membership, see GATT, Activities Report 1993 (1994), Annex I.

[340] See S.A. Lorenzen, "Technical Analysis of the Anti-Dumping Agreement and the Trade Agreements Act", (1979) 11 Law & Pol'y Int'l Bus., 1405, 1414-1415.

[341] J.J. Barcelo, "Anti-Dumping Laws as Barriers to Trade - The United States and the International Anti-Dumping Code", (1972) 57 Cornell Law Review, 491-560, 533.

[342] 42 Stat. 11 (1921).

[343] See R.B. Long. "U.S. Law and the Anti-Dumping Code", (1969) 3 Int'l Lawyer 464.

that the Congress enacted the Renegotiation Amendments Act of 1968, which instructed the Treasury and Tariff Commission (the predecessor of the ITC) to 'resolve any conflict between the International Dumping Code and the Anti-Dumping Act of 1921 in favour of the Act as applied by the agency administering the Act.'[344]. The de facto non-participation of the United States in this agreement ensured that it would have only limited success.

For these reasons, and many others relating to the substantive obligations contained in the text of the agreement, the 1967 Code was a spectacular failure. Within the first five years of its operation, its signatories were already engaging in negotiations as part of the Tokyo Round for its radical revision.[345] The final result of these negotiations was the Anti-Dumping Code 1979.

(B) Countervailing Duty Measures

Under the original framework established by the GATT, Article VI, the customary right of states to impose countervailing duties to counter the adverse economic effects of direct or indirect subsidies granted on the manufacture, production or export of goods was preserved with only minor modifications. A number of restraints were imposed, but on the whole, these obligations were agreed to prevent countervailing duties being employed in a penal manner, or when no economic justification could be adduced for their use, as opposed to the introduction of controls to prevent abuse inspired by

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[344] 82 Stat. 1347 (1968).

[345] Declaration of the Ministerial Meeting, Tokyo, 12-14 September 1973, 12 ILM 1533 (1973).

protectionist motives.[346]

According to the same article, countervailing duties could not be levied on any product in excess of the 'estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such products'.[347] The object of this rule was obviously to prevent countervailing duties being utilised as a means of levying duties in excess of the true level of subsidy received by a producer.

No attempt was made to link Article VI concerning countervailing duties with Article XVI which, as amended, regulated subsidies.[348] Therefore, the fact that Article XVI of the GATT permitted certain types of subsidies, particularly domestic subsidies, was no guarantee that contracting parties would refrain from imposing duties on such subsidies despite the fact that they were not prohibited.[349]

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[346] R.R. Rivers & J.D. Greenwald, "The Negotiation of a Code on Subsidies and Countervailing Duties", (1979) 11 Law & Pol'y & Int'l Bus., 1447-1495, 1455-1459.

[347] Article VI, Paragraph 3, GATT.

[348] The lack of coordination between Article VI and XVI, particularly as regards the permissibility of domestic subsidisation schemes, was an issue raised by the European Union at the Tokyo Round of trade negotiations. A proposal was submitted that duties could only be levied against products receiving subsidies specifically prohibited by Article XVI, as interpreted by the 1979 Subsidies Code. But the opposition of the United States to the assimilation of treatment between domestic and export subsidies obstructed the introduction of measures to coordinate the treatment of specific types of subsidies.

[349] As the Group of Experts reported:
"The fact that the granting of certain subsidies was authorised by the provisions of Article XVI of the General Agreement clearly did not debar importing countries from imposing, under the terms of Article VI, a countervailing duty on the products on which

The GATT specifically acknowledges that the existence of subsidised products is sufficient to justify countervailing duties.[350] No economic criteria are expressly provided in the GATT for interpreting and applying the concept of material injury, which incidentally is an equivalent standard to that applicable in anti-dumping investigations.[351] Nevertheless, contracting parties have had to satisfy panels that their standards were GATT-consistent.[352]

The United States again took advantage of the PPA to grandfather its countervailing laws to the extent that it did not require proof of material injury prior to the imposition of duties. This created a serious imbalance in the application of the test as other nations gradually amended their laws to comply with the GATT. The United States also refused to amend its legislation to conform to Article VI when it introduced statutory amendments to its countervailing laws in the form of the Trade Act of 1974.[353]

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subsidies had been paid."
Report of the Group of Experts, supra note 336, Para. 32.

[350] See E. McGovern, International Trade Regulation (Second edition, 1986), Para 11.41.

[351] See text supra, pp.178-180.

[352] New Zealand - Imports of Electrical Transformers From Finland, GATT BISD, 32nd Supplement, 32, Para. 44 (1984-85).

[353] There is little doubt that this refusal was contrary to the GATT. Although no complaint was ever lodged against this refusal, in the United States Manufacturing Clause Case, an attempt to re-enact and amend legislation relating to the limitation of copyright protection on imported English language books was condemned by the investigating panel on the grounds that the codification amounted to re-enactment; GATT BISD, 31st Supplement 74-94 (1985).

The incorporation of an effective injury test into the domestic law of the United States was a major goal of many industrialised nations, including the European Union, at the Tokyo Round of negotiations.[354] As a quid pro quo for the assumption of an injury test, the United States demanded stricter and more precise rules governing the misuse of subsidies. However, while the United States eventually agreed to the incorporation of such a test into its laws, its application was limited to signatories to the 1979 Subsidies Code and could not be applied to countervailing orders in force prior to the coming into force of the Code.[355]

While these provisions outline, in broad strokes, a general international policy towards the application of countervailing duties, they have been overtaken by developments. The technical nature of countervailing duties, together with a general recognition of their growing importance in world trade, created a movement towards drafting detailed rules for the administration of countervailing duties. This was first attempted in the 1979 Subsidies Code and the negotiations undertaken at the Uruguay Round have built upon many of the rules originally conceived in this instrument.

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[354] See J.F. Beseler & A.N. Williams, Anti-Dumping and Anti-Subsidy Law of the European Community (1986), 16.

[355] United States - Countervailing Duties on Non-Rubber Footwear From Brazil, GATT Doc. SCM/94 (October 1989), not yet adopted.

## (3) The Tokyo Round Codes: The Charade of Attempting to Impose Normative Regulation on State Behaviour

### (A) The Anti-Dumping Code 1979

#### (1) Brief outline of content

##### (a) Procedure

An anti-dumping complaint must take the form of a written petition from an 'affected industry' and must include sufficient evidence of: (a) dumping; (b) material injury; and (c) the existence of a causal link between the imports and the alleged material injury.[356]

Standing to bring a complaint to the competent authorities is reserved to 'affected industries' under Article 5(1) of the Code. A degree of clarity is, however, added by specific reference in this provision to the definition of 'industry' stipulated in Article 4.[357] This is a parallel definition to that provided in the Subsidies Code.[358]

The Code lacked specific detail on the obligations of national authorities when gathering evidence during investigations to verify the accuracy of information

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[356] Article 5(1), 1979 Anti-Dumping Code. These obligations were clarified by guidelines published by the Anti-Dumping Committee in Recommendation Concerning Transparency of Anti-Dumping Proceedings, GATT Doc ADP/17 (November 1983), adopted by the Committee on November 15, 1983.

[357] Interpretative Footnote 9 to Article 5, 1979 Anti-Dumping Code.

[358] See text, infra pp.205-206.

submitted in a complaint.[359] Abuse of this deficiency in the Code subsequently materialised into a major international concern in the application of the Code by the United States and the European Union.

(b) Definition of Dumping

Article 2 of the Code defines dumping as the introduction of a product into the commerce of a country at less than the price paid in the country of manufacture. In the event that a product is so introduced, then depending on the satisfaction of a number of other conditions, anti-dumping duties can be imposed.

There are two main variables in the quantification of dumping: (a) 'normal value' of the product; and (b) 'export price'. The adjustments, deductions and methods of calculating these two figures are therefore critical in determining if dumping has occurred and in the quantification of the amount of duties that may be imposed on imports.

(c) Material injury

Again, the provisions relating to material injury closely follow those contained in Article 6 of the 1979 Subsidies Code. Injury can take one of three forms: (a) actual injury; (b) threat of material injury; and (c) material retardation of the establishment of a domestic

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[359] This lacuna was not rectified by the two Anti-Dumping Committee guidelines adopted in November 1983 namely, Recommendation Concerning Procedures for an On-the-Spot Investigation, GATT Doc ADP/18 (November 1983), Recommendation Concerning the Time-Limits Given to Respondents to Anti-Dumping Questionnaires, GATT Doc ADP/19 (November 1983). See also Draft Recommendation Concerning Best Information Available in Terms of Article 6:8, GATT Doc ADP/W/59/Rev.5 (May 1984).

industry.[360]

A determination of actual injury can only be made after an objective examination of two economic indicators: (a) the volume of the dumped imports and their effect on prices in the domestic market for like products; and (b) the impact of these imports on the domestic producers of such goods.[361]

On the whole, it is true to say that the Code failed to establish a common standard for the application of an injury test, even between two nations such as the United States and the European Union. The significance of the term 'material' has largely become irrelevant because the most important indicator is the actual standard applied by signatories in practice, but there is little doubt that there are few similarities in the legislation of signatories concerning injury.

For example, the United States legislation defines the term 'material injury' as 'harm which is not inconsequential, immaterial or unimportant'.[362] This definition entails a higher degree of harm than that imposed by previous legislation.[363] The International Trade Commission (ITC) evaluates injury but there are considerable differences in its interpretation of the concept from that of its European counterparts.[364]

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[360] Article VI(6)(a), 1979 Subsidies Code.

[361] Article 3(1), 1979 Anti-Dumping Code.

[362] Section 771(7), Tariff Act of 1930, as amended by the Trade Agreements Act of 1979.

[363] P.D. Staple, "Implementing the Tokyo Round Commitments: The New Injury Standard in Anti-Dumping and Countervailing Duty Laws", (1980) 32 Stanford Law Review 1183.

[364] R.M. Bierwagen, GATT Article VI and the Protectionist Bias in Anti-Dumping Laws (1990), 91.

Indeed, there is significant divergence of opinion among the ITC Commissioners themselves whose findings are made public.[365]

The European Union legislation does not define the term material injury. Instead it merely enumerates a number of factual elements that must be examined to determine whether or not material injury is present. The important point is that the European Union legislation in fact makes specific reference to the need to isolate injury caused through the direct effects of dumped products from injury that is caused from imports of similar products that are not dumped.[366] Yet, in practice, the Commission tends to combine all imports that affect a specific industry in its assessment of injury. This has the obvious effect of exaggerating the injury caused to the relevant domestic industry.[367]

(d) Domestic industry

Article 4(1) of the Code defines the relevant domestic industry as 'the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products'.[368] This definition is identical to that contained in the Subsidies Code.[369] The term 'like product' is therefore essential to the determination of the relevant domestic industry.

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[365] See M.D. Rowat, "Protectionist Tilts in Anti-Dumping Legislation of Developed Countries and the LDC Response", (1990) 24:5 JWT 5, 15.

[366] Article 4(1), Council Regulation 2423/88 (1988).

[367] See Rowat, supra note 365, 18.

[368] Article 4(1), 1979 Anti-Dumping Code.

[369] Article 6(5), 1979 Subsidies Code.

Article 4(2) defines the term 'like product' as 'a product which is identical, ie. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration'.[370] This definition is not only prescribed for the determination of standing or to assist identify the relevant industry but applies whenever that term is used.

The United States has merely adopted the phraseology of the Code and its legislation follows the wording of Article 4(1).[371] The definition of like product is, however, slightly wider than that of the Code and provides that a like product is 'a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation.[372] According to this definition, a product is like another when either its physical appearance or its uses resemble that of the product under investigation. This is generally accepted to be a more expansive definition than that authorised under the Code.[373]

The European Union definitions of domestic industry and

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[370] This definition is identical to that contained in Interpretative Note 18 to Article 6(2), 1979 Subsidies Code.

[371] Section 771(4)(A), Trade Agreements Act of 1979.

[372] Ibid, Section 771(10).

[373] For example, in one case concerning 64K DRAM components, the United States authorities included in the definition of like products both finished DRAMs and components of DRAMs, even although the components have sharply different uses and markets; 64K Dynamic Random Access Memory Components, USITC Inv. No. 1862 (1986), 8-9.

like product are identical to those of the Code.[374] The Union's definitions have not, however, been interpreted in practice in a matter generally consistent with the Code.[375]

(e) Causation

Both Article VI of the GATT and Article 3(4) of the Anti-Dumping Code require that the dumped goods cause injury to a domestic industry before anti-dumping duties can be imposed. Extraneous factors may contribute to the economic difficulties of an industry, but these cannot be taken into account in assessing the causal link between the dumped products and the injury to the domestic industry. This leads to the difficult task of isolating those economic factors that identify injury caused by dumping from those factors that relate to the general economic climate within the country. This is not a clear cut distinction.

The Code provides limited assistance by identifying a number of factors that cannot be taken into consideration by investigating agencies in determining whether injury has been caused by the dumped products.[376] Since these factors are not in any way related to the effect of the dumped products on the domestic industry, they must be excluded from

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[374] Articles 2(12) and 4(5), Council Regulation 2324/88 (1988).

[375] See text, infra Chapter 10.

[376] These include: (a) the volume and prices of imports that are not sold within the territory at dumped prices; (b) contraction in demand or changes in patterns of consumption;(c) restrictive trade practices and competition between foreign and domestic producers; (d) developments in technology; and (e) the export performance and productivity of the domestic industry; Interpretative Note 5 to Article 3(4), 1979 Anti-Dumping Code.

evaluations of injury.

(2) Issues not regulated

(a) Indirect Dumping - Input and Sub-Assembly Dumping

Input dumping occurs when parts or raw material that are sold below their home market price are incorporated into finished products and exported to another country.[377] Depending on the point at which these dumped products are incorporated into the finished product, this process is known also as prior-stage, secondary, downstream or upstream dumping.

Sub-assembly dumping occurs when components of an end product, such as semi-conductors or circuit boards, which need only minor assembly, are dumped in a country and subsequently assembled.[378] It is to prevent this practice that anti-circumvention laws have been introduced by many states.

Both practices raise difficult issues for the application of anti-dumping measures in a manner consistent with the 1979 Code. In both cases, the actual dumped products are in fact components of the final product. Therefore, in neither case can the industries competing with the finished products be said to be manufacturing products like those that are actually dumped. If the domestic manufacturers are not producing like products, they have no standing to raise an anti-

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[377] See generally, R. Bierwagen, "Input, Downstream, Upstream, Secondary, Diversionary and Components of Sub-Assembly Dumping", (1988) 22:3 JWT 27.

[378] See Yanowitch, "Foreign Assembly and Outsourcing: New Challenges to the Anti-Dumping Law", (1986) 18 Law & Pol'y Int'l Bus., 815.

dumping petition nor are they the relevant domestic industry for the purposes of establishing material injury for the dumped parts.

The only solution to the problems caused by input dumping and sub-assembly dumping is to amend Article 5 of the Code. This could either be done by creating specific mechanisms to tackle the problem, or by extending the definition of domestic industries. In light of the imbalance that could be caused by altering the definition of domestic industry, the more appropriate course of action is to create new mechanisms.[379]

(b) Cumulation and Cross-Cumulation of Injury

The Code does not address the issue of injury cumulation and cross-cumulation. Cumulation involves the aggregation of the effects of dumped imports from more than one source in one country, or from sources in several countries. Cross-cumulation refers to assessing the injurious effects of both dumped and subsidised imports on a particular domestic industry. Rules are required to regulate this practice because most signatories have adopted laws permitting both cumulation and cross-cumulation.[380]

Both cumulation and cross-cumulation are doctrines that can be manipulated to produce greater findings of injury than would be the case where only one product from one country was involved and international rules are

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[379] See S.L. Hsu, "Input Dumping and Upstream Subsidies: Trade Loopholes Which Need Closing", (1986) 25 Col. J. Trans. Law 137.

[380] On this point and the WTO Agreement on Anti-Dumping, see A. Pangratis & E. Vermulst, "Injury in Anti-Dumping Proceedings - The Need to Look Beyond the Uruguay Round Rules", (1994) 28:5 JWT 61.

required to provide guidelines to prevent any possible abuse.[381] For example, petitioners in the United States are increasingly adopting the strategy of filing multiple complaints against a number of countries. During an investigation the ITC, in reaching its injury determination, is required to consider the cumulative effect of the total volume of imports from all sources rather than considering each exporter as an individual source. The consequence is that the element of injury is magnified.

(c) Exchange rate fluctuations

In order to compare export price with normal value, the two values must be stated in the same currency. Although occasionally both prices are stated in the same currency, more often than not a currency conversion is required. The Code does not indicate a method of selecting an appropriate rate, despite the fact that the rule for selecting such a rate can have a significant impact on the quantification of a dumping margin. For example, if the official rate of exchange is considerably lower than the actual rate used in transactions, a dumping margin may be found even although one does not exist.[382]

Equally, in commercial transactions, different rates may be applicable to different parts of the transaction. Elements of the export price such as insurance and freight are often contracted and paid for in advance of the completion of the sales contract. If the rates that are used at the time of the actual shipment are used, a distortion will occur since the value at the time the

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[381] See N.D. Palmeter, "The Anti-Dumping Emperor", (1988) 22:4 JWT 5, 7.

[382] See generally, M. Salchizadeh, "Dumping: The Influence of Currency Movements", (1994) 28:1 JWT 181.

sales contract was concluded may be more appropriate.

(d) Anti-circumvention

Anti-dumping duties are imposed on particular goods originating from a specific country. Foreign manufacturers can therefore avoid the imposition of such duties if they break the product down into its component parts and export these for assembly inside the country imposing the duties, or, alternatively, export the parts for assembly in a third country, the exports from which are not subject to anti-dumping measures.

The 1979 Code did not envisage such a development and no provision of that Agreement tackles the problem of manufacturers deliberately setting out to evade anti-dumping measures. This has lead to a considerable number of countries, including the United States and the European Union, resorting to unilateral measures.[383] The main point is, that by creating mechanisms to counter the possibility of anti-circumvention, states may produce even greater distortion than those caused by the avoidance of duties.[384] This was the essence of the complaint lodged by Japan against the European Union, and the anti-circumvention laws of other signatories may be equally susceptible to such a challenge.[385]

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[383] The original Community Legislation dealing with this issue was Council Regulation 1761/87 (1987), which has been superseded by Council Regulation 2423/88 (1988). The counterpart provision in United States law is Section 781 of the Tariff Act of 1930, as amended by the Omnibus Trade and Competitiveness Act of 1988.

[384] S.A. Baker, "'Like' Products and Commercial Reality", in Jackson & Vermulst, supra note 313, 287-301.

[385] See text, infra, pp.189-192.

(e) Anti-absorption

The European Union anti-dumping legislation requires that all anti-dumping duties must be borne by the importers and/or their customers. If these duties are absorbed by exporters, an additional duty may be imposed to compensate for the amount of expense borne by the exporter.[386]

The Code itself contains no explicit term prohibiting the use of anti-absorption techniques but the Union regulation does not sit comfortably alongside a number of Code provisions. For example, under Article 5 of the Code, no anti-dumping duties can be imposed without an examination into the existence of dumping, injury and causation. The imposition of additional anti-dumping duties without an investigation into these factors would therefore appear prima facie inconsistent with the Code.

(3) Dispute settlement and implementation

The disputes which have arise between the various signatories to the Code provide insight into how effectively it has operated. In this section, the main cases which have arisen in this context among the signatories are considered with particular emphasis on the subject-matter of the dispute, the arguments submitted by the parties, the methodology of the panel and implementation of the final panel ruling.

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[386] This rule was introduced as Article 13(11) of Council Regulation 2423/88 on the ground that the Commission believed that it was necessary to prevent the effectiveness of anti-dumping duties being eroded by the duty being borne by exporters.

**United States A/D Duties on Imports of Seamless Steel Products From Sweden**

Sweden lodged a complaint with the Anti-Dumping Committee about the standing of United States petitioners in an investigation which culminated in the imposition of definitive anti-dumping duties on certain Swedish steel products.[387] The United States had imposed the duties after an investigation based on a complaint filed in 1986 by the 'Speciality Tubing Group' and a number of companies manufacturing stainless steel products.[388]

Sweden alleged that the petition was inconsistent with the Agreement because the Department of Commerce had failed to verify that the petition represented a request by or on behalf of 'an affected industry' as required by Article 5(1) of the Code. Only 2 of the 13 producers of the product were among the petitioners.

The Panel considered that Articles 4 and 5(1) of the Code imposed an obligation on the administering authorities of a signatory to investigate the relevant domestic industry prior to initiating proceedings in order to determine whether or not the petitioners represented the relevant domestic industry. The panel found that such an investigation had not been conducted by the U.S. authorities.[389]

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[387] United States A/D Duties on Imports of Seamless Steel Products From Sweden, GATT Doc. ADP/47 (July 1990).

[388] Stainless Steel Pipes And Tubes From Sweden, USITC Inv. No. 731-TA-354 (November 1987); (1988) 22:2 JWT 127-136.

[389] See E-U Petersmann, "GATT Dispute Settlement Proceedings in the Field of Anti-Dumping Law", (1991) 28:1 CML Rev., 69, 90.

The United States was found in violation of its obligations under the Code and the panel recommended that it should revoke the anti-dumping duties and reimburse all duties already paid. The United States vigorously opposed the panel recommending a remedy that it should adopt, even although this was clearly the most logical course of action.[390]

As a result, the adoption of the panel report was suspended pending the resolution of this matter despite repeated calls from Sweden for adoption of the panel's recommendations.[391] In other words, the United States was successful in blocking the adoption of the report on the grounds of a legal technicality.[392] It has therefore not amended its laws or administrative practices to accord with the decision of the panel.

**European Union Anti-Circumvention Measures Imposed on Components and Parts From Japan**

This complaint was the first ever lodged by the Japanese government against another contracting party and was based on arguments that Article 13(10) of Council Regulation 2423/88 (1988) [393], violated Articles I, II, III, X and was inconsistent with Article VI of the GATT.[394] The complaint was based on the general provisions of the GATT, and not the Code, because the

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[390] GATT, Activities Report 1990 (1991), 70-71.

[391] GATT, Activities Report 1991 (1992), 63-64.

[392] See also, Annual Report of the Anti-Dumping Committee, GATT BISD, 38th Supplement (1992), 82, 85.

[393] O.J. L209/1 (1988).

[394] European Community Anti-Circumvention Measures Imposed on Components and Parts From Japan, GATT Doc. L/6657 (March 1990), reproduced at [1990] 2 CMLR 639; (1990) 2:3 WTM 5.

Code contains few directly relevant provisions, although both parties agreed that Article VI of the GATT 'had to be interpreted in light of the provisions' of the Anti-Dumping Code.[395]

Article 13(10) of the Regulation permitted the imposition of definitive anti-dumping duties on products introduced into the commerce of the Union if certain conditions were met. Between June 1987 and October 1988, the European Union initiated investigations into the assembly of five products - all Japanese - assembled in the Union: electronic typewriters[396], electronic weighing sales[397], hydraulic excavators[398], plain paper photocopiers[399] and ball bearings[400]. These investigations resulted in duties against eight companies for infringement of the Regulation and the acceptance of price revision undertakings in four cases.

The critical question in determining the validity of the Union Regulation related to the characterisation of the duties imposed. The Union alleged that the duties were anti-dumping duties and were consistently applied in accordance with Article VI and the Code. In reply, Japan argued that Article VI defined dumping as a situation in which 'products of one country are introduced into the

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[395] Ibid Para. 3.4.

[396] Investigation initiated O.J. C235/2 (1987), and terminated O.J. L101/4 (1988).

[397] Investigation initiated O.J. C235/2 (1987) and terminated O.J. L101/1 (1988).

[398] Investigation initiated O.J. C285/4 (1987) and terminated O.J. L101/24 (1988).

[399] Investigation initiated O.J. C44/3 (1988) and terminated L248/36 (1988).

[400] Investigation initiated O.J. C150/4 (1988) and terminated O.J. L25/90 (1988).

commerce of another country' at prices less than the normal value of such products.[401] The duties imposed by the Union were not therefore, strictly speaking, anti-dumping duties since they had been imposed on products once they had already entered into the Union.

The panel agreed with the Japanese representative. The duties were imposed on finished products and therefore constituted either import duties or internal charges. This distinction is however critical insofar as import duties are regulated by Article II(1) of the GATT while internal charges are governed by Article III(2). Both these provisions imposed different regimes on charges.

The European Union argued that, if the measures were not governed by Article VI of the GATT, then they fell to be regulated by Article II as customs duties.[402] The panel dismissed these propositions and found that the duties were internal charges and regulated by Article III of the GATT. This conclusion was derived from the terms of Article 13 of the Union Regulation, according to which 'the amount of duty collected shall be proportional to that resulting from the application of the rate of the anti-dumping duty applicable to the exporter of the complete product on the cif value of the parts or materials imported'. The panel noted that like products of domestic origin were not subject to a corresponding charge. Therefore, the anti-circumvention duties subjected imported parts and materials indirectly to an internal charge in excess of that applied to like products and consequently they were declared contrary to Article III(2).[403]

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[401] Ibid, Para. 3.30.

[402] Ibid Para. 3.34.

[403] Ibid, Para. 5.9.

The European Union was intensely hostile to the panel's findings and the panel members were in fact required to defend their decision in the GATT Council.[404] The main point of contention was the finding that the charges were internal charges rather than customs duties, or charges imposed in connection with the administration of customs duties. But the opposition of the Union was insufficient to prevent the adoption of the report in the Council. In the face of opposition from a number of countries, including the United States, the Union had little choice but to allow the Council to adopt the report.[405]

The European Union did not, however, immediately amend its internal legislation to comply with the terms of the panel report. It merely gave an undertaking not to impose further duties on the basis of this provision. Hence, the measure remained on the European Union's statute-books although the Union declined to accept complaints from private parties requesting the imposition of anti-circumvention duties.

**New Zealand Anti-Dumping Proceedings Against Electrical Transformers From Finland**

In this case, one of the few not to involve either the United States or the European Union, the panel was instructed to decide the legality of anti-dumping duties imposed on a Finnish exporter which had allegedly dumped two transformers under a tender from a New Zealand electrical power board. The subject-matter of the dispute concerned identification of the relevant domestic industry for electric transformers and whether

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[404] The extract minutes of these proceedings are reproduced at [1990] 2 CMLR 639, 641-644.

[405] GATT, Activities Report 1990 (1990), 55-57.

the domestic industry had suffered material injury due to the 2.4% of the market share acquired by the Finnish imports.[406]

The Finnish government claimed that the relevant industry was the electric transformer industry as a whole, and that no differentiation could be made within that industry on the basis of the size of the units. The New Zealand authorities held otherwise. Four separate industries were identified for the purposes of the injury test based on the output of the units.

The panel rejected the existence of four separate industries and declared that New Zealand was in violation of Article VI of the GATT. This decision was based on the ground that the national company complaining in fact accounted for 92 percent of total domestic production of all transformers and it produced transformers with capacity throughout all four ranges.[407]

The panel also concluded that while the domestic transformer industry might have suffered injury from the increased imports, the cause of this injury was not the imports from Finland which 'constituted an almost insignificant part' of the overall sales in the relevant product.

The panel decision was rendered on the basis of Article VI of the GATT and not the Code provisions. The explanation for this is while simple; while Finland was an original signatory to the Code, New Zealand did not accept the obligations contained in the Code until 1988.

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[406] New Zealand Anti-Dumping Proceedings Against Electrical Transformers From Finland, GATT BISD, 32nd Supplement 55 (1986).

[407] Ibid, Para. 4(6).

Hence, since New Zealand was the subject of the complaint, proceedings could not be brought under the Code.

Interestingly, the panel made none but the most superficial reference to the terms of the 1979 Code in reaching its conclusions. This is slightly unusual in that such a reference could have been justified on the basis that the Code provided customary guidelines as to the applicable law.

The report of the panel was adopted by the Council in 1985 without objection.[408] This is not surprising since neither of the disputants exercised sufficient authority to block the adoption of the report. The case itself therefore provides an example of how the dispute-settlement procedure can work when neither the interests of the United States or the European Union are involved.

**Australian Anti-Dumping Duties on Imports of Electric Transformers From Finland**

This case concerns electrical equipment designed to specification for Australian power companies.[409] The main legal point was the question whether the domestic industry which had lodged the complaint produced like products for the purposes of establishing standing and to identify the necessary degree of injury.[410]

A panel was established on 25th September 1990 to

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[408] GATT BISD, 32nd Supplement 55 (1986).

[409] Australian Anti-Dumping Duties on Imports of Electric Transformers From Finland, GATT Doc. L/6609 (1992).

[410] See E-U. Petersmann, "GATT Dispute Settlement Proceedings in the Field of Anti-Dumping Law", (1991) 28:1 CMLR 69, 93.

investigate this matter, but to date its findings have not been made public.[411]

**United States Anti-Dumping Duties on Imports of Cement From Mexico**

At a special meeting of the Anti-Dumping Committee in July 1991, Mexico lodged a complaint against U.S. anti-dumping duties of almost 60% on imports of Mexican cement.[412] Four allegations were made by the Mexican authorities, namely that the United States authorities had failed to verify the standing of petitioners, that the injury determination finding did not meet the requirements of the Code, that the authorities had erroneously cumulated the volume and price effects of cement imports from Mexico and Japan, and that no causal link had been established between injury to the domestic industry and the allegedly dumped imports.[413]

The United States vigorously opposed the establishment of a panel into this matter but eventually a panel was established with terms of reference in January 1992.[414] The panel's findings were reported to the Anti-Dumping Committee in October 1992.[415]

Once again, the panel found against the United States interpretation of its obligations under the Code. The investigation was held to be inconsistent with Article 5(1) of the Code because the U.S. authorities had not

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[411] Annual Report of the Anti-Dumping Committee, GATT BISD, 37th Supplement 297, 300 (1991).

[412] GATT Doc. ADP/51 (1991).

[413] GATT, Activities Report 1991 (1992), 64.

[414] Annual Report of the Anti-Dumping Committee, GATT BISD, 38th Supplement 82 (1992).

[415] GATT, Activities Report 1992 (1993), 34.

satisfied themselves prior to initiation that the petition had been made on behalf of producers of all or almost all of the producers in the regional market. The panel further concluded that imposition of the duties was inconsistent with Article 1 of the Code and 'recommended' that the Committee request the United States to revoke that anti-dumping duty order and reimburse any duties paid or deposited under this order. In view of these findings, the panel stated that it was not necessary to issue findings on the other issues raised by Mexico.

The matter has not yet been resolved.[416] Certainly the United States has not yet revoked the order and the disputants have advised the Anti-Dumping Committee that they are 'seeking a mutually satisfactory solution' to the dispute.[417] In other words, the dispute will not be resolved on the basis of the findings of the panel but on a bilateral settlement of the matter.

**United States Anti-Circumvention Measures Imposed on Colour Picture Tubes From Canada and Mexico**

Both Canada and Mexico initiated consultations within the Anti-Dumping Committee with the United States in respect of anti-circumvention investigations conducted against imports of colour picture tubes.[418] In fact, no panel was established to review this matter since the final determination of the United States authorities was

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[416] GATT, Focus, No. 109, 4 (1994).

[417] Annual Report of the Anti-Dumping Committee, GATT BISD, 39th Supplement 391.

[418] United States Anti-Circumvention Measures on Colour Picture Tubes from Canada and Mexico, GATT Docs. ADP/50 and ADP/52 (1990).

that no circumvention had occurred.[419] The matter was therefore removed from the agenda of the Committee prior to any investigation.

This particular dispute is, however, of interest because the pressure placed on the United States authorities by the mere raising of the complaint may have been a significant factor in the final negative determination in the investigation. It is clear from other panel investigations, and in particular the panel report in European Union Regulation on Imports of Parts and Components From Japan, that the United States is acutely sensitive of its anti-circumvention legislation.[420] In its own submissions in that case, the United States argued strenuously to distinguish its own laws from those of the European Union even although its own laws were not being scrutinized.[421] The desire to avoid a negative finding in a panel investigation may have been sufficient to persuade the American authorities to alter their findings in order to secure this objective.

**European Union Imposition of Anti-Dumping Duties on Imports of Audio Cassettes From Japan**

In October 1992, Japan continued its attack on the European Union's anti-dumping legislation, this time by requesting the establishment of a panel to investigate the imposition of anti-dumping duties on the importation of audio cassettes originating in Japan.[422] The case

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[419] Annual Report of the Anti-Dumping Committee, GATT BISD, 38th Supplement 82 (1992).

[420] GATT Doc. L/6657.

[421] Ibid, Paras 4.34-4.41.

[422] GATT, EEC - Imposition of Anti-Dumping Duties on Imports of Audio Cassettes From Japan, GATT Doc. ADP/85 (October 1992).

followed the imposition of provisional anti-dumping duties ranging between 0.4% and 80.20% on imports of audio tapes in cassettes in November 1990[423] followed by definitive duties in May 1991 ranging between 2.6% and 25.5%.[424]

The essence of the Japanese complaint was the concern that the European Union had failed to comply with the terms of the Code as regards the determination of dumping, the determination of injury and the finding of a causal connection between both of these elements. In other words, the Japanese complaint went to the very heart of European Union substantive anti-dumping law. Violations of Articles 2, 3 and 8 of the Code were alleged by Japan.

The views of the European Commission on the nature of the complaint are of note at this point. After reporting the emergence of the dispute, the Commission expressed the view that its findings:

> '...were made after the investigation, carried out according to Community legislation which is in full conformity with the substantive and procedural requirements of the GATT Anti-Dumping Code, had shown clear and conclusive evidence of both dumping and injury.'[425]

Nevertheless, the Japanese complaint contained potentially damaging allegations. It contended that the methodology employed by the European Union in the

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[423] O.J. L313/5 (13/11/90).

[424] O.J. L119/35 (14/5/91).

[425] European Commission, Eleventh Annual Report From the Commission to the European Parliament on the Community's Anti-Dumping and Anti-Subsidy Activities, COM (93) 516 Final (1993), 94.

calculation of dumping margins is biased against exporters and that the investigation failed to establish that it was these goods which had caused injury. Although the European Commission had found injury in only one state, it had applied the anti-dumping duty on a European Union-wide basis.[426]

The panel report, issued in May 1995, upheld many of these criticisms including the claim that EU anti-dumping calculations manufactured dumping margins by making asymmetrical adjustments for indirect selling expenses.[427] The European Union has indicated that it will oppose the adoption of this report and can block its adoption by the Council indefinitely since the complaint was initiated under the GATT procedure and not the revised WTO system.[428]

**European Union Anti-Dumping Procedures for Establishing Duty as a Cost**

In October 1992, Japan requested consultations on the methodology whereby the European Commission appropriates duties as a cost of production in constructing export prices.[429] The interesting point is that the European Court was asked earlier to adjudicate the same points being brought at the international level.

In NMB (Deutschland) and Ors v EC Commission, The Court

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[426] GATT, Activities Report 1992 (1993), 29.

[427] GATT Secretariat Press Release, EEC - Anti-Dumping Duties on Audio Tapes in Cassettes From Japan (May 1995).

[428] Statement by Dr Hans-Adolf Neumann, Chef de Unité, DGIC, European Commission made at the 8th European Trade Law Association Conference, Brussels, November 11, 1995.

[429] See text, infra Chapter 10.

was requested to consider applications made by three European Union subsidiaries of a Japanese company.[430] These companies had requested refunds of anti-dumping duties which had been partially rejected by the Commission which had inflated the dumping margins by deducting the anti-dumping duties paid from the resale prices of each subsidiary to first independent buyers. This practice, it was claimed, caused discrimination since independent importers (mostly domestic) and related importers (mostly foreign subsidiaries) were treated differently for the purposes of refunds without objective justification.

The Court rejected these arguments by applying Community/Union law and, in particular, recognised that although violations of the Code may be invoked as an argument that the European Union's anti-dumping regulation had not been correctly applied, this was not the case on the facts presented. Hence, the applications were dismissed in their entirety.

Again we must await to see if a panel will be constituted on this matter. If so, an interesting clash of legal interpretation may develop between the judgment of the Court on the one hand and the findings of the panel on the other hand.

**United States Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon From Norway**

In July 1991, Norway requested the establishment of a panel to review the compatibility of definitive duties on imports of fresh and chilled Atlantic Salmon into the

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[430] Case C188/88 [1992] ECR I 1689.

United States.[431] The panel ruled on the matter in November 1992.[432]

The dispute centred on the selection of third country surrogates when there are no sales of like products in the ordinary course of trade in the domestic market of an exporting country and the adjustments made to the export price and the domestic price to establish the same level of trade. In both cases, the panel found against the United States.[433]

The report was submitted to the Anti-Dumping Committee in February 1993 but was only adopted in April 1994 due to the opposition of the United States.[434] The United States has not yet amended its laws at this point to comply with the ruling of the panel.

**Canadian Anti-Dumping Duties on Beer From the United States**

The final dispute which can be considered in this context concerns the establishment of a panel to investigate anti-dumping duties imposed by the Canadian International Trade Tribunal on imports of American beer into British Columbia.

The United States challenged the validity of the regional industry analysis which was conducted. Specifically, the United States contended that, as a

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[431] GATT, United States Anti-Dumping Measures on Fresh and Chilled Salmon From Norway, GATT Doc. ADP/61 (October 1991).

[432] GATT, Annual Report of the Anti-Dumping Committee, GATT BISD, 38th Supplement 82, 85 (1992).

[433] GATT, Activities Report 1992 (1993), 37.

[434] GATT, Focus No. 109, 4 (1994).

legal matter under the express terms of the Code, there was no concentration of dumping imports into the province of British Columbia.[435] No panel report has yet been published on this matter.[436]

(4) Tentative Conclusions

It is distressing that after more than thirty years and numerous rounds of trade negotiations, the issues that first arose in 1960 continue to plague the international system for the regulation of anti-dumping measures. Although it cannot be denied that anti-dumping mechanisms have become more sophisticated over the course of the last three decades, the international rules have not evolved in response.

There are a number of reasons for the failure of the international system to impose a normative effect on the anti-dumping activities of states, particularly, as we have seen, those of the United States and the European Union. From a legal perspective, one could point to the inherent vagueness of the rule that allow two states to interpret the same rules in completely different ways, neither being fully consistent with the Code obligations. Experience shows that, given any discretion unilaterally to decide their obligations, the United States and the Union will opt for the interpretation which allows for expansion in the scope and volume of anti-dumping measures.

Most of the legal loopholes that have been exploited by the United States and the European Union will be discussed in Chapters 8, 9, 10 and 11 of the present

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[435] GATT, Activities Report 1992 (1993), 30.

[436] Annual Report of the Anti-Dumping Committee, GATT BISD, 39th Supplement 391.

work. Nevertheless, it should be stressed that, if any subsequent agreement is to meet with any degree of success, it must tackle these issues head on, and establish rules that deal squarely with the matter rather that obscure the issue. Undoubtedly this is easier said than done, and the present discussions on anti-dumping at the Uruguay Round prove this to be true. But if the international consensus is that abuses of anti-dumping measures must cease, such a system is absolutely essential.

One strange phenomenon of the Code has been, until recently at least, the relative lack of international litigation that has been aroused by its existence. Given that the existence of wide-spread violations is common knowledge within the international trade fraternity, it is strange that more signatories have not challenged measures believed to be inconsistent with the Code.

At the same time, it is clear that Japan has recently learned of the value of using this apparatus but it is not clear to what extent this strategy has been adopted in order to put leverage on the European Union on the anti-dumping negotiations which took place in the context of the Uruguay Round.

(B) The Subsidies Code 1979

The scheme followed by the 1979 Code built upon the existing obligations imposed by the relevant terms of the GATT; a contracting party continued to be at liberty to impose countervailing duties on products benefitting from subsidies, provided that such products caused, or were likely to cause, injury to a domestic industry.[437]

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[437] See C.H. Cosgrove, "Technical Analysis of the Subsidies and Countervailing Measures Agreement", (1979) 11 Law & Pol'y Int'l Bus., 1497; and Evans, "Subsidies

To fortify the earlier obligations, a number of additional procedural duties were introduced in an unsuccessful attempt to ensure the objective and proper adminstration of countervailing actions and to mitigate the possibility of the perversion of this mechanism for protectionist motives.

(1) Brief outline of content

(a) Countervailable subsidies

The 1979 Subsidies Code does not define a countervailable subsidy but, Article 4(2) of the Code reformulates the requirement of Article VI(3) of the GATT that contracting parties confine their assessment to the 'estimated amount of the subsidy or bounty'.

The same article declares that it is desirable that the imposition of the duty is permissive, and that in cases where a duty less than the amount of the subsidy will suffice to remove the injury to a domestic industry, the lesser amount should be applied.[438] Unfortunately, this mitigating rule has not been widely adopted by signatories and, for example, the United States authorities are prevented by statute from employing this rule in the calculation of countervailable subsidies.[439]

Signatories are also urged to develop an understanding setting out the criteria for the calculation of the

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and Countervailing Duties in GATT: Present Law and Future Prospects", (1977) 3 Int'l Trade Law Journal, 211.

[438] Article 4(1), 1979 Subsidies Code.

[439] Section 101, Trade Agreements Act of 1979, amending section 701 of the Tariff Act of 1930, 93 Stat. 144 (1979).

amount of a subsidy.[440] In fact, the Group of Experts established by the Subsidies Committee did arrive at a set of rules on the Application of the Concept of Specificity in the Calculation of the Amount of a Subsidy[441], but these were never adopted due to the opposition of the United States.[442] The absence of rules on this point encouraged the development of quantification rules on a state-by-state basis.

The result is that no detailed rules are specified for the measurement of a countervailable subsidy, although it is clear that both export and domestic subsidies remained susceptible to countervailing duties.

(b) Material injury

Administering authorities are instructed to examine, on an objective basis, two main economic trends in assessing injury: (a) the volume of subsidised imports and their effect on prices in the domestic market; and (b) the consequent impact of these imports on domestic producers of such products.[443]

An analysis of the impact of subsidized imports on the relevant domestic industry must include an 'evaluation of all relevant economic factors and indices having a bearing on the state of the industry'. These indices include: (a) actual and potential decline in output, sales, market share, profits, productivity, return on investment, or utilization of capacity; factors

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[440] Interpretative note 15 to Article 4(2), 1979 Subsidies Code.

[441] GATT Doc. SCM/W/89 (1986).

[442] Annual Report of the Subsidies Committee, GATT BISD, 34th Supplement, 186, 188 (1988).

[443] Article 6(1), 1979 Subsidies Code.

affecting domestic prices; (b) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investment; and (c) in the case of agriculture, whether there has been an increased burden on governmental support.[444]

(c) Domestic industry

Identification of the relevant domestic industry is important for the demarcation of a specific group of producers or manufacturers that can be singled out for the application of the injury test. The general rule is that the domestic industry is constituted by:

> "...the domestic producers as a whole of the like products or those of them whose collective output of the product constitutes a major proportion of total domestic production of those products."[445]

The relevant domestic industry therefore consists of the producers of the identical product, together with producers of 'like products'.

(d) Causation

A nexus must exist between the subsidy and material injury to a domestic industry before countervailing duties can be imposed.[446] Further, a countervailing duty can only remain in force for as long as, and to the extent necessary, to counteract the subsidisation that

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[444] Article 6(3), 1979 Subsidies Code.

[445] Article 6(5), 1979 Subsidies Code; Article 16(1), Second Subsidies Code.

[446] Articles 2(1) and 4(4), 1979 Subsidies Code.

is causing the injury.[447]

(2) Issues not regulated

The main issue not covered by the 1979 Code must be the question of anti-circumvention measures. This allowed both the United States and the European Union to unilaterally develop such measures. The legality of both of these mechanisms have been questioned in a GATT context although only the laws of the European Union have been declared incompatible with the terms of the General Agreement not, it should be noted, the terms of the Subsidies Code.

(3) Dispute settlement and implementation

The function of the Subsidies Committee has been considered in sufficient detail earlier in this work[448], and it is not proposed to consider its work further at this point. The limits of its ability effectively to control the behaviour of the signatories has been considered too often to merit further discussion. It only remains to consider some of the major cases which have involved issues within the scope of the Subsidies Code and to decide what degree of normative influence was exercised by the substantive provisions of the Code as applied by the Subsidies Committee itself.

**United States Countervailing Duties on Fresh, Chilled and Frozen Pork From Canada**

A panel was established to investigate a complaint by Canada that the United States' assessment of

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[447] Article 4(9), 1979 Subsidies Code; Article 20(1), Second Subsidies Code.

[448] See text supra, pp.54-59.

countervailing duties on pork products exceeded the subsidy conferred by the Canadian government.[449] The United States had initiated an investigation into imports of live swine and fresh, chilled and frozen pork from Canada after a complaint was lodged by the American National Pork Producers' Council. Although affirmative decisions were rendered by the DOC, the US Court of International Trade only upheld the findings against live swine.

After the publication of this ruling, the US Congress amended the Tariff Act of 1930, in 1988 through the Trade and Competitiveness Act. This added a new provision intended to allow the possibility that a countervailing duty could be levied on agricultural products in excess of any direct subsidies granted if subsidies on inputs could be attributed to the finished final product.[450] Another complaint was filed and this time the DOC made affirmative final determinations of subsidisation.[451] Pork producers were therefore held liable for subsidies that had been granted, not directly to them, but to producers of their inputs.

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[449] United States - Countervailing Duties on Fresh, Chilled and Frozen Pork From Canada, GATT Doc. DS7/R (September 1990); GATT BISD, 38th Supplement 30 (1991).

[450] Section 771B, to the statute, which read:
"In the case of an agricultural product processed from a raw agricultural product in which
(a) the demand for the prior stage product is substantially dependent on the demand for the latter stage product, and
(b) the processing operation adds only limited value to the raw commodity,
subsidies found to be provided to either producers or processors of the product shall be deemed to be provided with respect to the manufacture, production, or exportation of the processed product."

[451] Fresh, Chilled and Frozen Pork From Canada, Federal Register, Vol. 54, 30,774 (1989).

Canada brought a complaint requesting the panel to find that the United States, by levying a countervailing duty in excess of the amount of the subsidy determined to have been granted on the production of pork products, had failed to comply with the terms of Article VI(3) of the GATT.[452] In effect, the panel was asked to rule on the consistency of Section 771B with Article VI(3) of the GATT.

The panel interpreted Article VI(3) strictly, on the ground that it constituted an exception to the general rule that imports must not be subject to charges other than ordinary customs duties.[453] This finding had two main consequences. First, the onus was on the United States, as the party invoking the exception, to demonstrate that it had met the requirements of Article VI(3). Secondly, in any case, the terms of Article VI(3) were to be construed contra proferentum. Applying these tests, the panel found that:

> "According to this clear wording, the United States may impose a countervailing duty on pork only if a subsidy has been determined to have been bestowed on the production of pork; the mere fact that trade in pork is affected by the subsidies granted to producers of swine is not sufficient."[454]

The panel also dismissed the policy arguments put forward by the United States that the agricultural sector was entitled to special treatment, a status recognised in the provisions of the Subsidies Code for

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[452] Ibid, Para. 3.1.

[453] Article II(1)(b), General Agreement.

[454] Supra note 451, Para. 4.8.

the treatment of subsidies in general.[455]

Although the panel's decision was introduced into the Council in November 1990, the United States has successfully resisted its adoption. The United States has argued that the issues raised in the report were the subject of discussions between the parties in the context of the Canada-U.S. FTA, a position that Canada strenuously rejected.[456] Canada has adopted the position that the binational settlement panels are unrelated to the GATT proceedings and hence the report should be adopted.

However, the United States was resilient in blocking the adoption of the report and initially refused to amend its legislation or return the cash deposits taken on Canadian pork imports. Eventually, the United States allowed the adoption of the report after the two bilateral panels established to investigate broadly similar matters found against the United States as well.[457]

**Canadian Countervailing Duties on Imports on Manufacturing Beef From the EEC**

The facts of this case, briefly stated, were that the CCA submitted a complaint under the Canadian Special Import Measures Act requiring the Canadian Import Tribunal to investigate allegations of subsidies on European imports of boneless manufacturing beef.[458] The

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[455] Ibid, Para. 4.7.

[456] GATT, Activities Report 1990 (1991), 58-59.

[457] GATT, Activities Report 1991 (1992), 51.

[458] Canadian Countervailing Duties on Imports on Manufacturing Beef From the EEC, GATT Doc SCM/85 (October 1987), not yet adopted.

CCA was an association of producers of live cattle.[459] The group was one of many supplying the industry manufacturing boneless beef. After an investigation, the Canadian authorities held that the CCA had standing to lodge a complaint on the ground that the organisation was one of a number involved in the 'continuous sequential process' of manufacturing boneless beef.[460]

The European Union brought this decision before the Subsidies Committee on the ground that, by allowing the CCA standing to bring a complaint, Canada was in violation of its obligations under the 1979 Code and in particular Article 2(1). During the course of the investigation, both Australia and the United States lodged memoranda in support of the Canadian position.[461]

Both parties were agreed that Article 2(1) of the 1979 Code defined the standing of petitioners to lodge a complaint. However, while the Union maintained that the concept was to be construed in narrow terms, and consistent with Article 6(5) of the Code, Canada argued that there was no specific definition of 'affected industries' and that, in these circumstances, signatories were free to define the scope of the concept themselves.

In arriving at its findings, the panel adopted a legalistic approach. In particular, it examined the legal sources and authority of the parties' arguments.[462] Although the panel clearly adopted a

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[459] Ibid, Para 2.2.

[460] On the CIT findings, see W.A. Kerr, "The Recent Findings on the Canadian Import Tribunal Regarding Beef Originating in the EEC", (1987) 13 World Competition 15.

[461] Ibid, Paras 4.1-4.5 and Paras 4.6-4.8.

[462] Ibid, Para. 5.6.

teleological approach to the interpretation of Article 2(1) - referring to the purpose of the provision and reconciling its function with the other terms of the Code - it gave little consideration to the economic arguments advanced by Canada. It dismissed the Canadian submissions relating to 'continuous sequential process' and 'functional dedication' by rejecting the claim for support for these notions in the preamble to the Code.

Instead, the panel held that Article 2(1) must be defined in terms compatible with the concept of 'domestic industry' in Article 6(5).[463] Reviewing the travaux preparatiores from the negotiation of the Code, the panel concluded that the draughtsmen had intended to give this concept a narrow definition. In these circumstances, the CCA was ineligible to raise a complaint against European imports because it did not represent an industry engaged in the manufacture of a like product.

In their decision, the panel emphatically rejected the proposition that signatories were entitled to determine standing according to their gloss on the terms of the Code. However, this case is a prime illustration of a signatory taking advantage of the vagueness of the Code to engage in unilateral interpretations of its international obligations. It evidences the principal defect in any attempts to regulate international behaviour - that detailed substantive rules and effective procedures must be created in order to deter unilateral interpretation.

This report has been blocked by the Canadian representative on the Subsidies Committee, ostensibly on the ground that the European Union and the United States

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[463] Ibid, Para. 5.11.

have been permitted to prevent the creation of a consensus for the adoption of reports that have gone against their interests. The Canadian government has successfully maintained its opposition to the adoption of the report despite the pressures imposed by the European Union.[464]

**United States Definition of Industry Concerning Wine and Grape Products**

The next case deals with a similar issue, namely the right of a producers group to be considered part of a domestic industry for the purposes of initiating a complaint against a particular foreign import alleged to have been subsidised.

The European Union complained to the Subsidies Committee that the United States definition of wine producing industry infringed Article 6(5) because it was too broad.[465] The original United States legislation defining 'domestic industry' for the purposes of countervailing investigations broadly followed the definition provided in the 1979 Code.[466] But, the Trade and Tariff Act of 1984 amended this section to specifically provide that for wine and grape products, the term 'industry' expressly includes the domestic producers of the principal raw agricultural product, namely grapes.[467] This allowed grape growers to petition the DOC for the imposition of countervailing duties on

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[464] Annual Report of the Subsidies Committee, GATT BISD, 39th Supplement 407 (1993).

[465] United States - Definition of Industry Concerning Wine and Grape Products, GATT Doc. SCM/71 (March 1986); GATT BISD, 39th Supplement 436 (1993).

[466] Section 771, Tariff Act of 1930.

[467] Section 612(a)(1), Trade and Tariff Act of 1984.

imports of subsidised wines from Germany France and Italy.

Although the subsequent investigation resulted in a negative determination by the USITC, the Union nevertheless proceeded with the complaint because the USITC decision was appealed to the Court of International Trade and because the U.S. Congress was, at that time, considering bills to seek to extend the definition of domestic industry applicable to processed products to producers of the raw agricultural inputs.[468] This would permit agricultural producers to petition against a broad range of imports, not necessarily directly related to their own.

The critical question that the panel had to decide was whether grapes producers constituted part of the same domestic industry as American wine producers. Only a domestic industry affected by the imports can initiate a complaint according to the terms of Article 6(5). Since the grape producers were not producers of identical products, the panel considered whether grapes were 'like products' to wine.[469] However, the panel did not provide a detailed analysis of the method it employed to make this determination. It merely stated that:

> "In view of the precise definition of 'domestic industry' the Panel considered that producers of the like products could be interpreted to comprise only producers of wine."[470]

The existence of two separate industries in the United

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[468] Supra note 465, Para. 3.5.

[469] Footnote 18 to the Code defines 'like product'.

[470] Supra note 465, Para. 4.2.

States, namely an industry comprising wine-grape growers on the one hand, and an industry comprising the wineries on the other therefore precluded grape-growers from initiating a complaint against imports of European wine.[471]

In a clash of two giants such as the United States and the European Union, it will be no surprise to learn that the final panel report has not yet been adopted by the Subsidies Committee even although it was submitted in March 1986.[472]

The interesting point is that the offending measure in U.S. trade legislation was removed by the Omnibus Trade and Competitiveness Act of 1988. Hence, even although the incriminating measures have been removed, the United States opposed the adoption of the report while the European Union vigorously advocated its adoption. In the final analysis this matter is more of a clash of egos than of principle. The report was finally adopted by the Subsidies Committee in April 1992.[473]

**United States Countervailing Duties on Non-Rubber Footwear From Brazil**

This decision was a technical question relating to the non- application of the injury test in countervailing investigations into imports of Mexican footwear when the measures were imposed prior to 1980 when the 1979 Code became effective. In essence the panel ruled that the continued application of the duties after 1980 was

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[471] Ibid, Para. 4.6.

[472] Annual Report of the Subsidies Committee, GATT BISD, 38th Supplement 95, 98 (1992).

[473] Annual Report of the Subsidies Committee, GATT BISD, 39th Supplement 407 (1993).

consistent with the terms of the Code and the obligations of the United States under that agreement.[474]

In an unusual twist, Brazil objected to the adoption of the report on the grounds that the panel's interpretation of the GATT and the Code constituted a clear violation of the MFN obligation.[475] In fact, Brazil even attempted to have another panel investigate the matter under the general provisions of the GATT and, in particular, Article I.[476] No break-through in this impasse has yet been reached.[477]

**Canadian Countervailing Duty on United States Grain Corn**

The next dispute considered by the Subsidies Committee on countervailing duty matters and in which a report has been rendered concerns a Canadian investigation into imports of U.S. grain and whether the United States position as the world's dominant grain producer was significant for a determination of injury.[478] The Canadian Import Tribunal had held that this was a significant factor in establishing injury since it related to the dramatic decline in world corn prices.

The panel report concluded that the CIT determination was not consistent with the terms of the Code, and in particular Article 6, because it had not determined on

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[474] United States Countervailing Duties on Non-Rubber Footwear From Brazil, GATT Doc SCM/94 (1989).

[475] GATT, Activities Report 1989 (1990), 104.

[476] GATT, Activities Report 1990 (1991), 72.

[477] GATT, Activities Report 1991 (1992), 59.

[478] Canadian Countervailing Duties on United States Grain Corn, GATT Doc SCM/140 (1992); GATT BISD, 39th Supplement 411 (1993).

the basis of positive evidence that the injury to the Canadian industry had occurred as a result of imports of subsidised grain corn from the United States. Accordingly, the panel 'recommended' that Canada amend its countervailing measure to conform with the Code.

The findings of the panel were adopted by the Subsidies Committee in March 1992 but Canada has stated that the adoption of the report will not prevent Canada taking action in the future against subsidised imports.[479]

**United States Countervailing Duties on Imports of Softwood Lumber From Canada**

This has been one of the longest running disputes in United States-Canadian trade relations. In October 1986, a controversial determination was made in a countervailing duty investigation against imports of softwood lumber imported into the United States from Canada. The countervailable duty was assessed at 15% but in a bilateral understanding the Canadian government agreed to impose a 15% export tax in return for the suspension of the duties.

The Canadian government introduced changes to its support programmes as part and parcel of this understanding and eliminated the export charge once these changes had been implemented. On September 3, 1991, Canada gave the United States notice of its intention to terminate the understanding. On October 4, 1991, the ITA self-initiated a countervailing investigation for these products and immediately Canada requested consultations on the matter.[480]

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[479] GATT, Activities Report 1991 (1992), 61-62.

[480] GATT, Activities Report 1991 (1992), 62-63.

Canada alleged that the self-initiation of the investigation contravened Article 2 of the Subsidies Code which required that authorities may only proceed in such circumstances if they have sufficient evidence of (a) a subsidy; (b) material injury; and (c) a casual connection between subsidisation and injury. In December 1991 a panel was established to investigate the issues raised in the dispute.

In February 1993, the panel issued its findings which found that the investigation has been properly conducted in a manner consistent with the requirements of the Code.[481] In its view, the US Department of Commerce had sufficient evidence of a subsidy in respect of Canadian stumpage pricing practices and a threat of material injury to domestic producers following the termination of the understanding. In fact, this is one of the very few cases were a panel has found in favour of the respondent.[482] To date, the panel report has not been adopted by the Subsidies Committee but Canada is unlikely to accept this result graciously.

**United States Countervailing Duties on Imports of Fresh and Chilled Salmon From Norway**

This was the parallel complaint to that lodged by Norway against United States anti-dumping duties against the same products.[483] In fact the countervailing duties imposed by the United States amounted only to 2.27%. A panel was convened in September 1991 and rendered its report in December 1992 finding in favour of the United

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[481] United States Countervailing Measures Against Exports of Softwood Lumber From canada, GATT Doc. SCM/154 (1993), not yet reported.

[482] GATT, Activities Report 1992 (1993), 32-33.

[483] See text, supra, pp.200-201.

States.[484] The imposition of the duties was not inconsistent with the terms of the Subsidies Code. The panel report has recently been adopted by the Subsidies Committee.[485]

(4) Tentative Conclusions

In addition to the legal problems that arise in the actual operation of the Subsidies Code, other issues are raised by the asymmetry of the rights of signatories to impose countervailing duties to prevent injurious subsidies and the more limited rights of affected parties to seek redress through the international machinery established to provide redress.[486]

Since no substantive obligations were incurred by signatories in relation to the use of domestic subsidies, the only available remedy to counter such measures is the imposition of countervailing duties, a unilateral measure that detracts from the principles of multilateralism embodied in the GATT. This has been reflected in the policy of the United States to impose duties on products that have benefitted only from generalised domestic subsidies.

As regards dispute settlement and implementation, quite clearly the process is extremely ineffective as contesting parties, especially the United States and the European Union can block the coalescence of a consensus

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[484] United States Countervailing Duties on Imports of Fresh and Chilled Salmon From Norway, GATT Doc SCM/149 (1992).

[485] GATT, Focus, No. 109, 4 (1994).

[486] See J. Terry, "Sovereignty, Subsidies and Countervailing Duties in the Context of the Canada-United States Trading Relationship", (1988) 46 University of Toronto Faculty Law Review, 48-95, 64-68.

for adoption in the Subsidies Committee. Further, the recommendations made by panels are rarely implemented and, in the past, have been used as an excuse for delaying adoption. At present, four new cases are presently pending before the Subsidies Committee for resolution.[487]

### (4) The Uruguay Round Attempt to Salvage A Minimum Degree of Restraint

#### (A) Anti-Dumping Measures

The negotiation of a third Anti-Dumping Agreement at the Uruguay Round of multilateral trade negotiations proved an exacting task. This may be attributable to one single factor, namely a tension developed between the major importing nations and the major exporting countries. The policy objectives of the European Union and United States were broadly similar: to prevent the imposition of more rigorous restrictions on their anti-dumping activities. Those of the exporting states were to put a straight-jacket on these countries and in particular the more novel forms of anti-dumping such as anti-circumvention and anti-absorption measures.

Hence, no consensus materialised at the Uruguay Round of multilateral trade negotiations on the terms of even a draft Anti-Dumping Code by the time of the Brussels meeting in December 1990.[488] These divisions separated

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[487] Argentina Countervailing Duty Measures on Diary Products from the EC; United States Countervailing Duty Measures on Portable Seismographs from Canada; United States Countervailing Duty Measures on Imports of Steel from the EC; and Australian Countervailing Duty Measures on Imports on Frozen Pork from Canada; Annual Report of the Subsidies Committee, GATT BISD, 39th Supplement 408 (1993).

[488] Draft Final Act of the Uruguay Round MTNs, GATT Doc. MTN.TNC/W/35 (December 1990).

the negotiating parties prior to the December 1990 discussions into two camps.[489] At one end of this spectrum were those participants requesting the adoption of more rigorous disciplines on the use of anti-dumping measures.[490] At the other end were those states wishing to adopt rules to place new developments, such as anti-circumvention measures, on a more solid legal foundation.[491]

At the same time, there was no agreement on a number of more fundamental issues such as the definition of dumping and the definition of injury. As the background press briefing reports described the situation prior to the December 1990 meeting in Brussels:

> "Successive drafts for a comprehensive revision of the Anti-Dumping Code have failed owing to the diverging and indeed diametrically opposed interests aired on the main problems."[492]

A draft revision of the 1979 Anti-Dumping Code was rejected by most of the participants as unbalanced because it failed to eliminate certain perceived protectionist biases in the existing Code.[493]

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[489] See E-U. Petersmann, "The Uruguay Round Negotiations", in E-U. Petersmann et al., The New GATT Round of Multilateral Trade Negotiations (Second edition, 1991), 501-577, 545.

[490] For example, see the proposals made by the Japanese Study Committee on Anti-Dumping entitled Proposed Amendments to the GATT Anti-Dumping Code, Fair Trade Centre (March 1989).

[491] See GATT, Activities Report 1989 (1990), 57.

[492] GATT, Press Background Briefs, November 1990, 33.

[493] GATT, Focus No. 76, 2 (November 1990).

In substantive terms, the main areas of disagreement related to: (a) the determination of dumping (ie. normal value, calculation of dumping margins, more precise criteria for price adjustments to ensure a 'fair comparison' between export price and home price, and the definition of like products); (b) factors relevant to the determination of injury (ie. cumulation, determination of the threat of material injury); (c) definition of industry (ie. exemption of related producers); (d) initiation of investigations (ie. proper documentation and verification of requests); (e) the imposition and collection of anti-dumping duties (ie. review and refund procedures, duration and retroactive application of duties); and (f) anti-circumvention measures.[494]

A second draft text - known as the 'Dunkel Draft' - made a number of significant proposed amendments to the original text and met with slightly greater approval.[495] This initiative proved to be the necessary bridge between the chaos of the December 1990 Ministerial Meeting and the final anti-dumping agreement contained in the December 1993 Final Act which, for present purposes, will be referred to as the Third Anti-Dumping Agreement.[496] It is useful at this stage to consider some of the more important provisions of the Third Anti-Dumping Agreement in order to determine whether or not these improve on the 1979 Anti-Dumping Code obstacles which arose in the course of the discussions.[497]

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[494] See GATT, Activities Report 1990, 42 (July 1991).

[495] Draft Agreement on the Implementation of Article VI of the GATT, GATT Doc. MTN.TNC/W/FA (1991).

[496] Agreement on Implementation of Article VI of the GATT 1994, GATT Doc. MTN/FA II-A1A-8 (December 1993).

[497] In general, see G.N. Horlick & E.C. Shea, "The WTO Anti-Dumping Agreement", (1995) 29:1 JWT 5.

(1) Calculation of dumping margins

The changes required in the method of calculating dumping margins was a contentious issue. First, a number of parties questioned the extent to which actual data is employed in establishing dumping margins as opposed to constructed values and estimates on the basis of the best information available.

The related issue of the lack of symmetry in the comparison of normal price and export price also generated heated exchange. For example, if averaging was to be used to establish home market price, it was questioned why this technique not be employed to calculate the export market prices in all cases. The difficulties inherent in the comparison were also debated. Among these issues was the question of the appropriate period for cost recovery in determining whether the home price is below the costs of production.

The Third Anti-Dumping Code sets out new guidelines for comparing the normal value of a product with the export price. The purpose of these guidelines is to curb the practice of arbitrarily creating or inflating dumping margins.[498] For example, there are specific rules regulating the application of exchange rates to export prices[499], the use of weighted average values[500], the method of establishing comparable levels of trade[501] and the calculation of third country prices where there are inadequate sales in the country of origin.[502]

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[498] Ibid, Article 2.

[499] Ibid, Article 2.4.1.

[500] Ibid, Article 2.4.2.

[501] Ibid Article 2.4.

[502] Ibid, Article 2.2.1.

In addition, Japan was successful in including within the Agreement a provision preventing the imposition of duties on products where a de minimis dumping margin is established. Article 5(8) of the Agreement establishes the de minimis rate as a dumping margin of less than two percent of the export price.

(2) The method of establishing material injury

The perennial issue of material injury again proved to be a major stumbling block to reaching a viable consensus on the terms of an agreement. The general rule, stated in Article 3(1), is that a determination of injury must be based 'on positive evidence and involve an objective examination' of both the volume of dumped imports and the impact of these products on domestic producers. The requirement of positive evidence is a recurring theme through Article 3 which sets down the standards required for a determination of injury.

In addition, new rules have been created to regulate cumulation of injury from two or more sources. Cumulation of injury may be made if (a) the margin of dumping established in relation to the imports from each country is more than de minimis and the volume of imports from each country is not negligible; and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between imported products and the conditions of competition between imported products and the like domestic products.[503]

Finally, a de minimis level has been established for the volume of dumped products when an assessment of injury is being made. The volume of dumped imports is normally

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[503] Ibid, Article 3.3.

to be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3% of imports unless countries which individually account for less an 3% of imports collectively account for more than 7% of imports.[504]

(3) Definition of industry

The definition of domestic industry for the purposes of identifying interested parties and assessing injury is broadly the same as the earlier 1979 Anti-Dumping Agreement.[505] No proportion of a particular industry is specified as being represented for the purposes of making a complaint and the term 'a major proportion' is retained. Hence, the charges made against both the United States and the European Union for setting this threshold too low will undoubtedly continue.[506]

(4) Procedure for investigations and evidence

The procedural and evidential requirements for initiating an anti-dumping complaint have undoubtedly been tightened up.[507] Although initiating complaints remains the primary prerogative of domestic industries, the Agreement introduces the concept of 'interested parties' which are granted certain rights including the right to present evidence and the right to be promptly informed of the outcome of preliminary and final determinations.[508]

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[504] Ibid, Article 5.8.

[505] Ibid, Article 4.

[506] See text, infra Chapter 11.

[507] Supra, note 505, Article 5.

[508] Article 6.11 of the Agreement defines 'interested parties' as (a) an exporter or foreign producer or the importer of a product subject to investigation, or a

Interested parties are also given the right to have an opportunity to present a defence of their interests.[509] The method and manner of making such representations is also regulated. In addition, the release of confidential information is subject to the requirement that such information cannot be disclosed if there is 'good cause shown' for preservation of confidentiality.[510]

Evidential thresholds are also raised substantially. All interested parties are to be given notice of the information on which the investigating authorities require and 'ample opportunity' to present in writing all evidence which they consider relevant in respect of the investigation in question.[511]

(5) The imposition of duties and termination of measures

Provisional duties may only be applied if an investigation has initiated in accordance with the procedural and evidential requirements set out in the Agreement and a preliminary affirmative determination has been made of dumping and consequent injury to a domestic injury.[512] There is an additional requirement for the imposition of such duties namely that the authorities judge such measures necessary to prevent

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trade or business association a majority of the members of which are producers, exporters or importers of such products; (b) the government of the exporting country; and (c) a producer of the like product in the importing country or a trade and business association a majority of the members of which produce the like product in the importing country.

[509] Ibid, Article 6.2.

[510] Ibid, Article 6.5.

[511] Ibid, Article 6.1.

[512] Ibid, Article 7.1.

injury being caused during the investigation.

The application of provisional measures is limited to as short a period as possible, not exceeding four months or, after a decision of such authorities, on request by exporters representing a significant percentage of the trade involved, to a period not exceeding six months.[513]

Definitive anti-dumping duties are to remain in force for a maximum period of five years from the imposition of such duties or as long as, and to the extent necessary, to counteract the dumping causing injury.[514] This is unless a review is initiated after a substantiated request made by or on behalf of the relevant domestic industry.

Two important controls are not included in the new Agreement. The first is that there is no compulsory requirement that duties are limited to an amount equal to those necessary to remove the material injury caused to the relevant domestic industry. In other words, national agencies continue to be entitled to impose duties to the greater of the margin of dumping or the margin of injury.

Second, there is no compulsory public interest requirement which would oblige national agencies to take into consideration the interests of consumers or other producers in the territory.[515]

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[513] Ibid, Article 7.4.

[514] Ibid, Article 11.1.

[515] It should be noted that, at present, the European Commission applies both these requirements on a voluntary basis.

(6) Anti-circumvention measures

The issue of anti-circumvention measures serves to highlight the vast differences among signatories in the negotiations. On the one hand, developed countries desired the extension of anti-dumping duties to products manufactured in third countries or broken down and assembled inside a country imposing duties on the finished product. These guidelines were deemed necessary to prevent the repetition of the successful attack on the anti-circumvention measures of the European Union.[516]

These proposals were opposed by a Japan-Pacific Rim coalition on the ground that they amounted to an unnecessary extension of the concept of dumping to the internal treatment of goods within a country.

In fact, the Dunkel Draft Agreement contained a detailed section on the regulation of measures to prevent circumvention of definitive anti-dumping duties.[517] These terms have been deleted from the text of the Third Anti-Dumping Agreement in whole. Consequently, there are no express provisions confirming the legitimacy of such measures. Hence, anti-circumvention measures must be justified in accordance with the obligations contained in the General Agreement itself and the terms of the Third Subsidies Code. For the most part, guidance may be obtained in this matter from the panel decision in the finding against the European Union's anti-circumvention measures.

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[516] EEC Regulation on Imports of Parts and Components, GATT Doc. L/6657 (March 1990).

[517] Article 12, Draft Agreement on Implementation of Article VI of the GATT, GATT Doc. MTN.TNC/W/FA (1992).

(B) Countervailing Duty Measures

The regulation of countervailing duties through the Second Subsidies Agreement proved slightly easier than the control of anti-dumping measures. As noted earlier, the Final Act contains a new Subsidies Code which follows its predecessor in regulating both subsidies and countervailing measures.[518] For the most part, the Agreement's provisions attempt to close the loop-holes in the terms of the 1979 Code without adding any significantly new concepts. At least in terms of substantive obligations, the new Agreement even follows the contours of that agreement.

In common with its predecessor, the Second Subsidies Agreement consists mainly of a series of obligations imposed on signatories requiring them to refrain from certain practices or to implement procedures that correspond to the terms of the Agreement. The main concepts which have been clarified are: (a) the definition of countervailable subsidies; (b) the relationship between regulated subsidies and countervailable subsidies; (c) the test of material injury; and (d) anti-circumvention measures.

(1) Countervailable subsidies

The new Agreement ties the concept of subsidy under the multilateral framework for the regulation of subsidies to the concept of countervailable subsidies for the first time. Thus, a countervailable subsidy must satisfy the following two conditions:

(a) there must be a financial contribution from a public body to a private individual which

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[518] Agreement on Subsidies and Countervailing Measures, GATT Doc. MTN/FA II-A1A-13 (December 1993).

confers a benefit on that individual[519]; and

(b) the subsidy must be specific with the terms of Article 2 of the Code.[520]

Therefore while the 1979 Code recognises that states possesses the right to impose duties on all kinds of subsidies, the Second Agreement restricts this discretion, although export subsidies and specific domestic subsidies, unless exempt, will continue to remain countervailable. In order to determine whether or not a subsidy is specific, reference must be made to Article 2 of the Code.[521]

Unfortunately, in common with the 1979 Code, the new Agreement does not provide rules to quantify a countervailable subsidy, instead providing that any method used to calculate financial assistance should be embodied in national legislation and should be both transparent and adequately explained. Nevertheless, any legislation relating to quantification must be consistent with five basic standards.[522]

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[519] Article 1(1), Second Subsidies Code.

[520] Article 1(2), Second Subsidies Code.

[521] See text supra, pp.125-130.

[522] (1) Government provision of equity capital shall not be considered as conferring a countervailable benefit unless the investment decision is inconsistent with the normal investment considerations of private investors; (2) A loan by a government does not confer a benefit unless there is a difference between the amount the firm receiving the loan pays the government for the loan and a comparable commercial loan available to the firm in the commercial money markets; (3) A loan guaranteed by a government shall not confer a benefit unless there is a difference between the amount that the firm receiving the guarantee paid for the loan and the amount that the firm would pay in the absence of the guarantee; (4) The provision or purchase of goods or services by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration or the purchase is made

Naturally the converse is also the case and where government assistance fails to meet these criteria a benefit is conferred.

A considerable degree of discretion therefore continues to reside with governments as to the determination of countervailable subsidies. No detailed rules, such as those proposed by the Group of Experts on the Measurement of Subsidies, were adopted to facilitate measurement of a benefit under a programme and this is clearly a defect in the scheme.

(2) The relationship between regulated subsidies and countervailable subsidies

The relationship between countervailable subsidies and the three categories of subsidies subject to general regulation - prohibited, actionable and non-actionable - is in fact defined by a footnote to Article 10 of the new Agreement. This provides that, although complaints may be lodged with the competent authorities at the international level to complain about prohibited and actionable subsidies, only one form of relief may be granted.[523] In other words, countervailing duties cannot be imposed on a product if countermeasures have been approved by the Subsidies Committee after the submission of a competent complaint.

Subsidies that are deemed non-actionable cannot be countervailed. This is consistent with the philosophy

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for more than adequate remuneration; and (5) Where the government is the sole provider or purchaser of goods or services, the provision or purchase of such goods or services shall not be considered a benefit unless the government discriminates among users or providers of the goods or services; Article 14, Second Subsidies Code.

[523] Interpretative note 1, Article 10, Second Subsidies Code.

that a non-actionable subsidy causes insignificant or limited injury. However, the fact that a subsidy is alleged to be non-actionable does not prevent any investigation being conducted to confirm this assessment.

(3) The method of establishing material injury

The new Agreement adopts the basic principles behind the 1979 Code and, again, injury may take any one of three forms: (a) actual injury; (b) threat of injury; and (c) material retardation of a domestic industry. Articles 15(2), 15(4) and 15(5) of the Second Subsidies Agreement are identical to Articles 6(1) (application of the tests relating to volume of imports and impact of imports), 6(2) (elaboration of the volume test) and 6(3) (elaboration of the impact test) of the 1979 Code.

A new rule has also been adopted to tackle the problem of cumulation of injury. The concept of cumulated injury refers to the process whereby injury is assessed on the basis of the impact or effects of all goods of a certain classification from all sources, not only those countries that are alleged to have subsidised production. This process tends to discriminate against small foreign exporters, especially those situated in another country from producers benefitting from scales of economy who contribute more directly to causing injury.[524]

Where imports from more than one country are simultaneously subject to countervailing duty investigations, the authorities may cumulatively assess the effects of such imports only if two conditions are

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[524] B. Balassa, "Subsidies and Countervailing Measures: Economic Considerations", (1989) 23:2 JWT, 63, 72-73.

satisfied:

- the amount of subsidisation established in relation to the imports from each country is more than de minimis (which is not defined) and that the volume of imports from each country is not negligible as defined in Article 11(7); and
- that a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between imported products and the conditions of competition between the imported products and the like domestic product.[525]

A related concept, the doctrine of cross-cumulation refers to calculations of injury based on the impact of both subsidised goods and all other like goods that have benefitted from some form of unfair competitive advantage, such as dumping. It is not clear how far an assessment of injury caused by violations of other unfair trade laws, such as dumping, should extend to countervailing investigations trade practices, but, the Second Subsidies Code does not address this issue.

(4) Anti-circumvention measures

The 1979 Code failed to tackle this issue but this situation was rectified in part in 1990 Draft Subsidies Agreement.[526] Under its provisions, two situations would have justified the imposition of anti-circumvention duties:

- when parts and components are shipped from the

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[525] Article 15(4), Second Subsidies Code.

[526] Article 12, Second Subsidies Code.

countervailing order to the importing country for assembly or conversion into a product covered by the order, and the value of the parts and components imported is equal to, or exceeds, an as yet unspecified percentage of the total value of the assembled or finished product; and

- when parts and components are shipped from a country covered by a countervailing order to a third country for assembly or completion into the product covered by the order and then exported into the importing country, and the value of the parts and components again exceed the minimum percentage of the total value of the finished product.[527]

In both these cases, signatories could apply the relevant duties to the imported products, although the manner in which this will be achieved is not yet settled, and there were at least two conditions applying to the imposition of such measures.[528]

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[527] See J.H. Bello, "Anti-Circumvention Measures: Shifting the Gears of the Anti-Dumping and Countervailing Duty Laws", (1990) 24 Int'l Lawyer 207.

[528] First, in the case of parts and components brought straight into the importing country, the investigating authorities must be satisfied: (a) that imports of the parts or components have increased since the enactment of the order; (b) the exporter of the parts or components, the producer covered by the order, and the assembler are related parties; (c) the most significant parts and components are being shipped for assembly or completion; and (d) the assembly or completion process was started, or materially expanded, after the issue of the countervailing order. Second, where parts of components are being brought in via a third country, the authorities must be satisfied: (a) shipments of the parts or components have increased since the order; (b) exports to the importing country from the third country have similarly increased; (c) the exporter, producer and assembler in the third country are related parties; (d) the most significant parts and components are being shipped to the third country; and

In fact, the final text of the Second Subsidies Code omits such provisions, a situation which mirrors that of the Third Anti-Dumping Code. This matter is therefore regulated by general principles of the GATT itself and the Second Subsidies Agreement.

(5) Tentative Conclusions

The Second Subsidies Agreement is not a radical overhaul of its predecessor and, in that respect, suffers from the defects outlined earlier in the text when that agreement was examined.

However, from a practical perspective, it is likely that the Second Subsidies Agreement will be accepted by a far greater number of signatories than its predecessor. At least as far as the developed contracting parties of the GATT are concerned, the Uruguay Round agreements are to be treated as a single document. A Member wishing concessions in a field unrelated to the obligations on countervailing duties will therefore be more prepared to accept the terms of the Second Agreement in order to obtain the benefits sought under the related agreements, particularly those concerning non-tariff barriers. As the former GATT Director-General pointed out, the final stage of the round was guided by the maxim 'nothing is agreed until everything is agreed.'[529]

Now that the Uruguay Round negotiations have been successful, it is likely that the Agreement's provisions on countervailing duties will attract considerably more participants than its predecessor. The question that arises is whether quantity will act as a sufficient

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(e) the assembly process was started or materially expanded since the issue of the order.

[529] London Times, January 11, 1992, p.18.

substitute for quality.

**(5) Observations**

The fundamental flaw in the whole GATT regulatory system for administered protectionism was to permit such measures to be applied on a basis which deviates from the MFN principle. This factor alone has contributed most to the proliferation of such measures because it allowed states to grant protection to specific domestic industries seeking protection from competition from particular foreign competitors.

This feature has also been responsible for the way in which these measures have evolved within states and, in particular, the United States and the European Union. Quite clearly, the present shape and content of these mechanisms in both these countries is far removed from the rudimentary structures for anti-dumping and countervailing duties operated when the GATT was originally conceived. The increased sophistication of such measures has been stimulated by the increased demands for protection from domestic industries competing in the aggressive markets of modern times.

In such circumstances, it should not therefore be surprising that such measures, especially anti-dumping measures, have transcended their original function and have become instruments of protectionism. The new international rules on anti-dumping and countervailing measures must recognise that this change has occurred and that both types of measures will continue to be the predominant method of obtaining protection in the foreseeable future particularly as average levels of tariffs decline now that agreement at the Uruguay Round

has been secured.

At the same time, the desirability of allowing states to continue to use measures which are effectively unilateral in nature must be questioned. The sole justification for unilateral measures must be to release pressure built up from legitimate requests for relief where pursuit of an international trade complaint would not provide an effective relief to a particular industry. The proper mechanism for such relief was recognised in Article XIX of the GATT and continues to remain the same to-day: selective safeguard measures.

It is not only the relationship between the different types of measures of administered protection which requires elucidation to be more effective; some of the basic concepts themselves also need clarification. For example, it no longer serves any useful purpose to continue with the fallacy that anti-dumping measures are designed to prevent some form of predatory or target pricing. Evidence of such behaviour is not required for the imposition of anti-dumping measures and, in any event, relief may be obtained against such practices through the normal channels of anti-trust or competition law.

It is necessary to discontinue the pretence that anti-dumping measures are necessary to prevent injurious predatory pricing and instead recognise that anti-dumping measures are simply a method of preventing the flow of cheap products from one country to another. It is a form of protection and the rationale for such protection is not economic but political; to protect domestic economies. Pretending that there is some viable economic rationale for anti-dumping measures cannot serve any other purpose than to obfuscate the nature of the rules which are required to properly regulate this

activity.

However, true to past form, the 1979 Agreement on Anti-dumping (and countervailing duties for that matter) failed to provide sufficient detail to allow the effective functioning of regulatory norms. To a certain extent this is merely one feature of international rules in general, namely that states are reluctant to limit their discretion to act by agreeing precise workable rules. Nevertheless, the effect of the vagueness of the rules contained in these agreements can only serve to undermine their enforceability and efficacy. That this is true is more than evidenced in the pre-1995 experiments into establishing legal regulations for these measures.

In general terms, the approach of the trade negotiators at the Uruguay Round in developing rules to regulate dumping and subsidies has been to follow the contours of the 1979 agreements respectively. The strategy has been to try to settle the applicable rules by adopting less imprecise definitions, guidelines and rules. This approach has been pursued even although the basic rules themselves have been ineffective.

This is also demonstrated by the fact that problems in the operation of the regulatory regime which arose even before the 1979 Codes continue to plague the 1995 system. Here we can cite the defects in the calculation of normal value and export prices, the issues of adjustments, deductions, sampling, averaging and the determination of injury and causation as well as the new practices which have emerged in the last ten years such as indirect dumping, cumulation and cross-cumulation of injury, exchange rate fluctuations, anti-circumvention and anti-absorption.

Even some of the most fundamental rules of Article VI of the GATT and the 1979 Code have been breached by both the United States and the European Union. For example, both countries have provisions in place which allow for simultaneous investigation of both anti-dumping and countervailing duty complaints despite the prohibition on the imposition of such duties in Article VI. Flagrant violations such as these, and others we shall examine in due course, confirm that both Codes have, to a large extent, been failures.

Within the 1979 Subsidies Code, the failure to link prohibited or regulated international subsidies with countervailable subsidies was also clearly a major substantive defect in the whole structure. The Second Subsidies Code will at least partially remedy this situation by linking countervailable subsidies with actionable subsidies. Only subsidies which are non-actionable will be non-countervailable. This adds some degree of clarity to the objective of trying to link the concept of prohibited/actionable subsidies with countervailable subsidies.

At the end of the day, both the countervailing duty provisions of the Subsidies Code 1979 and the provisions of the Anti-Dumping Agreement 1979 were intended to harmonise the laws of the signatories - including the United States and the European Union - at a basic minimum level. While superficially the anti-dumping and countervailing laws of both these countries are similarly structure, the dramatic increase in the use of these measures since 1979 has demonstrated that harmonisation does not necessarily mean limitation.

It is also highly unlikely that the negotiation of the new agreements for countervailing and anti-dumping duties will result in a decrease in the overall amount

of such investigations by either the United States or the European Union. These states can simply redefine their laws in light of the international rules taking advantage of lacuna and short-comings in order to provide protection to their domestic industries. If the United States and the European Union do in fact fine-tune their laws in these areas, there will still remain the substantial administrative discretion which has been exercised by the administrating agencies in both countries. The inadequate detail in both agreements will ensure that this will be the case.

In addition, the failure to secure new rules to regulate the more exotic aspects of anti-dumping and countervailing measures will be exploited by both the United States and the European Union for operating these mechanisms. Thus, anti-circumvention measures and anti-absorption measures have escaped express regulation and now are controlled only by general principles.

The more rigorous procedural and evidential standards set down in the new Agreements are not likely to produce a decline in the volume of anti-dumping or countervailing investigations pursued by the United States or the European Union each year. It is more likely that the procedure for conducting an investigation will become more complex and intricate as interested parties are granted rights to be heard during the proceedings. Of course, the more complicated an investigation becomes, the greater the expense a foreign producer incurs in defending its interests. Hence, there may be an increase in the number of investigations each year where foreign producers simply withdraw their products from the market rather than incur expenditure which may or may not be justified in the future.

Turning to dispute settlement and rule implementation,

both phenomenon have been abysmal in the case of the two 1979 Codes. The volume of cases submitted for dispute resolution is considerably lower than would normally be anticipated being no more than an average of two or three cases each year except for 1992 and 1993 when the procedure was clearly being used as part and parcel of the negotiating strategies of certain countries. Also, although the position under the Anti-Dumping Code has been slightly better than under the Subsidies Code, the panel procedure has failed to satisfy the needs of either the complaining or the responding parties.

Blocking adoption of panel reports has been for some of the most spurious reasons. Countries have refused to allow adverse reports to be adopted because other countries have been able to stall adoption in the past. Similarly, objections to the adoption of reports have been made because the panel recommended a particular form of relief or because the panel allegedly rendered erroneous legal interpretations.

It is not a trite observation to note that more panel reports have been blocked than have been adopted. In other words, if a party initiates a complaint, it has less than a fifty-fifty chance of having the final report adopted without being contested. It has even less chance of the defending state revising its laws to eliminate the mischief. It can therefore be legitimately concluded that the panel procedure does not provide a sufficiently satisfactory means of allowing effective complaints to be made. This has been a substantial contributing factor to the fragmentation of the effectiveness of the Codes.

It is true that this analysis has concentrated on the deficiencies of the international rules for measures of administered protection and largely ignored the rules

which are clear and well-respected. However, to a large extent this is the test for effective regulation. The most effective rules are those which are non-contentious, which do not permit any degree of administrative discretion or which are based on easily-identifiable concepts. In fact, it is the degree to which many of the present international rules under examination are imprecise, or ignored, that is the cause of concern.

## PART B

# THE DIRECTION AND SHAPE OF THE TRADE POLICIES OF THE UNITED STATES AND THE EUROPEAN UNION

## 4 The Direction and Shape of United States Trade Policy

The United States trade policy is at a crisis point. There is deep division within the government of that country as to whether trade policy is best served through the existing multilateral system, or through the pursuit of unilateral measures coupled with bilateral diplomacy and the negotiation of free trade agreements. It is a principal theme of this work that certain forces within the United States are at work to draw that country into a more unilateralist/bilateral trade policy.

Multilateral trade diplomacy no longer occupies as central a place in the formulation of United States trade policy in the 1980s and 1990s as it did in the first three decades of the GATT. Increasingly, the United States has sought to achieve policy objectives through a combination of unilateral trade measures and bilateral diplomacy.[530] This change of direction has also be accompanied by an erosion in the commitment of the United States to respect the fundamental tenets of the GATT such as the binding of tariffs, the reduction of charges on imports and the prohibitions on discriminatory internal taxation.

Once it is realised that the continued commitment of the United States to the GATT, and the principle of multilateralism, is no longer an immutable of U.S. trade policy[531], I shall be able to evaluate the degree to

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[530] See J.H. Jackson, "Multilateral and Bilateral Negotiating Approaches for the Conduct of United States Trade Policy", in R.M. Stern (ed), United States Trade Policies in a Changing World Economy (1987), 377-401.

[531] See the comments of former Ambassador A.W. Wolff, "International Competitiveness of American Industry: The Role of U.S. Trade Policy", in B.R. Scott & G.C. Lodge

which a greater emphasis is now placed on bilateralism and unilateralism. In addition, I shall evaluate the primary objectives of the United States at the Uruguay Round to determine whether the United States has reaffirmed its commitment to the GATT or whether participation in the Round is simply a means through which the United States can achieve policy objectives which are unobtainable through a combination of bilateral and unilateral measures.

### (1) The Erosion of the United States Commitment to the Fundamental Principles of the GATT

There is little doubt that the United States has made considerable tariff concessions during the various rounds of MTNs, including both the Tokyo and Uruguay Rounds. The Trade Policy Review of the United States conducted by the GATT in 1989 concluded that weighted average tariff rates on agricultural imports presently stand at 3.3 percent and at 5.0 percent for industrial products.[532] The United States also maintains a high degree of tariff binding on both agricultural and industrial products (90% for agricultural products and more than 90% for industrial products).

These low average tariffs obscure the fact that in certain sectors, such as agriculture, textiles and footwear, tariff rates of over twenty five percent are maintained which effectively eradicates competition in these sectors. However, low tariff rates encourage trade liberalisation only if they are fairly operated. The United States authorities have been able to impede

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(eds), United States Competitiveness in the World Economy (1985), 301.

[532] GATT, Trade Policy Review of the United States, 1989 (1990), 176 [hereinafter 'TPRM USA 1989'].

imports by manipulating its laws and practices relating to the application of tariffs. These measures have the effect of increasing levels of duty to the detriment of foreign importers. Four common practices can be identified: product re-classification, customs users fees, discriminatory internal taxes, and the removal of countries from the GSP programme.

(A) Unilateral Reclassification of Imports

Customs duties can be increased on certain products by unilaterally and periodically reclassifying them into headings which are subject to higher rates of duties. This practice has occurred in the United States tariff schedules despite adoption of the Harmonised Commodity Description and Coding System[533] into United States customs laws.[534]

As a result of such reclassification, the European Union has alleged that duties on a number of textile products have risen from 8-15% to 39%, heavy machinery products from 3% to 18% and certain food additives from 7% to 17.5%.[535]

Similarly, in January 1989, the U.S. Customs Service issued a classification ruling which reclassified two types of vehicles -minivans and sports utility vehicles - as light trucks which attracted an ad valorem rate of duty of 25% as opposed to the rate of 2.5% previously

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[533] Protocols Relating to the Introduction of the Harmonized Commodity and Coding System, GATT BISD, 34th Supplement 5 (1988).

[534] Sections 1201-1217, Omnibus Trade and Competitiveness Act of 1988, 102 Stat. 1147.

[535] European Commission, Report on United States Trade Barriers and Unfair Practices 1991 (1991) [hereinafter the European Commission Report 1991], 17.

applied when these products were classified as passenger cars.[536] On appeal, this reclassification was reversed by the Department of the Treasury for minivans, but the ruling stood for sports utility vehicles. It was only in May 1993 that the Court of International Trade issued a ruling overturning the Treasury's order for sports utility vehicles although this decision was rendered on the basis of American customs law and not the international rules.[537]

While a Customs Valuation Agreement[538] was agreed as part of the Tokyo Round package of agreements and implemented into United States law [539], this Agreement does not fetter the discretion of customs officials to classify products on the basis of principles of national law that have developed over the course of time.[540] The above examples demonstrate the almost arbitrary and unilateral nature of reclassification decisions by the American customs authorities and, while appeal is possible, it is not immediately to a court of law but to a political agency, namely the U.S. Treasury Department, and only thereafter to the Court of International Trade.

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[536] TPRM USA 1989, 221.

[537] See European Commission, Progress Report on EU-US Relations, 15-16 (Dec 1994).

[538] GATT BISD, 26th Supplement, 116 (1980).

[539] Section 201, Trade Agreements Act of 1979, 93 Stat. 144 (1979).

[540] On the principles, see W&J Sloane Inc v United States, 408 F. Supp. 1392 (Customs Ct., 1976) and Nootka Packaging Co v United States, 22 C.C.P.A. 464 (1975), both reproduced in part in J.H. Barton & B.S. Fisher, International Trade and Investment (1986), 402-406, 408-413.

(B) Illegal Introduction of Custom Users Fees

An equally pernicious practice has been the periodic introduction of customs users fees. The GATT does not prohibit charging fees to importers using the services of customs officials but places an obligation on all contracting parties to levy such fees at a charge commensurate with the cost of rendering the services.[541]

In a series of statutes between 1985 and 1986, the United States imposed additional processing fees on a number of merchandise goods including vehicles, vessels, trains, private boats and aircraft.[542] The effect of these fees was to place foreign producers at an unfair competitive disadvantage vis-a-vis United States manufacturers because these fees were imposed on selected products. Further, the measures are directed against the European Union and Japan as the principal suppliers of these goods. In other words, these charges provided indirect protection through de facto discrimination.

Another such charge, the merchandise processing fee, was in fact challenged by the European Union and Canada in the GATT.[543] This charge was levied on an ad valorem basis on all commercial merchandise entering the United States at a rate of 0.22% of the value of the merchandise.

A panel was established to investigate the matter and

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[541] Articles II(2)(c) and VIII(1)(a), General Agreement.

[542] Extended and modified in the Customs and Trade Act of 1990 and the Omnibus Budget Reconciliation Act of 1990.

[543] Introduced in the Omnibus Budget and Reconciliation Act of 1986.

concluded that the ad valorem structure of the merchandise processing fee was inconsistent with the obligations of the United States under Articles II(2)(c) and VIII(1)(a) of the GATT.[544] The basis of the decision was that the charges were levied in excess of the costs of the services rendered. This was tantamount to an additional tax on imports contrary to the principle that contracting parties shall not levy fees or other charges unless these are commensurate with the costs of the services rendered.

Despite the adoption of the panel report in the Council in November 1987, the United States was reluctant to implement its findings. Instead of repealing the measure, the United States simply changed the rates with the average rate being decreased but minimum threshold charges being introduced.[545] The Omnibus Budget Reconciliation Act of 1990 extends the scheme for a further four years until September 1995 and also provides for the discretionary adjustment of fees.

(C) The Use of Discriminatory Internal Taxes

Article III of the GATT establishes the rule that internal taxes and other charges or laws, regulations and requirements affecting the internal sale or use of products should not be applied to discriminate between imported and domestic production of identical goods.

An example of a United States measures blatantly

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[544] United States - Customs Users Fees, GATT BISD, 35th Supplement 245 (1989).

[545] The main provisions of this legislation was a 0.17 percent ad valorem charge on all entries, a $21 minimum fee and a $400 maximum fee, and various additional fees for manual entries and informal entries; Customs and Trade Act of 1990. See GATT, Focus, No. 75 (Oct 1990), 3.

violating this obligation was the scheme introduced by the Superfund Amendments and Reauthorization Act of 1986. This legislation was ostensibly enacted to fund a programme financing the cleaning of hazardous waste sites by imposing an excise tax on petroleum at the rate of $0.082 per barrel for domestic crude oil and $0.117 per barrel for imported petroleum products. Again, the European Union and Canada, this time joined by Mexico, challenged the validity of this programme in the GATT.

A panel was convened which promptly held the United States in violation of its GATT obligations.[546] The panel found the excise tax on petroleum was inconsistent with Article III(2) of the GATT because it was an internal tax which imposed charges on imports in excess of those applied to like domestic products. After immense international pressure, the Executive submitted a bill to Congress to correct the legislation by equalising the rates of tax on the imported and domestic products and was successful in persuading Congress to adopt the legislation into law.

Periodically, the United States Congress introduces bills designed to afford protection to American industries by means of discriminatory taxes.[547] For example, in 1991, a luxury excise tax was introduced which levied a 10% tax on the retail price of passenger cars over $30,000.[548] The European Union and Japan have both attacked this measure since the price of

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[546] United States - Taxes on Petroleum and Certain Imported Products, GATT BISD, 34th Supplement 136 (1988).

[547] See generally, D.J. Roussland & J.W. Suomela, "The Trade Effects of a U.S. Import Surcharge", (1985) 19 JWTL 441.

[548] Omnibus Budget Reconciliation Act of 1990. This measure has been extended by the Omnibus Budget Reconciliation Act of 1993.

domestically-produced passenger cars rarely exceeds this level whereas many European and Japanese producers have concentrated their sales efforts on the luxury car market in order to prevent the application of quotas.[549]

This tax becomes more blatantly discriminatory if it is considered that other luxury goods such as private aircraft and boats, which are predominantly manufactured in the United States, were excluded from the scope of the measure by a specific amendment. In effect this is tantamount to de facto discrimination, which occurs when a measure which is prima facie non-discriminatory has effects which are discriminatory or is administered in a discriminatory fashion. It is on this basis that the European Union intends to attack this measure and a request for the establishment of a panel on the matter was made to the GATT in May 1994.[550]

(D) The Unjustifiable Removal of Countries from the GSP Programme

The United States GSP system is open to all countries designated by the President as being a 'beneficiary developing country'.[551] The scheme is governed by American law and there is no international agreement to determine how such programmes should be administered. Approximately 140 countries benefit from the United States GSP system, but the grant of benefits can be unilaterally withdrawn by the President.

Countries are generally removed from the GSP programme

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[549] The European Commission estimates that 41.2% of European vehicles are subject to this tax in comparison to 2% of American-produced vehicles; European Commission Report 1994, 50.

[550] GATT, Focus, No. 109, 4 (1994).

[551] Section 502(a)(1), Trade Act of 1974.

for two reasons. Either countries have achieved a degree of economic development that will remove them from the category of beneficiary developing country or they fail to meet the subjective standards set by the United States for the proper running of their economies.

On grounds of advanced economic development, Hong Kong, Singapore, the Republic of Korea and Taiwan were removed from the list of eligible countries with effect from January 1989.[552]

Other countries have been removed for a myriad of political reasons. Nicaragua was removed from the programme in March 1987 for alleged workers' rights violations. Paraguay, Chile, the Central African Republic and Myanmar were suspended from the programme on similar grounds between 1987 and 1989. Panama was suspended from the scheme on the grounds that it provided inadequate controls to prevent the domestic production and exportation of narcotics. In other words, this sanction is often used to punish states for not complying with moral standards set by the United States.

(E) Other Indicators of Change in Trade Policy Direction

Imports are also restricted through discriminatory measures taking the form of quantitative restrictions, discriminatory product standards, public procurement policy and discriminatory barriers in certain service sectors.

The United States also operates a series of quantitative restrictions designed to protect domestic farmers from the effects of international competition in the

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[552] TPRM USA 1989, 177.

agricultural sector including peanuts, sugar and dairy products. The United States indicated at the Uruguay Round negotiations that these restraints will continue even after the negotiations have been concluded.[553]. In addition quantitative restrictions are maintained in other sectors, mainly by means of import licences, many of which are of dubious compatibility with the obligations of the GATT. For example, in 1989, the GATT reported that questionable restrictions were imposed on imports of natural gas, fish and wildlife, controlled substances, alcoholic products and biological products.[554]

United States legislation relating to product standards, testing, labelling and certification has been subject to much criticism despite its adherence to the Agreement on Technical Barriers to Trade agreed in 1979.[555] The United States has persistently used its product standard legislation to protect domestic producers by impeding goods that have not satisfied United States standards despite having satisfied technically equivalent standards.[556]

These barriers to trade are most prominent in a number of heavily protected sectors of the economy such as telecommunications which was even excluded from the scope of even the Canada-United States Free Trade

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[553] J.H. Bello & A.F. Holmer, "The Uruguay Round: Where Are We Now", (1991) 25 Int'l Lawyer 723, 727.

[554] TPRM USA 1989, 181.

[555] GATT BISD, 26th Supplement 8 (1980).

[556] European Commission, Report on United States Trade Barriers and Unfair Practices 1994 (March 1994) [hereinafter European Commission Report 1994], 55-60.

Agreement at the behest of the U.S. government.[557] Other areas of notable prominence are sanitary and photosanitary requirements such as the sampling of wine, mineral water, and tinned produce, as well as electrical products and components.

There are also a number of American laws relating to public procurement that blatantly violate the 1979 Public Procurement Code.[558] In fact, the United States has been accused of a myriad of measures deviating from its obligations under the Agreement most often on the pretext of national security considerations.[559] The main problem in challenging such measures is that complaints have to be raised on a case by case basis which inevitably involves almost insignificant volumes of imports.[560]

Again, a number of procurement practices have been identified as violating the GATT Agreement, including the supply of valves and machine tools to the Department of Defence, the procurement of equipment by American radio stations and the use of synthetic fibres by the Department of Defence. In addition, a number of states maintain 'buy American' legislation at the state level.

Trade barriers in the service sector are, for the most part excluded from the present discussion because the

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[557] Chapter 14, Canada - United States Free Trade Agreement.

[558] The Code was given effect in U.S. law by Sections 301-309, Trade Agreements Act of 1979.

[559] See, for example, the National Security Act of 1947, Title VII Omnibus Trade and Competitiveness Act of 1988 and Airport and Airway Safety, Capacity, Noise Improvement and Intermodal Transportation Act of 1993.

[560] See United States Procurement of Sonar Mapping Systems by the US National Science Foundation, GATT Activities Report 1991, 64-65.

GATT is inapplicable in its present form to the supply of services although the Uruguay Round, of course, contains an agreement on this subject.[561]. Yet passing reference should be made to impediments to the supply of services by foreign companies in the fields of the financial services sector, maritime transport, air transport and telecommunications.

International investment has also been progressively restricted as the United States public has reacted to Japanese purchases of prominent American companies and properties such as Sony's purchase of Columbia and Matsushita's takeover of MCA, as well as Mitsubishi's purchase of the Rockefeller centre. These events precipitated the introduction of the 'Exon-Florio' provisions into the 1988 Trade Act which require that mergers and acquisitions deemed to affect national security must be reviewed by a special committee with powers to recommend divestiture to the United States President.[562]

**(2) The Greater Emphasis on Bilateral Trade Diplomacy**

There is substantial evidence pointing to a shift in emphasis from multilateral to bilateral diplomacy on the part of the United States. This policy has been manifested not only in the negotiation of a number of free trade agreements with trading partners, but also in the reaching of bilateral accords or understandings with

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[561] General Agreement on Trade in Services, GATT Doc. MTN/FA II-1B-1 (December 1993).

[562] Section 5021, Omnibus Trade and Competitiveness Act of 1988.

trade rivals.[563]

Deviation towards bilateral diplomacy has been caused, for the most part, by American misgivings with the present multilateral trading system. Former U.S. President Reagan admitted as much when, commenting in 1985 at the launch of the Uruguay MTN, he declared:

> "To reduce the impediments to free markets, we will accelerate our efforts to launch a new GATT negotiating round with out trading partners....But if these negotiations are not initiated or if insignificant progress is made, I am instructing our trade negotiators to explore regional and bilateral agreements with other nations."[564]

The first manifestation of the intention of United States policy-makers to place trade relations on a more bilateral footing was the United States-Israel Free Trade Agreement 1985.[565] Although in 1965 the United States and Canada had negotiated a complex bilateral agreement for free trade in automotive products [566], the 1985 treaty with Israel signalled a significant change of policy towards comprehensive bilateral free trade

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[563] Arguing the case for greater use of bilateral measures, see Senator M. Bancus, "A New Trade Strategy: The Case for Bilateral Agreements", (1989) 22 Cornell Int'l Law Journal 1.

[564] Remarks by President Reagan to Business Leaders and Members of the President's Export Council and Advisory Committee for Trade Negotiations. Reproduced in J.H. Jackson, The World Trading System (1989), 147.

[565] 24 ILM 653 (1985). Ratified in the United States by the United States-Israel Free Trade Area Implementation Act of 1985, 99 Stat. 82 (1985).

[566] United States-Canada Automotive Products Agreement 1965, 17 UST 1372 (1965). See generally, S. Metzger, "The United States-Canada Automotive Products Agreement of 1965", (1967) 1 JWTL 103.

agreements.[567]

A more significant step was the negotiation of the United States-Canada Free Trade Agreement in 1988.[568] This agreement not only covered trade in goods and agricultural commodities, but also contained provisions regulating energy supplies, services, investment, government procurement and technical standards. A number of sectors such as textiles, the wine industry, the automotive industry, and the energy resource sector were singled out for special treatment. There were also detailed rules on permissible subsidies, countervailing duties and anti-dumping measures.[569]

The treaty was a comprehensive model of United States trade policy objectives.[570] First, it lowered tariffs in all sectors other than those which were required for the protection of sensitive sectors, such as telecommunications. Second, it allowed the United States to continue to operate its trade protection laws, albeit nominally fettered by a separate dispute resolution procedure. Third, it protected both trade in services and American foreign investment, both paramount objectives in the multilateral trade negotiations.

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[567] See also the Caribbean Basin Initiative in the Caribbean Basin Economy Recovery Act of 1983, 97 Stat. 384 (1983).

[568] 27 ILM 281 (1988).

[569] S.A. Baker & S.P. Battram, "The Canada-United States Free Trade Agreement", (1989) 23:1 International Lawyer 37, 73.

[570] Statement made by the U.S. Representative to the GATT Working Party on the Free Trade Agreement Between Canada and the United States, GATT BISD, 38th Supplement 47, 48 (1992). For a Canadian perspective on the Agreement, see M.M. Bowker, What Will the FTA Mean to Canada, An Independent Analysis Based on the Text of the Canada-United States FTA, Unpublished Manuscript, Edmonton, Alberta (July 1988).

Finally, it established an effective bilateral dispute resolution process to ensure the enforcement of the obligations assumed by the parties.[571]

President Bush made little secret of his desire to create a North American free trade area, in which the 1988 agreement with Canada was only one cornerstone.[572] The other was an agreement with Mexico to link the three countries in a single market. As President Bush emphatically declared in April 1991:

> "The United States has embarked on a historic task with Mexico and Canada, a creation of a trilateral free trade agreement, which would establish the largest free trade area in the world. It would involve some 360 million people and a total of $6 trillion in combined annual output."[573]

The North American Free Trade Agreement (NAFTA), which entered force on January 1, 1994, is a tripartite agreement between the United States, Canada and Mexico.[574] It is modelled on the text of the Canada - United States FTA which should hardly be surprising

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[571] Canada - United States Binational Secretariat, Background Note on the FTA Binational Secretariat and a Status Report of Cases Filed with the Secretariat, reproduced at 30 ILM 181 (1991). On the constitutional legitimacy of these provisions, see D. Resnicoft, "The United States-Canada Free Trade Agreement and the United States Constitution", (1990) 13:1 Boston College Int'l & Comp. Law Review, 237-272.

[572] See T. Wu & N. Longley, "The United States-Mexico Free Trade Agreement: United States Perspectives", (1991) 25:3 JWT 5.

[573] Statement at the Presidential News Conference held with President Salinas of Mexico on April 7, 1991. Quoted from Congressional Quarterly, April 13, 1991, p.937.

[574] 32 ILM 289 (1993).

since it is merely an extension of United States trade policy objectives. For trade in goods, the agreement phases out tariffs over a ten year period, with an extension to fifteen years for a limited range of products.

There are also extensive provisions regulating national treatment and market access for goods together with measures to eliminate non-tariff barriers such as import/export restrictions, customs users fees, country of origin marking requirements and special sector provisions.[575] Special sector provisions cover areas such as energy, petrochemicals and telecommunications.[576] Similarly, mechanisms are included for the regulation of anti-dumping, countervailing duties and safeguard measures and well as the removal of technical barriers to trade. Intellectual property rights, investment and services are also included within the scope of the agreement.

The purpose of the agreement is simple: the establish a free trade area covering the whole of Northern America. Already, the United States has conducted preliminary negotiations for the extension of the system further south, with Venezuela, Brazil and Panama being the most likely candidates for inclusion within the scheme. In the event that more countries are included within this framework, it is likely that we shall witness the creation of a regional economic bloc with the United States at the centre as a dynamo. In other words, the scheme places the United States in the same position relative to the members (present and future) of the NAFTA as was the case vis-a-vis the immediate post-Second World War international trading community.

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[575] Ibid, Articles 300-310.

[576] Ibid, Article 601.

Bilateral overtures have not been confined to the North American hemisphere. It has also played an increasingly significant role in the conduct of commercial relations between the United States and the European Union, outside the scope of the GATT.[577] One of the most evident manifestations of bilateralism between the United States and the Union was in connection with European integration.[578] The United States was vigourous in its bilateral lobbying for the adoption of international standards in the harmonisation process initiated under the Single European Act. The objective of bilateral discussions was to protect United States business interests in the European Union after 1992.

This process culminated in the Declaration on European Union - United States Relations in November 1990.[579] This instrument, which is not legally binding, was signed by the United States, the European Union and the twelve Member States. It recognises inter alia that it was a common goal of the parties to 'promote market principles, reject protectionism and expand, strengthen and further open the multilateral trading system'. Nevertheless, there was no direct reference to the Uruguay Round negotiations and, on the whole, the Declaration referred to a list of vague traditional values and common goals.

There is also a plethora of bilateral agreements between the United States and the European Union resolving

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[577] See generally, I.G. Bercero, "Trade Laws, the GATT and the Management of Trade Disputes Between the United States and the EEC", (1985) 5 Yearbook of European Law 149.

[578] For example, see Y. Devuyst, "European Community Integration and the United States: Towards a New Transatlantic Relationship?", (1990) 16:1 Journal of European Integration,

[579] European Commission, Bulletin, Vol 11, 96 (1990).

specific international disputes, such as the bilateral agreement on trade in civil aircraft, and even extending as far as co-operation in the field of anti-trust/competition law enforcement.[580]

Commercial relations with Japan have also been the subject of bilateral diplomacy.[581] Indeed, agencies within the government have been engaged in feasibility studies on the subject of a free trade agreement between the United States and Japan.[582] For the most part, the initiative for such an accord have stemmed from a near-xenophobic fear of Japan inside United States government circles and a failure on the part of the Executive to explain the imbalance in the trading relationship between these two countries.[583]

One recent example of this paranoia was the bill introduced by majority leader Gebhardt, in the U.S. Congress on January 28, 1992, which, had it become law, would have mandated the United States trade deficit with Japan by 20% in each of the following five years through a series of draconian and coercive measures. Failure to reach these targets would have resulted in sanctions being imposed on Japanese imports of motor vehicles which presently account for 75% of the trade deficit with Japan.

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[580] See text, infra pp.335-336.

[581] On United States-Japan trade relations, see Symposium, "The U.S.-Japan Trade Relationship", (1989) 22:3 Cornell Int'l Law Journal, 371-515.

[582] See ITC, "Initiating Negotiations with Japan to Explore the Possibility of a United States-Japan Free Trade Area Agreement", USITC Pub. No. 2120 (September 1988), reproduced in (1989) 1:1 WTM 49. Also reproduced in K.R. Simmonds & B.H.W. Hill, Law and Practice Under the GATT, Vol. 2, III.D.2 (May 1989).

[583] J. Bhagwati, The World Trading System at Risk (1991), 13-22.

The same bill would also have compelled the opening of a Section 301 investigation on behalf of the United States auto parts industry to investigate the alleged 'toleration of systematic anti-competitive practices' by the Japanese government. These alleged anti-competitive practices included the 'Keiretsu' and the methods of distribution in Japan, both of which were expressly identified as unfair commercial practices in the Omnibus Trade and Competitiveness Act of 1988.[584] In addition, an anti-dumping investigation would have been initiated into the sale of Japanese auto parts into the American market as part and parcel of the package of protectionist measures envisaged in the bill.

A bilateral trade agreement is seen as at least a partial solution to these concerns. It is seen as the most expeditious method of tackling the contentious disputes which frequently arise between these countries. In fact, the motives for such an agreement are a blend of politics and economics.[585] From a political perspective, such an agreement would form a surer foundation for co-operation on a host of other matters including security. Economically, it would provide a framework for resolution and enforcement of trade disputes. Such a strategy may, of course, back-fire on the United States if it believes that such an agreement would be a one-way street for raising disputes.[586]

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[584] On the legitimacy of these practices, see GATT, Trade Policy Review Mechanism for Japan 1990, GATT Doc. 1486 (April 1990); reproduced in part at (1990) 2:5 WTM 30.

[585] See G.S. Fukushima, "United States - Japan Free Trade Agreement: A Sceptical View", (1989) 22 Cornell Int'l Law Journal 455.

[586] In general, see also M.W. Punke, "Structural Impediments to United States - Japan Trade: The Collision of Law and Culture", (1990) 23 Cornell Int'l Law J. 55; and J.O. Haley, "Luck, Law, Culture and Trade: The Intractability of U.S. - Japan Trade

At the same time, the idea of an Asian-Pacific trade block consisting of the United States, Japan, Australia, New Zealand and the Pacific Rim states has been voiced with a degree of credibility that might not have been possible ten years ago.[587] This is especially the case now that a loose framework for co-operation have been created since the Asia-Pacific Economic Co-operation Forum has been constituted.[588]

The negotiation of a greater number of free trade agreements and bilateral trade accords may be an expeditious means of settling international trade disputes and conducting negotiations. But, this is a short-term view.[589] This network of bilateral agreements and understandings will, in the long-term damage the multilateral trading system and cause polarisation and even fragmentation. This is especially the case since the European Union has also adopted a similar policy towards bilateral agreements. We are in fact witnessing the gradual separation of the North American market and the European market into isolated trade areas which are related only through the gossamer threads spun by the GATT unless, of course, the Multilateral Trade Organisation is successfully supplanted as an effective bulwark against this trend.

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Conflict", (1990) 22 Cornell Int'l Law J. 403.

[587] See K. Anderson, "Is an Asian-Pacific Trade Bloc Next?", (1991) 25:4 JWT 27.

[588] Members of this organisation are: Australia, Brunei, Canada, Chile, China, Hong Kong, Indonesia, Japan, Malaysia, Mexico, New Zealand, Papua New Guinea, the Phillippines, Singapore, South Korea, Taiwan, Thailand and the United States.

[589] See C.M. Aho, "More Bilateral Trade Agreements Would be a Blunder: What the New President Should Do", (1989) 22 Cornell Int'l Law J. 25.

## (3) The Primary Instrument of U.S. Unilateral Trade Policy - Section 301 of the Trade Act of 1974

Retaliation, in the sense that the term is used in international trade law, is the use of economic countermeasures against foreign states accused of engaging in inequitable trade practices. It is the embodiment of unilateralism and a device for coercing other states into accepting the views of a country without resorting to any international forum for arbitration or adjudication on the merits of a dispute. Subjectivity and coercion are the two main elements in retaliatory measures and it is these two factors that most often raise concerns as to the legitimacy of such measures in light of the express provisions of the GATT.[590]

At the same time, economic retaliation is a bullying tactic. Almost by definition, smaller states and economically disadvantaged countries are never in a position to use such measures. Only when a state is aware that it has the ability to withstand counter-measures from the targeted state that retaliation is effective. In today's world economy, only the United States, the European Union and perhaps Japan could aspire to exercise such a power but the smaller relative size of the Japanese internal market would be a factor militating against its ability to effectively engage in such practices.

The United States has pioneered the most aggressive form of unilateralism by creating an institutionalised mechanism for retaliation, originally contained in the Trade Expansion Act of 1962 and now contained in Section

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[590] See generally, J. Bhagwati & H. Patrick (eds), Aggressive Unilateralism (1992).

301 of the Trade Act of 1974, as amended. True, the European Union also subsequently adopted legislation to facilitate retaliation in its New Commercial Policy Instrument[591], but the use made of this measure has been insignificant compared to that made by the American government of Section 301.[592]

Section 301 has been variously described as a 'highly dangerous piece of international brinkmanship'[593], 'a misguided and dangerous measure which puts the international trading system at risk'[594] and 'an instrument of aggressive unilateralism'[595] on the one hand and as 'the champion of market liberalisation' on the other hand.[596] There is little doubt that it is intended to open markets to American products by threatening to withdraw reciprocal benefits in the event that foreign governments do not succumb to the policy objectives of the United States. But it is an inherently destabilising measure in so far as the use of Section 301 is inconsistent with both the spirit and letter of the GATT.

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[591] Council Regulation 2641/84 (1984), O.J. L 252/1 (1984).

[592] See text, infra, pp.337-349.

[593] R.E. Hudec, "Retaliation Against 'Unreasonable' Foreign Trade Practices: A New Section 301 and GATT Nullification and Impairment", (1975) 59 Minnesota Law Review 461, 463.

[594] Peter Sutherland, Director-General of the GATT, quoted in the Financial Times, March 4, 1994, p.1.

[595] J. Bhagwati, The World Trading System at Risk (1991), 126.

[596] J. Bello, "Section 301 of the U.S. Trade Laws: Champion of Market Liberalisation", Paper presented to the Bruges Conference on Trade Law, September 1989.

(A) A Brief Background to the Evolution and Use of Section 301

Section 301 of the Trade Act of 1974 is designed to counter undesirable trading practices by foreign states by granting retaliatory authority to the President. This authority was to be 'exercised vigorously to ensure fair and equitable conditions for U.S. commerce.'[597] Section 301 is therefore unequivocally intended to impose unilateral pressure on foreign trade partners to reduce or remove commercial practices deemed undesirable by the United States authorities.[598]

The mechanism may be invoked by complaints from interested private parties or on the initiative of the President or another agency within the Executive. While, on the one hand, Congress has been generally satisfied with the private petition procedure under Section 301, it has been thoroughly dissatisfied with the matter in which Section 301 has been implemented by the Executive and every legislative opportunity has been taken to compel greater use of the measure. Amendments to Section 301 have occurred with the passage of every significant trade measure since its enactment. The Trade Agreements Act of 1979, the Trade and Tariff Act of 1984 and the Omnibus Trade and Competitiveness Act of 1988 all made substantial alterations to the mechanism with the general aim of encouraging greater retaliation in trade relations.

Between 1974 and the amendments made by the Trade

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[597] Senate Report No. 1298, 93rd Congress, 2nd Session, 164 (1974), reproduced in part in J.H. Jackson & W.J. Davey, International Economic Relations (Second edition, 1986), 811-12.

[598] See M.A. Echols, "Section 301: Access to Foreign Markets From an Agricultural Perspective", (1980) 6 Int'l Trade Law Journal, 4, 11.

Agreements Act of 1979, a total of eighteen petitions were lodged under Section 301.[599] International settlements were reached in four of these complaints by reference to GATT panels[600], eleven were settled through bilateral negotiations, three investigations were suspended on the negotiation of MTN Codes or undertakings and one complaint was dismissed for lacking merit. In three cases, the United States adopted retaliatory measures.[601]

At least in part, the failure of the Executive to resort

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[599] The final determinations in these cases are as follows: Inv. No. TA-301-1 Guatemala Shipping Practices, 40 Federal Register 29,134 (1975); Inv. No. TA-301-2 Canadian Egg Quotas, 41 Federal Register 9430 (1976); Inv. No. TA-301-3 EC Levies on Egg Albumin, 45 Federal Register 48,758 (1980); Inv. No. TA-301-4 EC Minimum Price and Licence Practices on Canned Fruit, 44 Federal Register 1504 (1979); Inv. No. TA-301-5 EC Export Subsidies on Malt, 40 Federal Register 41,558 (1975); Inv. No. TA-301-6 EC Export Subsidies on Wheat Flour, 45 Federal Register 51,169 (1980); Inv. No. TA-301-7 EC Variable Levy on Sugar, 45 Federal Register 41,254 (1980); Inv. No. TA-301-8 EC Soyabean, 44 Federal Register 1,504 (1979); Inv. No. TA-301-9 ROC Tariffs on Home Appliances, 41 Federal Register 15,452 (1976); Inv. No. TA-10 EC/Japan Steel Diversion to the United States, 43 Federal Register 23,456 (1978); Inv. No. TA-11 EC Citrus Preferences, 50 Federal Register 30,146 (1988); Inv. No. TA-301-12 Japan Silk Import Policies, 43 Federal Register 8,876 (1978); Inv. No. TA-301-13 Japan Leather Quotas, 51 Federal Register 9,435 (1977); Inv. No. TA-301-14 USSR Marine Insurance, 43 Federal Register 7,894 (1978); Inv. No. TA-301-15 Canada Broadcasting Deductions, 44 Federal Register 12,345 (1979); Inv. No. TA-301-16 EC Wheat Export Subsidies, 45 Federal Register 49,428 (1980); Inv. No. TA-301-17 Japan Cigars, 46 Federal Register 1,389 (1981); Inv. No. TA-301-18 Argentina Marine Insurance, 45 Federal Register 49,732 (1980).

[600] Inv. No. TA-301-6 EC Export Subsidies on Wheat Flour; Inv. No. TA-301-8 EC Soyabeans; Inv. No. TA-301-11 EC Citrus Preferences; Inv. No. TA-301-12 Japan Leather Quotas.

[601] Inv. No. TA-301-11 EC Citrus Preferences; Inv. No. TA-301-13 Japan Leather Quotas; and Inv. No. TA-301-15 Canada Broadcasting Deduction.

to more vigorous assertion of these claims was due to United States involvement in the Tokyo Round discussions.[602] It was widely believed that retaliation during this period might well have jeopardised the United States negotiating position in several areas.[603] This concern was not shared among Congressmen who, responding to the wishes of their constituents, attempted to refine Section 301 into an even more lethal weapon in 1979.

Between 1979 and 1984, the point at which Section 301 was yet again amended, twenty nine investigations were opened but in only one case was retaliatory measures adopted.[604] This lack of retaliatory measures fomented hostility in Congress and, one Senator who subsequently became the Vice-President of the United States is on record as stating:

> "[I]t is clear that some of our major trading partners have pursued policies that have placed unfair burdens on some United States industries...[and]...since the United States has already removed most of its trade barriers, it is time to enact new legislation to allow the United States to retaliate against countries which have not reciprocated by removing their own trade

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[602] See S. Coffield, "Using Section 301 of the Trade Act of 1974 as a Response to Foreign Government Trade Actions: When, Why and How", (1981) North Caroline Journal of Int'l Law and Comparative Regulation 381.

[603] See K.J. Ashman, "The Omnibus Trade and Competitiveness Act of 1988: The Section 301 Amendments", (1989) 7 Boston Univ. Int'l Law Journal, 115-153.

[604] Inv. No. TA-301-24 Argentinean Hides, 47 Federal Register 53,989 (1982).

barriers."[605]

The third phase in the evolution of Section 301 followed the amendments made by the Trade and Tariff Act of 1984.[606] This period marked a decisive moment in American trade policy. It marked a significant departure from the pursuit of trade dispute resolution through multilateral processes towards a new policy of seeking solutions through unilateral measures. In the pursuit of this policy, President Reagan himself took the initiative to initiate investigations and despite the commencement of negotiations in 1986 for the Uruguay Round of discussions, no degree of restraint was exercised in the pursuit of this policy of naked unilateralism.

For the first time, in 1985, at the President's direction, four investigations were self-initiated[607], and in the period between 1986 and 1987, without any preceding formal investigation under Section 302, a whole series of investigations were launched.[608] During

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[605] D. Quayle, "United States International Competitiveness and Trade Policies for the 1980s", (1983) Northwestern Journal of Int'l Law & Business 1, 4.

[606] 98 Stat. 2948 (1984).

[607] Inv. No. TA-301-TA-49 Brazilian Informatics, 50 Federal Register 37,608 (1985); Inv. No. TA-301-50 Japanese Tobacco Products, 50 Federal Register 37,609 (1985); Inv. No. TA-301-51 Korean Insurance, 50 Federal Register 37,609 (1985); and Inv. No. TA-301-52 Korean Intellectual Property Rights, 50 Federal Register 45,883 (1985).

[608] Inv. No. TA-301-54 European Community Enlargement, 51 Federal Register 18,294 (1986); Inv. No. TA-301-56 Taiwanese Customs Valuation Practices, 51 Federal Register 28,219 (1986); Inv. No. TA-301-57 Taiwanese Beer, Wine and Tobacco Products, 51 Federal Register 39,639 (1986); Inv. No. TA-301-58 Canadian Softwood Lumber Products, 52 Federal Register 231 (1987); Inv. No. TA-301-60 European Community Hormones,

the 1985-1988, a total of thirty three investigations were conducted under Section 301 and retaliation was authorised in nine instances.[609] Quite clearly, the proportion of investigations culminating in the adoption of unilateral measures markedly increased.

Section 301 was again radically altered by the amendments made in the Omnibus Trade and Competitiveness Act of 1988.[610] These will be examined in detail later in this chapter.[611]

Already there have been a number of notable investigations against foreign countries maintaining restrictions deemed contrary to American trade policy objectives.[612] Between 1988 and 1992, a total of twelve

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52 Federal Register 49,131 (1987).

[609] (1) Inv. No. TA-301-48 Japanese Semiconductors, 52 Federal Register 13,412 (1987); (2) Inv. No. TA-301-54 EC Enlargement, 51 Federal Register 18,296 (1986); (3) Inv. No. TA-301-62 EC Hormones, 52 Federal Register 49,131 (1987); (4) Inv. No. TA-301-25 EC Pasta Export Subsidies, 53 Federal Register 53,115 (1988); (5) Inv. No. TA-301-13 Japanese Leather Imports, 51 Federal Register 9437 (1986); (6) Inv. No. TA-301-36 Japanese Leather Footwear, 51 Federal Register 9435 (1986); (7) Inv. No. TA-301-11 EC Citrus Fruits, 50 Federal Register 26,143 (1985); (8) Inv. No. TA-301-58 Canadian Softwood Lumber Products, 52 Federal Register 229 (1987); and (9) Inv. No. TA-301-61 Brazilian Pharmaceuticals, 53 Federal Register 41,551 (1988).

[610] 102 Stat. 1107 (1988). On the nature of this statute in general, see A.F. Holmer & J.H. Bello, "The 1988 Trade Bill: Savior or Scourge of the International Trading System?", (1989) 23:2 Int'l Lawyer 523.

[611] See text, infra, pp.274-289.

[612] See for example S. Thaveechaiyagarn, "The Section 301 Cigarette Case Against Thailand - A Thai Perspective", (1990) 21 Law & Pol'y Int'l Business 367.

investigations were conducted[613] and of the six investigations concluded as of January 1, 1993, retaliation had been authorised in only two cases.[614] The explanation for this is two-fold. First, the various modified types of Section 301 had come into operation during this period. Second, the Uruguay Round negotiations involved a sensitivity in trade policy which could be upset by the adoption of retaliatory measures.[615]

The legislative background to the passage of the amendments to Section 301 in the 1988 Act indicates the level of near-hysteria in Congressional circles at the Executive's refusal to initiate even more investigations

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[613] Inv. No. TA-301-71 EC Canned Fruit, 54 Federal Register 41,708 (1989); Inv. No. TA-301-72 Thailand Cigarettes, 55 Federal Register 49,724 (1990); Inv. No. TA-301-79 Norway Toll Equipment, 55 Federal Register 19,692 (1990); Inv. No. TA-301-80 Canada Import Restrictions on Beer, 56 Federal Register 308 (1991); Inv. No. TA-301-81 EC Enlargement, 55 Federal Register 53,376 (1990); Inv. No. TA-301-82 Thailand Copyright Enforcement, 56 Federal Register 67,114 (1991); Inv. No. TA-301-83 EC Third Country Meat Directive, 56 Federal Register 1,663 (1991); Inv. No. TA-301-84 Thailand Patent Protection, 56 Federal Register 25,765 (1991); Inv. No. TA-301-85 India Intellectual Property, 57 Federal Register 763 (1992); Inv. No. TA-301-86 PRC Intellectual Property, 57 Federal Register 3,084 (1991); Inv. No. TA-301-87 Canada Softwood Lumber, 58 Federal Register 8,902 (1992); Inv. No. TA-301-88 PRC Market Access Barriers, 57 Federal Register 3,084 (1991).

[614] Inv. No. TA-301-80 Canada Import Restrictions on Beer, 57 Federal Register 308 (1992); Inv. No. TA-301-63 EC Soyabean Export Subsidies, 57 Federal Register 50,123 (1992).

[615] Of course, the notable exception to this was Inv. No. TA-301-63 EC Soyabean Processing Subsidies, where the United States threatened to adopt extensive counter-measures in the event that the European Union failed to implement the panel report in the Second Oilseeds Subsidies Case.

and to adopt a greater number of retaliatory measures.[616]

Most of the proposed bills submitted between 1985 and 1987 to amend Section 301 stemmed from Congressional concern to reduce the budget deficit. The most dramatic proposal no doubt was the so-called 'Gephardt Amendment' introduced by Congressman Richard Gephardt, at one time a Democratic contender for the 1988 Presidential elections. The Gephardt amendment provided that:

> "[A]n excessive and unwarranted trade surplus country must reduce its trade surplus by ten percent annually. If not then the United States Trade Representative must take action under Section 301 and/or take administrative action to meet the surplus reduction requirements."[617]

The main point about this amendment was that retaliation was not directed against foreign states accused of engaging in specific unfair trade practices. The existence of the trade surplus ipso facto characterised such a state as a threat to United States economy.

Despite strong Executive pressure to resist the adoption of mandatory retaliation against foreign trading partners, both House of Congress adopted bills requiring mandatory retaliation.

The first major Senate Omnibus Trade Bill would have

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[616] J.H. Bello & A.F. Holmer, "The Heart of the 198 Trade Act: A Legislative History of the Amendments to Section 301", (1988) 24(2) Stanford Journal of Int'l Law 1, 4-5.

[617] Quoted from J.C. Bliss, "The Amendments to Section 301: An Overview and Suggested Strategies For Foreign Response", (1989) 20 Law & Pol'y Int'l Bus., 501, 522.

required mandatory retaliation within fifteen months of an investigation in almost every case in which an unfair practice was deemed to exist.[618] The equivalent bill in the House of Representatives required mandatory retaliation in all cases involving violations of trade agreements, unjustifiable practices that burden or restrict United States commerce and export targeting.[619]

Mandatory retaliation also had bipartisan support in the Congress with both Democratic and Republican supporters favouring such action. There was little in terms of policy content between Congressmen from either party in this matter. This rabid sprint towards greater retaliation was not confined to the members of one single party.

In the final event, Section 301 was significantly altered to facilitate the use of retaliation while diluted versions of the mandatory retaliation proposals became special and super section 301 measures.

There is little doubt that throughout the 1980s, Congress has been utterly determined to move the weapon of unilateral retaliation from the background of American trade policy to the foreground. Unilateralism is construed as underpinning a successful trade policy and in the event that Congress achieves its goal, first, by removing many of the discretionary powers from the Executive to retaliate and, second, by creating super and special Section 301 mechanisms designed to allow automatic retaliation against specific countries, there will be a significant step backwards for trade liberalisation.

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[618] Senate Bill No. 1860 (1985).

[619] House of Representatives Bill No. 4800 (1985).

(B) Enlarging the Scope for Retaliation in the 1979 and 1988 Acts

Originally, retaliation could only be authorised if foreign states were found to be indulging in any one of four practices deemed to be burdening or restricting United States commerce. First, maintaining unjustifiable or unreasonable tariff or other import restrictions which impair the value of trade commitments made to the United States. Second, engaging in the discriminatory acts or policies that are unjustified or unreasonable. Third, granting export subsidies on products destined for the United States or to other countries with the effect of substantially reducing sales of competing American products in those foreign markets. Fourth, imposing unjustifiable or unreasonable restrictions on access to supplies of food, raw materials, or manufactured or semi-manufactured products.[620]

The 1979 Act substantially altered these conditions by generalising the power to retaliate under Section 301.[621] The Omnibus Trade and Competitiveness Act 1988 tightened these conditions even more by creating two categories of Section 301 mechanisms: mandatory action and discretionary action.

(1) Mandatory Action

Reading this power in conjunction with the amendments made by the 1988 Act, Section 301 now reads that the United States Trade Representative (USTR) must adopt retaliatory measures if any of the following

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[620] See generally, B.S. Fisher & R.G. Steinhardt, "Section 301 of the Trade Act of 1974: Protection for U.S. Exporters", (1982) 14 Law & Pol'y Int'l Bus., 569.

[621] Section 301(a) Trade Act of 1974, as amended by Section 901 of the Trade Agreements Act of 1979.

circumstances are disclosed after an investigation:

> (1) the rights of the United States under any trade agreement are being denied; or
> (2) an act, policy or practice of a foreign country:
>  (a) violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or
>  (b) is unjustified and burdens or restricts United States commerce.[622]

In these circumstances, the USTR has little option but to adopt the authorised measures although he or she does have discretion as to the type of measure which may be adopted and the extent of the sanction.[623] This

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[622] Section 301 of the Trade Act of 1974, as amended by Section 1301 of the Omnibus Trade and Competitiveness Act of 1988.

[623] The USTR is not required to take action in the following cases: (a) the CONTRACTING PARTIES of the GATT have determined, a panel of exports has reported to the CONTRACTING PARTIES, or a ruling issued under the formal dispute settlement proceeding provided under another trade agreement finds that (i) the rights of the United States under a trade agreement are not being denied or (ii) the act, policy, or practice is not a violation of, or inconsistent with, the rights of the United States or does not deny, nullify or impair benefits to the United States under any trade agreement; (b) the USTR finds that (i) the foreign country is taking satisfactory measures to grant the rights of the United States under a trade agreement or (ii) the foreign country has agreed to eliminate or phase out the act, policy or practice or agreed to an imminent solution; (c) it is impossible for the foreign country to comply but the country has agreed to provide compensatory trade benefits; (d) where the taking of action would have an adverse effect on the United States which is substantially out of proportion to the benefits of such action; or (e) the taking of action would cause serious harm to the national security of the United States; Section 301(a)(2) Trade Act of 1974, as amended.

authority is intended to be exercised in consultations with the U.S. President who can issue specific directions but it is clear that the U.S. Congress intended that the USTR should have a considerable latitude in wielding this power in order to prevent Presidential procrastination.

(a) Violations of, or denial of benefits accruing to the United States under, trade agreements

The 1979 and 1988 Acts broaden the scope of retaliation to cover infringements, or the denial of benefits, under any trade agreement regardless of whether the agreement was a Congressionally approved trade agreement or an Executive agreement. Nor is a distinction drawn between multilateral and bilateral agreements important for this purpose. Informal international instruments, not in themselves trade agreements have also been invoked to found a Section 301 investigation into legal, but allegedly unfair, foreign trade practices.[624]

The most obvious example of a violation that would give rise to an investigation under Section 301 is an infringement of the GATT or one of the Tokyo Round Agreements.

There are numerous examples of United States retaliation for alleged violations of the Tokyo Round Agreements[625], but the most notorious are the EC Hormones Case and the

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[624] See Inv. No. TA-301-51 Korea Insurance; and Inv. No. TA-301-48 United States - Japan Semiconductor Arrangement.

[625] For example, Inv. No. TA-301-25 EC Pasta Export Subsidies; and Inv. No. TA-301-60 EC Third Country Meat Directive.

EC Soyabean Case.[626] In the former investigation, in 1987, the U.S. President proclaimed increased duties on a number of European Union products in response to a proposed European Union hormones directive.[627] This legislation was designed to protect European Union consumers from certain hormones used for fattening cattle, mostly in the United States. The effect of the directive was to limit imports of beef from the United States into the Union.

The measures of retaliation were suspended based on Union assurances that individual Member States would be permitted to continue to import meat products derived from animals treated with hormones until 1988.

In 1989, the European Union suspended trade in hormone-treated animals. In response, the United States raised tariffs to 100% on selected European Union foodstuffs and prevented the supply of Union beef products to American troops in Europe.[628]

Throughout this dispute, it must be conceded that the European Union has acted with the utmost mala fide. The European Union repeatedly blocked American efforts to resolve the dispute in the GATT Standards Committee, which allows the right of disputing parties to set up a panel of experts to investigate a complaint, on the most spurious of grounds of interpretation.

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[626] This case will be considered in greater detail later in the text, see infra, pp.458-460.

[627] Inv. No. TA-301-62 EC Meat Hormones, 55 Federal Register 20,376 (1987).

[628] This latter measure is known as the Harkin Amendment and was signed into United States law in December 1989. The purpose of this law has explicitly stated to be 'because the European Community put a ban on all meat and meat products that were using hormones'.

In the final event, the United States did not seek to settle the dispute through the general GATT dispute-resolution processes, but opted for unilateral retaliation, generally out of legitimate frustration with the antics of the European Union. The matter was eventually partially resolved in a rather innovative manner by setting up a US/EU Hormones Task Force given the mandate of 'lifting retaliation on EC products to the extent that US meat exports to the EC resume'. In other words, this Task Force is required to agree periodically on reductions on a reciprocal basis. Between 1990 and 1994, two reductions in the levels of retaliatory duties were in fact made.[629]

The most common alleged violation of a non-GATT agreement is in the area of intellectual property rights where investigations have been initiated into alleged failures to protect copyright materials[630], patents[631] and other intellectual property rights.[632] To a large extent, these rights will in the future be regulated by GATT agreements.[633]

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[629] European Commission, Report on United States Barriers to Trade and Investment 1994, 79 (March 1994).

[630] For example, Inv. No. TA-301-82 Thailand Copyright Enforcement, 56 Federal Register 67,114 (1990).

[631] For example, Inv. No. TA-301-61 Brazil Pharmaceutical Patents, 52 Federal Register 1,607 (1987); Inv. No. TA-301-68 Argentina Pharmaceutical Patents, 53 Federal Register 2,012 (1988); and Inv. No. TA-301-84 Thailand Patent Protection, 56 Federal Register 18,609 (1991).

[632] See for example, Inv. No. TA-301-85 India Intellectual Property, 56 Federal Register 18,090 (1991); and Inv. No. TA-301-86 PRC Intellectual Property, 56 Federal Register 21,713 (1991).

[633] Agreement on Trade-Related Aspects of Intellectual Property Rights Including Trade in Counterfeit Goods, GATT Doc. MTN/FA I-1C (December 1993).

(b) Unjustifiable acts, policies and practices

An 'unjustifiable' practice is defined as 'any act, policy or practice which is in violation of, or inconsistent with, the international legal rights of the United States'.[634] A breach of international obligations is therefore required before retaliation can be triggered on this ground but the illegitimate act is not expressly confined to violation of trade and economic undertakings.

Examples of unjustifiable acts are inserted into the 1974 Act by the 1984 Act. Unjustifiable acts include policies and practices which deny United States producers the right to national or most-favoured-nation treatment, the right of establishment or the protection of intellectual property rights. It should be noted that multilateral achievement of the last two of these rights is a declared objective of the United States at the Uruguay Round. Nevertheless, Section 301 gives the United States government a mandate to pursue these goals through unilateral measures.

Denial of most-favoured nation treatment in a number of sectors in a number of countries has provoked the United States government into retaliating under Section 301. The protracted EC Canned Fruit is one case in point.[635] This investigation was initiated in 1981 at the request of a Californian trade association on the basis of allegations that production subsidies on canned fruit favoured European Union producers over American producers. The United States brought the matter to the attention of the GATT and a panel was constituted which

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[634] Section 304, Trade and Tariff Act of 1984.

[635] Inv. No. TA-301-26 EC Canned Fruit, 46 Federal Register 2,316 (1981).

subsequently found in favour of the Americans.[636]

The European Union vigorously objected to the adoption of the report in the Council and, to date, the report has not been adopted. In September 1985, the President instructed the USTR to recommend retaliatory measures in the event that the dispute was not settled by December of that year. Before that deadline expired, an agreement was reached between the United States and the Union on the phasing out of subsidies for canned fruit.

The European Union failed to honour its commitments and in June 1989, the USTR announced in a second investigation that proposals would be submitted for retaliatory measures.[637] The adoption of these measures was eventually suspended after the two parties agreed to adopt a further agreement clarifying the prior accord.

(2) Discretionary Action

Section 301 permits the USTR to take measures at his or her discretion if certain other types of unfair commercial practices are being perpetrated by foreign states. The element of discretion enters into the equation because the types of behaviour that may be subject to such measures are not necessarily illegal or inconsistent with the GATT. Here the whole mechanism itself enters into a grey area of legality.

The measures which may be subject to discretionary retaliation at the instance of the USTR are any acts, policies or practices of a foreign country which are unreasonable, discriminatory or burdens or restricts

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[636] European Community - Production Aids on Canned Fruit, GATT Doc L/5778 (1985), not yet adopted.

[637] Inv. No. TA-301-71 EC Canned Fruit, 54 Federal Register 41,708 (1989).

United States commerce.[638]

(a) Unreasonable practices

An 'unreasonable' practice is one deemed unfair and inequitable, but 'not necessarily in violation of or inconsistent with the international legal rights of the United States'.[639] Three practices are defined as being unreasonable: denial of workers rights, export targeting and denial of market access.

Workers rights

A persistent pattern of conduct which denies employees the rights of association, organisation, collective bargaining, or which permits forced or compulsory labour, or which fails to provide a minimum age for the employment of children, or a minimum wage or maximum hours of work is deemed unreasonable.[640]

This amendment was not motivated by humanitarian considerations but by the belief in Congress that American workers could not compete with foreign workers that have been coerced or forced to supply their labour.[641]

The terminology itself has been borrowed from Section 503 of the Trade and Tariff Act of 1984 which designates beneficiary developing countries under the United States

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[638] Section 301(b) Trade Act of 1974, as amended by Section 1301 of the Omnibus Trade and Competitiveness Act of 1988.

[639] Ibid.

[640] Section 301(d)(3)(B)(iii) of the Trade Act of 1974 as amended by Section 1301 of the Omnibus Trade and Competitiveness Act of 1988.

[641] Ashman, supra note 603, 132.

GSP programme. This language in turn has been taken from a number of International Labour Organisation Conventions. It is of more than passing interest to note that the United States has never saw fit to adopt any of these agreements. Similarly, the United States has been a traditional opponent of the International Covenant on Economic, Social and Cultural Rights 1966 which contains similar rights to those imposed under threat of retaliation.

It is therefore nothing short of hypocritical for the United States to demand, under threat of economic coercion, that states adopt standards of labour rights that it has itself refused to accept either in treaty form of in its philosophy towards economic and social justice in general.

Export targeting

Export targeting, which is defined as 'any government plan or scheme consisting of a combination of coordinated actions that are bestowed on a specific enterprise [or] industry...to become more competitive in the export of a class or kind of merchandise is also deemed unreasonable and therefore actionable.[642] The precedent for this type of protectionism was the Japanese industrial policy of the 1970s which devoted vast amounts of national resources to the production of electronic goods.

A targeting programme can generally be identified by four features. First, the market in question is closed off by the government to domestic producers who are guaranteed the entire home market usually at premium prices. Second, national resources are diverted to the

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[642] Section 301(d)(3)(ii) of the 1974 Act as amended by Section 1301 of the 1988 Act.

targeted industry in the form of subsidies, loose enforcement of anti-trust laws, tax incentives and other means. Third, as production increases, the volume and amount of domestic assistance is decreased and access gradually opened to foreign suppliers. Finally, once the industry is competitive on a global basis, exports are encouraged.

Export targeting is thought to violate a number of provisions of the GATT, most notably Article XI prohibitions on the use of quotas and Article XVI restrictions on the use of subsidies. It is to be distinguished from infant industry protection which is intended to protect fledgling industries as opposed to the deliberate diversion of resources into particular sectors for the purposes of increasing international competitiveness.

However, every country that implements an industrial policy will favour one sector over another and may be liable to charges of export targeting. Further, there is nothing ipso facto unreasonable in such practices if the means selected do not violate the rules of the GATT.

Denial of market access

Finally, market restrictions by states restrict access to the internal market place to American firms are also deemed unreasonable.[643] Such restrictions include any systematic anti-competitive activities by private firms or among private firms in the foreign country that have the effect of restricting, on a basis that is inconsistent with commercial considerations, access of United States goods to purchasing by such firms are also deemed unreasonable.

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[643] Section 301(d)(3)(B)(i)(III) of the 1974 Act as amended by Section 1301 of the 1988 Act.

Examples of unreasonable foreign practices include toleration of cartels, or monopolistic behaviour, failure to enforce anti-trust laws and toleration of closed purchasing arrangements by private firms.[644]

An illustration of the use of Section 301 to prise open a closed foreign market was the Taiwan Customs Case.[645] In an investigation in 1986, Taiwan was accused of failing to maintain adequate access to its markets in some products contrary to both the GATT and the Customs Valuation Code. Immediately following this determination, Taiwan agreed to revise its customs laws in light of its undertakings under these agreements and the USTR decided that the amendment of its customs laws was sufficient to prevent the need for Section 301 action.

Other unreasonable practices

The 1984 Act definition of 'unreasonable' clearly envisages a greater number of foreign practices being actionable than those added by the 1988 Act. The definition refers to 'any' act, policy or practice 'deemed to be unfair and inequitable'. The original term expressly included acts, policies and practices which deny fair and equitable (a) market opportunities; (b) opportunities for the establishment of an enterprise; and (c) deny adequate and effective protection of intellectual property rights.

This provision leaves ample scope to define actionable practices since it is a subjective judgment to determine which practices deny market opportunities or the chance

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[644] See Ashman, supra note 603, 135.

[645] Inv. No. TA-301-56 ROC Customs Valuation, 51 Federal Register 37,608 (1986).

to establish a business.

(b) Discriminatory practices

Discrimination is defined as 'any act, policy or practice which denies national or most-favoured national treatment to United States goods, services or. investment'.[646] It should be noted that the requirement to refrain from discrimination against United States producers and suppliers extends to goods, the provision of services and capital investment.

(C) Forms of Retaliation

Authority to retaliate under Section 301 extends to 'all appropriate and feasible steps within [the President's] power to obtain the elimination of such restrictions'.[647] This authority allows the President to suspend, withdraw or prevent the application of the benefits of trade agreement concessions and to impose duties and other import restrictions on relevant foreign products. The President is also authorised to enter into international agreements to phase out offensive measures or to provide the United States with appropriate compensation.[648]

These actions may be taken on a discriminatory basis against a particular country. These is no requirement for the extension of the MFN principle to measures of retaliation. Further, the response adopted may be taken against goods or economic sectors unconnected with the

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[646] Section 301(e)(5) of the 1974 Act as amended by Section 304 of the 1984 Act.

[647] Section 301(a) and (b), Trade Act of 1974, as amended.

[648] Section 301(c), Trade Act of 1974.

original offending practices and this is most often the case in practice.[649]

The actual form of retaliation is at the discretion of the USTR, but the amount of relief must be equivalent to the burden of the restrictions imposed by the unfair practices on American goods and services. While the forms of retaliation remain discretionary, the USTR is bound to ensure that a preference be given to tariff increased or the removal of tariff preferences over quantitative restrictions.[650] This is because, when quantitative restrictions are employed, foreign producers benefit from the monopoly rents that accrue under such measures whereas with tariffs, the Treasury Department receive the revenue.

(D) Compatibility of Section 301 with the GATT

A significant inconsistency of Section 301 with the GATT is that it prevents the operation of the proper dispute resolution procedures established both in the GATT and in the Tokyo Round Codes. Unilateralism and the pursuit of settlements at the multilateral level are polers apart even if the object of both is the same, namely the effective settlement of disputes.

Section 301 circumvents the need for the United States to resort to the GATT and the various dispute resolution committees set up under the Tokyo Round agreements except in particular circumstances. The use of this measure is therefore further evidence of the deviation

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[649] B.S. Fisher & R. Steinhardt, "Section 301 of the Trade Act of 1974: Protection For U.S. Exporters of Goods, Services and Capital", (1984) 14 Law & Pol'y Int'l Bus., 569, 573.

[650] Section 901, Trade Agreements Act of 1979, 93 Stat. 144 (1979).

of the United States from the policy of multilateral trade diplomacy and towards the pursuit of unilateral or bilateral remedies.

Section 301 has been defended on the basis that 'the results of this program...have been substantially more open, freer trade, widely benefiting producers and exporters in third countries as well as in the United States'.[651] But, in this case the means do not justify the end. While trade liberalisation has been achieved in a number of instances, the practices that the retaliatory measures have been directed against have been unilaterally deemed unfair, unreasonable, restrictive or discriminatory. There has been no objective or impartial assessment of alleged offending practices.

At the same time, the use of Section 301 against the sole trading group that can withstand such pressures - the European Union - cannot have been said to have been successful. The principal effect of the measure has been to encourage the European Union to engage in illegitimate practices in order to avoid the consequences of retaliation. Thus, the European Union has blocked the adoption of panel reports in the GATT Council, indulged in bad faith in the interpretation of its international obligations under the Tokyo Round Agreements, generally procrastinated in fulfilling its commitments and entered into bilateral agreements with the United States which, it is difficult to believe, were entered into for any other purpose than expediency.

The utility and sense of using unrelated measures to counter unfair foreign practices also must be called

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[651] A.F. Holmer & J.H. Bello, "The 1988 Trade Bill: Saviour or Scourge of the International Trading System", (1989) 23:2 Int'l Lawyer 523, 527.

into question. When the United States accuses the European Union of engaging in unfair agricultural practices, and then adopts retaliatory measures in the form of restrictions on manufactured or industrial goods, it is obvious that the remedy is ineffective. Certainly such measures do not benefit American agricultural producers.

Although the GATT authorises the use of retaliation in Article XXIII(2), this sanction must only be used when decided by the CONTRACTING PARTIES. Individual contracting parties are not free under the GATT to engage in unilateral retaliation outside the scope of the organisation.

There are also a number of technical infringements of the GATT caused by Section 301 such as unduly restricting the consultations and conciliation procedure under Articles XXII and XXIII.

The problem of Section 301 and its consistency with the GATT has arisen in one particular case. In 1985, the United States imposed retaliatory tariffs against Brazil for failure to provide patent protection for pharmaceutical products.[652] The measure itself fell outside the scope of the GATT, being concerned with the enforcement of property rights and not trade in goods.

Brazil subsequently raised the matter before the GATT alleging that the United States retaliatory tariffs are inconsistent with the GATT being imposed on the basis of a question outside the scope of the GATT.[653] Brazil contended that the United States measures violated GATT

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[652] Inv. No. TA-301-49 Brazilian Informatics, 50 Federal Register 37,608 (1985).

[653] GATT Activities Report 1989 (1990), 97-98.

Articles II, because the products in question had been bound at particular tariff rates, and Article I because the duties were directed only against Brazil and were not imposed on an MFN basis.

The United States argued unsuccessfully that, in the absence of internationally agreed rules on patent protection, contracting parties were free to take measures necessary to protect intellectual property rights. The Council rejected this ridiculous argument and established a panel to investigate the matter. Aware that it would be unable to prevail in the event of a panel report, the United States caved in and withdrew the Section 301 measures.[654]

It was rather unfortunate that the issue was not heard by a panel which might have had a number of comments to make on the legitimacy of Section 301 as well as the use made of the provision by the United States. To the knowledge of the present writer, there has been no panel ruling on the legitimacy of measures under Section 301 other than decisions rendered on the basis GATT complaints raised under Section 301 by private petitioners and taken up by the USTR at the multilateral level.[655]

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[654] GATT Activities Report 1990 (1991), 66.

[655] For example, Thailand - Restrictions on the Importation of and Internal Taxes on Cigarettes, GATT BISD, 37th Supplement 200 (1991).

## (4) Variants of Section 301 - Super Section 301 Actions and Special Section 301 Actions

### (A) Super Section 301 Actions

The 1988 Act added Section 310 to the Trade Act of 1974.[656] This amendment, known as 'Super 301' was introduced to 'combat generic or systematic foreign trade practices' and imposes a series of self-initiation investigations obligations on the USTR. Initially the mechanism was effective for only two years, 1989 and 1990.[657] However, President Clinton resurrected the provision by means of an Executive Order on March 3, 1994.[658]

The renewal of the measure was provoked by the failure of negotiations between the United States and Japan for a suitable arrangement to ensure the opening of the Japanese market to United States goods.[659] The purpose of the negotiations was to establish quantitative and qualitative indicators to measure the progress of Japan in opening its markets.[660]

The measure originally required the USTR to self-initiate section 301 investigations after identifying 'priority trade liberalising practices and countries'

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[656] Section 1302, Omnibus Trade and Competitiveness Act of 1988.

[657] European Parliament, Report on United States - European Community Relations (1991), 3.

[658] Presidential Proclamation No.341 59 Federal Register 35,109 (1994).

[659] Financial Times, March 4, 1994, p.1.

[660] Japan had been reluctant to agree the terms of such indicators because of concern that these might subsequently become benchmarks, failure to meet which might provoke trade sanctions.

and then to seek to negotiate the elimination of such practices.[661] The statute lists specific factors that the USTR is required to take into consideration in identifying priority practices and countries. In the event that these negotiations were unsuccessful, mandatory retaliation was required. The 1994 measure requires the USTR to identify a similar group by September 1994 and to enter negotiations with these states over a 12-18 month period failing which sanctions are to be imposed.

On May 25, 1989, the USTR, Carla Hills, designated Japan, India and Brazil as priority states for investigation and market-opening negotiations.[662] Subsequently, on June 16, 1989, investigations were commenced into six particular priority practices maintained by these three states.[663]

Both South Korea and Taiwan were widely believed to have narrowly avoided being included on the priority list and their omission was generally attributed to an intense lobbying effort and a spree of trade concessions granted at the last minute.[664] One of the concessions granted by Taiwan to avoid inclusion in the list was an undertaking to expand its domestic demand and to reduce its trade deficit with the United States by a minimum of ten

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[661] These practices and countries were to be identified by reference to the annual National Trade Estimates Report.

[662] TPRM USA 1989, 264.

[663] Inv. No. TA-301-73 Brazil Import Licensing; Inv. No. TA-301-74 Japan Satellites; Inv. No. TA-301-75 Japan Supercomputers; Inv. No. 301-TA-76 Japan Forest Products; Inv. No. TA-301-77 India Investment Restrictions; Inv. No. TA-301-78 India Barriers to Insurance Sales; 54 Federal Register 24,238 (1989).

[664] C. Svernlov, "The Implementation of 'Super 301'", (1990) 31 Harvard Int'l Law Journal 359, 362.

percent per annum. Korea also caved in to the pressure and granted undertakings to open its domestic agricultural markets, to abolish certain import restrictions and to lift barriers on the provision of certain types of services.

These two illustrations aptly demonstrate the potency of Super 301 as a weapon of unilateral trade aggression. Without an opportunity being presented to examine the merits of their case, both South Korea and Taiwan were induced to make concessions under the threat of retaliation and the closure of the United States market to their products. The one-sided nature of this device is also exposed since the United States was not required to make a reciprocal concession in order to obtain these benefits.

Japan

Japan was named as a priority country because of the existence of a number of exclusionary government policies that afforded protection to domestic products by excluding foreign suppliers. These barriers were particularly prominent in the areas of government procurement of forestry products, supercomputers and foreign satellites.[665] Nevertheless, the naming of Japan on the priority list was not a surprise to many commentators.[666] Indeed, many of the motives behind Super 301 originated in the balance of trade between

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[665] 54 Federal Register 26,136 (1989); 54 Federal Register 26,137 (1989).

[666] E.K. King, "The Omnibus Trade Bill of 1988: Super 301 and Its Effects on the Multilateral Trade System Under the GATT", (1991) 12:2 Un. Pen J. Int'l Bus. Law 245, 258.

these two countries.[667]

The Japanese response to this development was to point out, with some degree of accuracy, that the United States itself maintained counterpart import restrictions in the sectors identified and initially the Japanese government refused to negotiate for the removal of the offending practices. At one point, the Japanese government threatened to bring a complaint to the GATT in order to determine the legitimacy of Super 301, but unfortunately the issue was settled before the complaint had been submitted.

Discussions on the removal of Japan from the list were held at top level between President Bush and former Prime Minister Uno, at the OECD Summit in Paris in July 1989. The pretence was maintained that these discussions were conducted outside the Super 301 framework but the outcome was the removal of Japan from the list and the implementation of the Structural Impediments Initiative.[668] These negotiations lead to a bilateral pact on all three problem areas.

This settlement produced a revolt in the House of Representatives where seventy members signed a petition calling for the USTR to change her mind and return Japan to the list. A bill was introduced in Congress, known as the Levin-Specter bill, to force the designation of Japan on the list as a nation that discriminates against American exports. In fact, the bill was eventually dropped but, as noted earlier, such bills are a common

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[667] See generally, P.B. Edelman, "Japanese Product Standards as NTBs: When Regulatory Policy Becomes a Trade Issue", (1988) 24:2 Stanford J. Int'l Law 389.

[668] See also the report on the meeting between President Bush and Prime Minister Kaifu at Newport Beach, United States, August 19, 1991, Oxford Analytica, Report No. 910404 (1991).

occurrence in the United States Congress.[669]

Brazil

Brazil was alleged to maintain a series of import restrictions on a number of U.S. exports including agricultural products and manufactured goods such as plastics, chemicals, textiles, leather products, electronic items, motor vehicles and furniture.[670]

The reaction of the Brazilian government was significantly different from that of the Japanese government. Instead of pointing to the illegality of the measures, the emphasis was placed on the need for Brazil to maintain these barriers in order to achieve a trade surplus which would then allow the country to pay its foreign debt. In support of its argument, Brazil pointed out that the offending measures were both temporary and non-discriminatory.

As a matter of law, the arguments put forward by Brazil could also be justified under the GATT. Article XVIII of the GATT contains an exception for the orderly adjustment of fundamental balance-of-payments disequilibrium. Developing countries with unstable currencies, such as that of Brazil, or massive external debts are eligible for a waiver from the more onerous GATT obligations. At the same time it is true that Brazil has never applied for such a waiver, and therefore is not technically exempt from the rigours of the General Agreement, but the basic argument is not

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[669] See text, infra, pp.368-372.

[670] 54 Federal Register 24,438 (1989).

without merit.[671]

Instead of confronting the United States, Brazil opted for appeasement and offending measures have been progressively reduced in order to satisfy the United States. Consequently, like Japan, Brazil was removed from the list of priority countries in 1990.[672] For the most part, this was due to the unilateral dismantling by Brazil of the alleged trade barriers and not through any negotiated settlement in the form of an agreement.

India

The inclusion of India on this list was not strictly because of trade practices but was due to India's trade-related investment measures which required foreign investors to export a portion of their production and to use locally-manufactured parts and components.[673] In addition, barriers to trade in U.S. services helped identify India as a priority country.

The Indian government reacted vigorously to its placement on the list and described the Super 301 procedure as 'totally unjustified, irrational and unfair'.[674] It has been the only one of the three governments that has stood up against the threat of unilateral retaliation by the United States, due in part to the domestic political system in India which forbids politicians from being seen to succumb to pressures from

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[671] For further consideration of this matter, see E.K. King, "The Omnibus Trade Bill of 1988: 'Super 301' and its Effects on the Multilateral Trade System Under the GATT", (1991) 12:2 University of Pennsylvania Journal of Int'l Bus., 245, 259-262.

[672] 55 Federal Register 18,693 (1990).

[673] 54 Federal Register 26,135 (1989).

[674] Svernlov, supra note 664, 363.

foreign governments.

India had the unfortunate honour of being the only country cited under Super 301 in 1990.[675] The rationale for this decision were basically the same as for the original determination, namely the protection of its insurance industry and for discouraging foreign investment.

(B) Special Section 301 Measures

The second variant on Section 301 introduced by the 1988 Act was the so-called Special Section 301 measure.[676] This mechanism requires the USTR to identify priority foreign countries that 'deny adequate and effective protection of intellectual property rights'. The USTR is required to select those countries:

(1) whose failure to provide protection has the greatest impact on relevant American products;
(2) which have not entered into good faith negotiations to provide adequate protection of intellectual property rights; and
(3) which deny market access to products subject to intellectual property protection.[677]

Special Section 301 measures, together with Section 301 actions themselves and Section 337 actions are at the core of the United States single-handed crusade to secure worldwide protection for intellectual property

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[675] 55 Federal Register 18, 693, 18,695 (1990).

[676] Section 182 of the Trade Act of 1974, as amended by Section 1303 of the Omnibus Trade and Competitiveness Act of 1988.

[677] Ibid.

rights.

No country was identified by the USTR as priority countries in May 1989, the first year of the operation of the programme. Instead, a 'watch list' of countries was created[678] as well as a 'priority watch list'.[679] The intention was to review the status of countries on the priority watch list each year.

The standards of intellectual property protection demanded by the USTR for a country to be removed from the watch lists appears to be unduly excessive. A number of European Union countries were placed on the 1989 watch list including Italy, Portugal, Spain and Greece. In 1990, Portugal was dropped from the list and Germany added. However, the most remarkable development was the placement of the European Union itself on the priority watch list because of the proposed broadcast directive.[680]

The USTR is also required to self-initiate investigations into a number of miscellaneous foreign practices affecting the supply of American services. Particular emphasis has been placed on certain Japanese practices relating to the provision of architectural, engineering, construction and consulting services offered by United States companies.[681]

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[678] This list consisted of Argentina, Canada, Chile, Colombia, Egypt, Greece, Indonesia, Italy, Japan, Malaysia, Pakistan, Philippines, Portugal, Spain, Turkey, Venezuela and Yugoslavia.

[679] This consisted of Brazil, India, South Korea, Mexico, China, Saudi Arabia, Taiwan and Thailand.

[680] European Parliament Report, supra note 657, 4.

[681] Section 1305.

(C) Tentative Observations

At least on the face of it, Super Section 301 has been successful in bringing countries to the negotiating table. Both South Korea and Taiwan made numerous concessions to the United States to avoid being named on the list, while both Japan and Brazil adopted measures to comply with the requests of the USTR to remove offending measures.

However, at the same time, the use of such measures against the European Union could lead to the fragmentation of the international trading system. Sources within the European Union indicate that the Union narrowly missed being targeted in 1989 for its public procurement practices in heavy electrical equipment, for agricultural subsidies and for the government support provided to the Airbus programme.[682] The placing of the European Union on the list would have resulted in a vicious spiral of retaliation and counter-retaliation which could have had the effect of stifling international trade.

These are considerations over and above the violations of the GATT caused by the introduction of Super 301. The automatic nature of any retaliation, had any been required, would have violated the consultation and conciliation procedures in the General Agreement and the degree of unilateralism involved would have infringed the Most-Favoured-Nation principle. In any event, retaliation is only authorised under the GATT in strict circumstances and even then only under specific conditions.[683]

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[682] European Parliament, Report by the Delegation for Relations with the United States, Doc No. PE 141.199, 5 (1990).

[683] Article XXIII(2) of the General Agreement.

The Special 301 measures are not likely to be repeated now that agreement has been reached in the protection of intellectual property rights at the Uruguay Round. However, somewhat sinisterly, the United States has turned its attention to the unilateral pursuit of non-MTO regulated issues. For example, in February 1994, the USTR announced his intention to consider new initiatives for special treatment. These include a 'blue 301 measure' for the protection of labour rights and human rights as well as a 'green 301 measure' for the purpose of ensuring protection of the environment. The separation of trade from non-commercial considerations raises suspicions that the United States will use any pretext to restrict trade.

### (5) Lipservice to Multilateralism - The Priority Objectives of the United States at the Uruguay Round Negotiations

Certain trade policy objectives can only be secured through multilateral negotiations. These objectives are outside the immediate scope of unilateral measures and bilateral trade diplomacy. The United States has not abandoned its intention to secure specific multilateral policy objectives and this explains to a large extent its ongoing active participation in the Uruguay Round negotiations.

A closer examination of the principal trade policy objectives of the United States at these discussions reveals a remarkable degree of similarity between the trade objectives which cannot be secured by unilateral/bilateral means and the policy goals which have been placed highest on the agenda by the United States. We shall consider four policy objectives in this context: reductions in levels of export subsidies,

improved market access, trade in services and the protection of intellectual property rights.

(A) Reduction in Levels of Export Subsidies

The Omnibus Trade and Competitiveness Act of 1988 called for the Executive to negotiate rules to assist American agriculture by:

> "increasing United States agricultural exports by eliminating barriers to trade and reducing or eliminating the subsidisation of agricultural production consistent with the United States policy of agricultural stabilisation..."[684]

Discussions on agricultural subsidies were conducted in the Negotiating Group for agriculture while industrial subsidies were tackled in the Negotiating Group on Subsidies. Reductions in export subsidies is fundamentally dependant on the willingness of the granting state to reduce these levels and countervailing measures only neutralises export subsidies on goods entering the United States. They do not neutralise the subsidies made available to foreign goods to compete in third country markets with goods made in the United States.

The issue of the reduction of agricultural subsidies proved to be a major stumbling block at the discussions.[685] The main difference was between the United States, supported by the Cairns Group, on the one

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[684] Section 1101(a)(7)(B), Omnibus Trade and Competitiveness Act of 1988.

[685] See J.G. Filipek, "Agriculture in a World of Comparative Advantage: The Prospects for Farm Trade Liberalisation in the Uruguay Round of GATT Negotiations", (1989) 30:1 Harvard Int'l Law Journal 123.

hand, and the European Union, supported by no-one else, on the other hand. The settlement eventually negotiated has been discussed elsewhere in the text.

The most obvious device to tackle this type of subsidies is countervailing duties, and as we shall see, the United States sees itself as blazing a trail in the use of countervailing duties.[686] This phenomenon has occurred against a background of growing disenchantment with the multilateral rules for the regulation of subsidies. Countervailing duties offer the prospect of neutralising subsidies on foreign products entering the United States market. They do not provide a solution to the problem of rectifying the competitive relationship between American goods and subsidised foreign goods in either the country where the subsidised goods were produced or third country markets.

There is therefore a degree of compatibility between United States trade policy objectives at the multilateral level and the aims sought to be achieved through the use of trade protection laws. Further, trade protection measures can be used in two way to underline the policy of eliminating subsidies. First, additional duties may be imposed as a means of coercing a trade partner into agreeing to a certain undertaking. Second, the countervailing law and Section 301 provide a major incentive for the trading partners of the United States to reach an agreement on this issue since the alternative would be the unilateral and unrestricted use of these devices to seek this objective.

(B) Improved Market Access

The 1988 Act instructs the Executive to negotiate to

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[686] See text, supra, Chapter 8.

obtain competitive opportunities for United States exports in foreign markets substantially equivalent to the competitive opportunities afforded to foreign exports in the American market.[687] This is specifically deemed to include the elimination of tariff and non-tariff barriers such as the following:

(1) measures identified in the annual report to the Congress on foreign trade barriers;
(2) foreign tariffs and non-tariff barriers on competitive United States exports when like or similar products enter the United States at low rates of duty and other tariff disparities that impede access to particular export markets.

The market access negotiations at the Uruguay Round covered trade in industrial products, tropical products and natural resource-based products and concerned the elimination or reduction of tariff and non-tariff barriers to trade in thee products. Progress on this subject was slow because of the difficulties in arriving at a consensus among the participants on a single common approach to the issue.

Clearly the most efficient manner of reducing non-tariff barriers is to conduct multilateral negotiations on each subject. The ability of the United States to unilaterally disarm the rest of the international trading community of non-tariff barriers is not infinite. While Section 301 measures may be directed against foreign states engaging in unreasonable or inequitable trade practices, the retaliate against all such practices would be infeasible.

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[687] Section 1101(b)(13), Omnibus Trade and Competitiveness Act of 1988.

In this particular area, the trade policy objectives of the United States cannot be properly served by trade protection laws. These barriers to trade are mostly outside the reach of such measures.

(C) Trade in Services

Trade in services has become an increasingly significant element in the invisible earnings of developed countries. The United States is no different in this respect and attached considerable importance to the successful conclusion of a multilateral agreement to regulate this activity.[688]

According to the 1988 Act, the negotiating objectives of the United States in relation to trade in services are:

(1) to reduce or eliminate barriers to, or other distortions of, international trade in services, including barriers that deny national treatment and restrictions on establishment and operation;
(2) to develop internationally agreed rules which are consistent with the commercial policies of the United States and which will reduce or eliminate such barriers or distortions and thus ensure fair and equitable opportunities for foreign markets.[689]

This issue was originally intensely pursued by the American delegation in Geneva and by the Brussels Ministerial meeting in December 1990, the negotiators had made significant breakthroughs in establishing the

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[688] F. Lazar, "Services and the GATT: United States Motives", (1990) 24:1 JWT 135.

[689] Section 1101(b)(9), Omnibus Trade and Competitiveness Act of 1988.

main features for a General Agreement on Trade in Services (GATS).[690]

The final General Agreement on Trade in Services is designed to establish a multilateral framework of principles and rules to regulate trade in services, bearing in mind the overall objectives of transparency, progressive liberalisation and the introduction of disciplines for individual sectors.[691]

The United States attempted to increase the pace of liberalisation of trade in services outside the multilateral sphere through bilateral negotiations on the issue and also through the use of Section 301. Trade in services was a critical issue in the negotiations on the North American Free Trade Agreement, a treaty which contains extensive provisions regulating trade in services. The text provides for the right of national treatment for most commercial service industries except transportation, telecommunications, legal services and medical treatment.

The other tool for the unilateral pursuit of this objective is Section 301 which is sufficiently broad as to include trade in services. In fact, the 'Super 301' procedure required the USTR to report to the Congress in 1989 and 1990, trade liberalisation priorities including the identification of priority practices which impede U.S. exports of goods and services to those countries placed on the list. As we have seen, this statute has been used to coerce Japan into opening certain sectors

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[690] See generally, P. Nicolaidas, "Economic Aspects of Services: Implications for a GATT Agreement", (1989) 23:1 JWT 125.

[691] GATT Doc. MTN/FA (December 1993).

of its economy.[692]

(D) Protection of Intellectual Property

The United States has also placed great store in protecting intellectual property rights registered in its territory from infringement by foreign manufacturers.[693] The great difficulty has been in protecting American patents, copyrights and trademark from pirating by unauthorised reproducers. Not only are sales within the United States undermined, but also distribution networks and agencies set up to market products in other countries are eroded by the appearance of plagiarised works.

In order to interdict this illicit trade, Congress instructed the President to enter into negotiations to protect intellectual and industrial property rights based on two principles:

(1) the enactment of effective enforcement provisions by foreign countries to protect intellectual property and to provide protection against unfair competition; and
(2) to establish GATT obligations to implement adequate substantive obligations based on international standards and procedures to prosecute and enforce infringements.[694]

This structure is to be underpinned by an effective dispute settlement procedure designed to improve on the

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[692] See text, infra, pp.292-294.

[693] See ITC Report, "The Economic Effects of Intellectual Property Right Infringement", reproduced in (1988) 22:4 JWT 101.

[694] Section 1101(b)(10), Omnibus Trade and Competitiveness Act of 1988.

existing GATT procedures.

It is significant that, in the past, the United States has shunned any involvement in the international instruments for the protection of intellectual property rights. For example, it has only recently signed the Berne Convention on the international protection of copyright and the Patent Cooperation Treaty of 1970. Nevertheless, the United States is a vigorous convert to the need to protect intellectual and industrial property rights.

The United States again has two mechanisms unilaterally to enforce the protection of intellectual property rights, first in the home market and, second, in foreign markets. Counterfeit imports into the United States from foreign sources can be restricted through section 337 of the Tariff Act of 1930, as amended, which allows American petitioners to seek relief from 'unfair import competition' resulting from the importation of products that have been manufactured through the infringement of a patent, copyright or trademark registered in the United States.

**(6) Observations**

The principal issue here is whether or not the United States conducts its general trade policy in a manner consistent with the international rules of the GATT trading system. In other words, is its commitment to the multilateral trading system a tangible and quantifiable fact? This is an important issue and one which deserves attention separate from the issue of whether or not measures of administered protectionism are being abused in the pursuit of a unilateralist trade policy.

Since the GATT itself was originally conceived as an instrument of United States trade policy, that country has been historically reluctant to abandon its commitment to that institutional framework. However, in recent times there have been indications that a continued commitment to the principle of multilateralism no longer serves the interests of the United States. In particular, there has been a tangible reliance on bilateral trade agreements and the use of unilateral trade measures.

The negotiation of the NAFTA is prima facie evidence of a distinct trend towards bilateralism as a preferred means of conducting trade policy. The creation of a single North American market represents a considerable coup for those trade policy-makers favouring the abandonment of the GATT in favour of a more insular trade policy. The Clinton administration has been a strong convert to this philosophy and clearly sees tangible benefits in direct negotiations with countries as opposed to the intricacies of negotiations at the multilateral level.

To a certain extent this policy has been successful in the short term. However, once the United States extends its bilateral policy towards trading nations such as Japan and the European Union, more difficulties will be encountered. This will also establish the authenticity of the proposition that this policy is not connected to a geographical nexus but rather is evidence of the abandonment of multilateralism as the principal arm of United states trade policy.

Inevitably, it is the increased arsenal of unilateral measures which causes the greatest concern as a measurement of trade policy direction. Section 301 and its variants are fearsome measures to support aggressive

unilateralism in the conduct of trade policy. It is a unilateral mechanism which functions largely independent of the international mechanisms for the resolution of disputes. Its purpose is to coerce other states into accepting the views of the United States on what is a legitimate or illegitimate commercial practice. Inherently, the use of such a mechanism involves an abuse of the United States economic position and, as we have seen, its legitimacy is the subject of considerable doubt.

Nevertheless, the legality of Section 301 is not the only international concern in relation to its existence. The use made by the Reagan and Bush administrations is a landmark in the evolution of United States trade policy. In the event that the United States is unsuccessful in securing international policy objectives at the multilateral level, it has the ability to pursue, at least to a limited extent, a state by employing this device. Since the vast majority of states are economically relatively weak when compared to the United States, even the threat of the use of such measures may compel a state to submit to the implied threat inherent in the mechanism.

The legislative history of the measure, and in particular, behind the 1988 Act, indicates that Congress is a strong proponent of the more aggressive wielding of this power. The United States Congress has historically taken a more protectionist and insular view of American foreign trade policy than its counterpart in the Executive branch of government.[695] In Section 301, Congress has been relatively successful in shackling successive administrations into considering the adoption of countermeasures even when such action may be against

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[695] For more on this point, see text infra, pp.365-374.

the long-term or strategic interests of trade policy.

It is interesting to note that Section 301 was originally conceived when the United States, for the first time, suffered a trade deficit. The measure was borne from the desire to reduce this deficit and that rationale has continued to shadow its functioning. It is therefore a knee-jerk reaction to an incredibly complex problem. Further, the use of the measure ignores both the cause of the U.S. trade deficit and fails to address the other issues which are relevant to this problem.

The United States would do well to de-emphasise Section 301 if it is to demonstrate to the rest of the international trading community that it is pledged to the continued operation of the principle of multilateralism and to the new World Trade Organisation. But, in this respect the U.S. Executive has a dilemma. The use of the measure has been relatively successful particularly in coercing the European Union and Japan into negotiating over trade problems. For example, it is difficult to believe that, in the absence of the threatened measures proposed in November 1992 against the European Union, an accord to resolve the issue of oilseeds/soyabeans would ever have been negotiated. Section 301 deserves the credit for this achievement. Hence, domestic observers and politicians have ample ammunition to defend the effectiveness, if not the legitimacy, of such a measure.

The extension of the principles behind Section 301 to issues which are not directly concerned with trade is also another serious concern. For example, the connection of trade with workers rights seems to indicate that the United States believes itself justified in interfering with the socio-economic affairs of other countries. The more sinister proposals to link

human rights and environmental protection to trade is also discouraging.

The various manifestations of Section 301 also illustrate how the United States has adopted a policy of tackling particular issues with specific measures. In other words, trade disputes are being brought to a confrontational level because the United States can tailor unilateral action to the needs of its own domestic industries. Quite clearly Japan was targeted for hi-tech electronic equipment which competes with American products of a similar standard. Brazil and India were targeted because of the alleged failure to protect particular industries which require the world-wide protection of intellectual property rights for their profits.

Finally, it is an illuminating fact that not all the main trade policy objectives of the United States can be secured by the use of unilateral measures. Multilateral diplomacy still remains essential to negotiate liberalisation of trade in services, reductions in levels of export subsidies when the subsidised goods compete with American goods in third markets and improved market access in the form of the reduction of tariffs, quantitative restrictions and measures having an equivalent effect. In these circumstances, the United States is compelled to maintain at least a minimum pretence of adherence to the principles of multilateral trade diplomacy. If this was not required, it seems relative clear from the internal currents within the United States that trade policy would in the future consist of a blend of unilateralism and bilateral trade diplomacy.

Therefore, to sum up, there is a distinct and unmistakable trend in the policy of the United States

away from multilateralism as embodied in the GATT towards more direct means of securing its interests. Section 301 and the other trade protection laws, as we shall see later, have substantially contributed towards this orientation.

The change of policy on the part of an important country in the international trading system does not bode well for the future. In the event that the United States is dissatisfied with the performance of the WTO, there is a distinct possibility that the multilateral trade-regulating system will fragment with the United States forming a North American block. The United States has already demonstrated a dissatisfaction with the existing rules and processes by developing these unilateral and bilateral techniques.

On the other hand, successful performance by the WTO will not necessarily mean the disarming of the United States and the abandonment of unilateralism and bilateralism. Quite simply, there is no need for such action since there are few restraints contained in the Uruguay Round Final Act to limit the use of these measures. Hence, it is extremely unlikely that the nascent international trading system will be able to prevent the United States from pursuing the avenues of unilateralism and bilateralism particularly as regards its tendency towards the use of trade protection laws.

# 5 The Direction and Shape of European Union External Trade Policy

The European Union is a unique organisation in international terms, a fact which must be borne in mind at all times when analyzing its commercial policy. Formulation of trade policy within the European Union involves peculiar institutional processes which have no analogy within sovereign states. The essential difference is that the European Union's trade policy is not the embodiment of the commercial interests of a single state, but rather is a compromise among the interests - internal and external - of its various Member States. The institutional processes within the European Union are intended to focus these interests to allow the European Union to speak with one voice even if this is not always a harmonious one.

Among the Member States of the European Union, these interests vary considerably despite the promotion of the fundamental goal of economic integration. Together the fifteen countries produce a wide variety of goods and services which compete with those of other countries in the international market-place. But there continues to be considerable specialisation of production and supply within each in country.

The significance of agricultural production in the economies of the fifteen countries is an obvious indicator of economic divergence. The percentages of the population engaged in agricultural production differs considerably between France, Ireland, Portugal and Greece on the one hand and the United Kingdom, Germany and Belgium on the other hand.[696] At the same time, the

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[696] Eurostat, Structural Data Report to the European Commission (December 1994), 6.

provision of services represents a greater proportion of gross domestic product (GDP) for the United Kingdom and Germany than for other Member States.[697]

Aside from the issues of production and supply of goods and services, there are also large differences in the export and import profiles of each Member State. According to a recent GATT Report, in 1990, trade to GDP ratios ranged from 12.5% for Spain to 62.5% for Belgium for exports and from 18% for Italy to 64.5% for Belgium as far as imports were concerned.[698]

At the same time, external trade links with non-EU countries also vary among the various Member States with external trade from the United Kingdom and Denmark far exceeding the proportion of exports by France, for example, to non-EU states. Naturally, the greater the volume of exports made to European Union countries as opposed to third countries, the less inclined a Member State is to concede concessions in the MTN process where this would compromise national interests.

This spread of diffuse economic and commercial interests among Member States is an important factor behind both the shape and form of European Union external trade policy since it is the trade-off of these interests that gives content to the final policy. Frequently, it is a difficult process for the Member States to arrive at a common position on trade policy matters due to these divergent national interests.

The unique nature of the European Union decision-making processes in trade policy matters must therefore always

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[697] Ibid.

[698] GATT, Trade Policy Review of the European Communities (1991), 5.

be borne in mind when considering the final content and shape of the policy. At the same time, it is important to note that as the Member States of the European Union progress towards closer economic integration so the trade policy of the European Union should become more coherent and consistent as greater and greater responsibility is transferred to the European Union from Member States. This is not to say that this transfer process is not acrimonious; it is merely to say that coherence in trade policy can only evolve in proportion to a commonality of commercial interests within the Member States.

## (1) Constitutional Foundations of European Union Trade Policy

From an international trade policy perspective, the European Union remains at its heart a common market - an advanced form of customs union - notwithstanding the ratification of the Treaty on European Union 1992.[699] The trade policy of the European Union is founded on two pillars - the Common Customs Tariff (CCT) and the Common Commercial Policy (CCP).[700] The CCT is essentially a Union-wide tariff schedule which has replaced the pre-existing individual national tariff schedules with a single harmonised and comprehensive system to facilitate the levying of duties on goods entering the European Union.[701]

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[699] Treaty on European Union, signed in Maastricht on February 7, 1992, O.J. C191/1 (1992).

[700] See generally, D. Lasok, The Customs Law of the EEC (Second edition, 1990); and N. Green et al., The Legal Foundations of the Single European Market (1992), 3-27.

[701] Council Regulation 2658/87, as amended, O.J. L256/1 (1987).

The CCP is the policy implemented by the European Union in the pursuit of international commercial objectives with trading partners.[702] The constitutional foundation of the Common Commercial Policy is Article 113 of the EC Treaty which provides:

> '[T]he common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the case of dumping or subsidies.'

This list of relevant subjects is non-exhaustive and, in light of the judgment in EC Commission v EC Council [European Road Transport Agreement][703], the European Union's competence in matters of external relations extends to subjects covered by the aims and objectives of the organisation set out in Article 3 of the EC Treaty. On the other hand, this competence is not always exclusive and may be shared between the Union and the Member States as, for example, the European Court held in Re: Competence of the Community to Conclude International Agreements[704] where the Court declared that the Union had sole competence to conclude the WTO Agreements on trade in goods but shared competence with Member States to conclude the Agreement on Services and the Agreement on Trade-Related Aspects of Intellectual

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[702] See D. Lasok, The Customs Law of the EEC (2nd edition, 1990), Chapter 13; and E.L.M. Volker, "The Major Instruments of the Common Commercial Policy", in J.H.J. Bourgeois, Protectionism and the European Community (1983), 17-51.

[703] Case 22/70 [1971] ECR 263.

[704] Opinion 1/94 [1995] 1 CMLR 205.

Property Rights.[705]

The creation of a comprehensive external trade policy among the original Member States of the European Union was a primary goal of the EC Treaty.[706] The Treaty transfers exclusive competence to formulate trade policy to the European Union institutions.[707] This means that Member States cannot legislate in fields covered by European Union measures nor can they enter into international obligations that would restrict the powers of the Union.[708] Nor can they negotiate with third states on matters that impinge on measures adopted at the European Union level.[709]

But, despite the expiry of the transition period for the completion of a common commercial policy, Member States have continued to express reluctance to transfer complete authority to the European Union to formulate a comprehensive and coherent Commercial Policy.[710] This reluctance may be attributed to two factors. First, the

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[705] See also Laying-Up Fund For Inland Waterway Vessels, Opinion 1/76 [1977] ECR 741.

[706] Article 3(b), EC Treaty.

[707] Articles 110-116 EC Treaty. See also Articles 71-75 ECSC Treaty.

[708] See Donkerwolcke v Procureur de la Republique Case 41/76 [1976] ECR 1921.

[709] See Re ILO Convention 170 on Chemicals at Work, Opinion 2/91 [1993] 3 CMLR 800; and R v Her Majesty's Treasury and the Bank of England Ex parte Centro-Com Srl [1994] 1 CMLR 109 (QBD).

[710] See generally, G.N. Yannopoulos, "The European Community Common External Commercial Policy: Internal Contradictions and Institutional Weaknesses", (1985) 19 JWTL 451; and M.C.E.J. Bronckers, "Legal Aspects of Protectionist Measures Affecting Japanese Imports into the European Community", in J.H.J. Bourgeois (ed) Protectionism and the European Communities (1983), 53-98.

institutional structure for the formulation and administration of the Common Commercial Policy is inadequate. Second, the actual objectives of the policy are fragmented, and not stated with a sufficient degree of precision in the Treaty to encourage a transfer of competence to the European Union.

It is self-evident that a consistent commercial policy requires a certain degree of power within a centralised agency. While the Commission has power to propose measures it is the Council that has ultimate responsibility for commercial policy. This institution is renowned for indulging in extensive and prolonged internal debates and bargaining before a mandate is finally given to the Commission to enter into negotiations. Since the final policy position within the Council is the embodiment of an essentially political compromise, the result is that many final measures are without depth, substance or coherence.

A recent illustration of the weakness in the fabric of the CCP occurred in June 1993 when Germany announced that it has independently negotiated a bilateral understanding with the United States to exclude Germany from the proposed sanctions to be imposed on the rest of the European Union as retaliation for alleged discrimination against foreign suppliers as part of a measure to regulate public procurement in the telecommunications sector.[711]

Germany relied on the terms of a 1954 Germany-United

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[711] Under the terms of Council Directive (EC) 93/38, O.J. L199/84 (1993), EU companies remain the favoured candidates for supply contracts even if a non-EU company underbids the EU supplier by up to 3% over the non-EU company's contract price.

States Friendship Treaty to justify its decision.[712] This treaty prohibited both parties from discriminating against each others suppliers and required both parties to apply the principle of mutual non-discrimination. Although the European Commission claimed that the U.S.-German accord was unlawful under EU law, the practical effect was to remove Germany from the scope of the proposed sanctions. This was the case even although Germany has voted along with the other eleven Member States to adopt a measure invoking counter-sanctions against the United States measures.[713]

Neither the Single European Act[714] nor the Treaty on European Union[715] significantly amend the provisions of the EC Treaty relating to the Common Commercial Policy and therefore the possibility of such gaps in the policy remains.[716] The Common Commercial Policy is therefore

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[712] On the legality of such a proposition, see R. Lauwaars, "Scope and Exclusiveness of the Common Commercial Policy - Limits of the Powers of Member States", in J. Schwarze (ed), Discretionary Powers of the Member States in the Field of Economic Policy and Their Limits under the EEC Teaty (1988), 73-95.

[713] For further on the settlement of this dispute, see text infra pp.462-463.

[714] See generally, M. Hilf, "The Single European Act and 1992: Legal Implications for Third Countries", (1990) 1:2 European Journal Int'l Law 89.

[715] Articles G26-31 repealed Articles 111, 114 and 116 of the original EC Treaty, but Articles 113 and 115 were replaced with almost identical provisions except that references to transitional periods were deleted and some minor alterations made.

[716] While neither of these agreements altered the substantive content of the policy by amending the EC Treaty itself, the Single European Act contributed to the CCP by requiring the adoption of Community-wide quotas for foreign trade while the Treaty on European Union made significant alterations to the manner in which international agreements are to be negotiated, agreed and approved.

not only subject to the criticism that it is often inconsistent with other European Union policies, but in fact, despite almost 40 years of evolution, it remains not yet fully complete.

### (2) Participation of the EU/EC in the GATT Multilateral Trading System

To permit the European Union to pursue trade policy objectives with third states, it has been given limited international personality.[717] This competence is manifested in two forms. First, the European Union conducts direct negotiations on trade policy matters and frequently concludes international treaties - both bilateral and multilateral - with other states. Second, it participates in a number of international organisations, most notably the GATT (now the WTO) and the Organisation for Economic Co-operation and Development (OECD), in its own capacity.[718]

European Union participation in the GATT system has not, however, been without problems. Even when the EC Treaty was agreed in 1957, it was clear that certain GATT contracting parties did not agree that its terms were compatible with the General Agreement. In fact, a GATT committee was established to assess the degree of compatibility between the two systems. The final report of the committee was unfavourable towards the European

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[717] This is consistent with Article 6 of the Vienna Convention on Treaties For International Organisations 1986, reproduced at 25 ILM 543 (1986). See also Lachman, 'International Personality of the European Community", (1984) 1 LIEI 93.

[718] See European Commission, Relations Between the European Community and International Organisations (1989) and J. Groux & P. Manin, The European Community in the International Order (1984), 61-67.

Union and concluded that the EC Treaty was not consistent with the GATT on the grounds, inter alia, that the Common Agricultural Policy (CAP) introduced greater quantitative restrictions on the flow of agricultural products, because of the increased amount of trade restrictions in general and since the formula used to create the common customs tariff was not consistent with the GATT provisions allowing exceptions for free trade areas and customs unions.[719]

It appears that a waiver has never been obtained by the European Union to justify its existence within the GATT framework but, although at one point the matter threatened to develop into 'an oversized legal issue'[720], it appeared at one point that the issue was resolved through a series of diplomatic compromises.[721] Technically, therefore, the continued existence of the European Union is a violation of the GATT, in the strict sense but the indefinite suspension of discussions on this matter was then seen as de facto informal accommodation of the European Union within the international trading system.[722]

To a certain extent, the expansion of the European Union, first in 1973 and again in 1981 and 1986, reopened the difference of opinion on the legal status

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[719] GATT, BISD, 6th Supplement 68-112 (1958), BISD, 7th Supplement 69-71 (1959).

[720] R. Hudec, The GATT Legal System and World Trade Diplomacy (1975), 195.

[721] See A.F. Lowenfeld, Public Controls on International Trade (1979), 57-58.

[722] See E-U. Petersmann, "Participation of the EC in the GATT", in H.G. Schermers & D. O'Keefe, Mixed Agreements (1983), 167-198.

of the European Union.[723] In these discussions, the European Union representatives asserted the view that the matter was closed as the CONTRACTING PARTIES had failed to formulate recommendations under Article XXIV to allow the Union to comply with the terms of the General Agreement but, in response, some members of the Working Party set up to investigate the issue disagreed claiming that the matter had merely been suspended and was therefore unresolved. The subsequent enlargement of the European Union has, to some extent, revived this dispute.[724]

This situation seems anomalous in light of the full participation of the European Union within the GATT itself. Since the Dillon Round of MTNs, the European Union has negotiated agreements on behalf of its Member States and has participated in all subsequent negotiations as an informal contracting party.[725] In fact, since 1970, the vast majority of agreements negotiated within the GATT system have been concluded by the European Union as Union agreements without the additional participation of the individual Member States.[726] Even the Uruguay Round Final Act was signed on behalf of the European Union (although referred to in

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[723] GATT BISD, 30th Supplement 168-190 (1982-1983); BISD, 35th Supplement 293-321 (1987-1988).

[724] The United States, as well as a number of other trading partners, successfully obtained compensation from the EU for increased duties charged by Austria, Finland and Sweden on U.S. goods following the accession of these states in settelement completed in December 1995.

[725] See E-U. Petersmann, "The EEC as a GATT Member - Legal Conflicts Between GATT Law and EC Law", in M. Hilf (ed), The European Community and GATT (1986), 23-71, 38.

[726] The major exceptions are the Agreement on Technical Barriers to Trade 1979 and the Agreement on Trade in Civil Aircraft 1979.

its capacity as a European Community in the text).[727]

At the same time, within the dispute settlement procedures of the GATT, the European Union's standing to raise complaints has never been challenged[728] nor has its responsibility for alleged violations of the General Agreement as well as the supplementary codes.[729] There is consequently strong evidence to support the proposition that the European Union is at least a de facto contracting party.[730]

### (3) The Traditional Policy of the European Union Towards Developing Bilateral Trade Relations and Deviation from Multilateralism

The European Union has used a blend of bilateral/regional and multilateral diplomacy in pursuing its trade policy objectives. In this context, bilateral/regional diplomacy means dialogue with individual states, or groups of states, with the objective of placing commercial relations on a formalised legal basis. In contrast, multilateral diplomacy involves the participation of the European Union in the many international forums for the

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[727] Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, GATT Doc. MTN/FA (1993).

[728] See US - DISC Legislation, GATT BISD, 23rd Supplement 98 (1977); Canada - Importation, Distribution and Sale of Alcoholic Drinks, GATT BISD, 35th Supplement 37 (1987-1988); and Japan - Trade in Semiconductors, GATT BISD, 35th Supplement 245 (1987-1988).

[729] See EEC - VAT Deductions, GATT BISD, 31st Supplement 247 (1984).

[730] See also, E-U. Petersmann, "EC and GATT: On the Economic and Legal Functions of GATT Rules", (1984) LIEI 37; and E-U. Petersmann, "International and European Foreign Trade Law", (1985) CML Rev 401.

negotiation of multilateral trade agreements. By engaging in bilateral diplomacy, the European Union conducts discussions directly with the government of one or more states whereas in multilateral negotiations the European Union is only one of many participants.

Bilateral diplomacy is an extremely important element of the European Union's trade policy. Trade and co-operation agreements have been negotiated with a vast number of the states participating in the present international trade system. Each of these are tailored to suit the European Union in conducting its trade and commercial relations. Certainly in such negotiations, the European Union generally has considerable ability to influence the final content of such agreements due largely to its size and importance in the international market-place.

The concern here is that eventually the European Union will be able to conduct its external commercial affairs without needing to resort to the multilateral mechanisms provided at the international level. Alternatively, it may de-emphasise its efforts at the multilateral negotiations if bilateral negotiations may provide an effective substitute. The belief that the European Union could rely exclusively on the development of such a network of arrangements is perhaps one of the greatest threats to the present international trading system. If the Union is successful at enshrining its commercial rights and duties through a network of bilateral/regional agreements, the question must be asked whether or not it has any more need of multilateral diplomacy.

It is not just the proliferation in the number of such agreements that raises concerns. Increasingly, these agreements have covered a wider and wider range of

topics - from trade and commercial affairs to financial co-operation and development aid. In other words, the European Union is easily able to achieve its objectives in certain areas through bilateral endeavours although naturally there are areas where, in the absence of multilateral agreement such objectives cannot be secured such as, for example, in the case of an international regime for the co-ordination of competition law and policy or the protection of intellectual property rights.

Another disconcerting development is the evolution of distinctive European Union policies for different geographical areas. At least six categories can be identified: (a) Western Europe; (b) Eastern Europe; (c) the Mediterranean; (d) Africa and the Caribbean; (e) Asia and the Far East; and (f) a residual category for other countries. In each of these areas the goals of the Union are different. Hence, bilateral arrangements between countries in different areas differ significantly while, in contrast, the arrangements between states in the same area are noticeably similar.

This is undoubtedly an issue that warrants closer examination. The question that must be asked is whether the European Union is deliberately carving up the globe into regions which it can exercise effective commercial control over its own trade policy agenda?

(A) Western Europe

In 1992, the most spectacular success of European Union bilateral trade diplomacy was achieved in the shape of the Agreement on the European Economic Area which united, at least temporarily, the majority of Western

European states in a commercial union.[731] The arrangement entered into force on January 1, 1994 and involved the nineteen members of the European Union and the European Free Trade Area (EFTA).[732] The pre-existing trade arrangements between the European Union and the members of the EFTA were largely superseded once the agreement came into effect. While not strictly a bilateral agreement, the EEA Treaty is a product of direct discussions with the EFTA members outside the traditional multilateral processes.

The conclusion of this agreement is a significant landmark in the European Union's commercial trade policy. At the outset, it replaces the complex system of free trade agreements between the EFTA countries and the European Union which in the past was confined mainly to the abolition of customs duties and measures having an equivalent effect.[733] The new single agreement extended the four freedoms of European Union law to EC-EFTA trade[734] while the European Union's competition rules are to apply to trade in goods and services.[735] In addition, an independent surveillance authority and a

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[731] Agreement Establishing the European Economic Area, signed in Oporto on May 2, 1992, Commission Doc. 5994/1/92 Rev 1.

[732] The scheduled date for implementation was delayed after the rejection of the Agreement by the Swiss population after a referendum held in December 1992.

[733] Agreement Between the EEC and Austria, O.J. L300/2 (1972); Agreement Between the EEC and Sweden, O.J. L300/97 (1972); Agreement Between the EEC and Switzerland, O.J. L300/189 (1972); Agreement Between the EEC and Iceland, O.J. L301/2 (1972); Agreement Between the EEC and Norway, O.J. L171/2 (1972); Agreement Between the EEC and Liechtenstein, O.J. L300/281 (1972); Agreement Between the EEC and Finland, O.J. L328/2 (1973).

[734] Articles 8-52, EEA Agreement.

[735] Articles 53-65, EEA Agreement.

court have been established to supervise the operation of the terms of the agreement.[736]

The most interesting aspect of the EEA Agreement from the European Union perspective is that it established an effective instrument for influencing the trade policies of the EFTA states vis-a-vis the Union as far as matters within the scope of the agreement are concerned. The EFTA countries, to a certain extent, surrendered the right to enact measures which conflict with the existing, and presumably future, acquis communautaire. The exact legal implications of this diminution cannot be speculated on until the first relevant rulings of the EEA Court, but since the ECJ has already ruled that European Union law prevails over national law, and since the treaty itself was modified to ensure the continued application of this principle, it is difficult to see how the rules applied by the EEA Agreement will not prevail over inconsistent laws of EFTA countries.

Perhaps the most important concession obtained by the EFTA states from the European Union in the Agreement was the suspension of the application of European Union anti-dumping, anti-subsidy and measures against illicit commercial practices legislation in the intra-trade area.[737] However, this concession is subject to two qualifications:

(a) the European Union competition laws are to apply in the area which allows action to be

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[736] It was these institutional arrangements which caused the ECJ to reject the constitutionality of the agreement; European Economic Area Agreement (No 1), Opinion 1/91 [1992] 1 CMLR 245. The terms of the agreement were accordingly amended in light of this opinion; European Economic Area Agreement (No 2), Opinion 1/92 [1992] 2 CMLR 217.

[737] Article 26, EEA Agreement.

taken against practices otherwise considered unfair such as predatory pricing.

(b) the prohibition on the use of such measures is subject to the qualification that the European Union reserves the right to introduce measures to avoid circumvention of the application of such instruments.[738]

The European Union has reserved the right to employ safeguard measures although these take a different form than measures taken under the European Union's general safeguard legislation. In the event of 'serious economic, societal or environmental difficulties of a sectorial or regional nature', which are considered by the European Union as liable to persist, an application for safeguard measures may be made to the EEA Joint Committee.[739]

Therefore, the European Union has grandfathered the right to resort to its ultimate weapon in the event of trade flow problems albeit that this measure can only be justified under strict conditions.

(B) Eastern Europe

In the period between 1988 and 1992 the geopolitical map of Eastern Europe changed significantly.[740] Gradually the countries with the most progressive economies have entered into association agreements to regulate their

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[738] Protocol 13, EEA Agreement.

[739] Article 112, EEA Agreement.

[740] G. Merritt, Eastern Europe and the USSR (1992).

commercial relationships with the European Union.[741] Association agreements are generally seen as a positive step towards future membership of the Union.[742]

The first step in the integration of Eastern European countries was the negotiation of comprehensive agreements between the Union on the one hand and Hungary, Poland, the Czech Republic, the Slovakian Republic, Romania and Bulgaria on the other.[743] These agreements were generally known as 'Interim Agreements'and were intended to provide a model for future negotiations between the European Union and the remaining other Eastern European countries.

As part of the stated objective of the British Presidency at the Edinburgh Summit in 1992[744], a further series of agreements have been entered into with this group of states. These agreements are designated as 'Europe Agreements' and are the next stage in the

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[741] See Agreement Between the European Community and Hungary on Trade and Commercial and Economic Co-operation, O.J. L327/2 (1988); Agreement Between the European Community and Poland on Trade and Commercial and Economic Co-operation, O.J. L339/2 (1989); Agreement Between the European Community and Czechoslovakia on Trade and Commercial and Economic Co-operation, O.J. L291/29 (1990); Agreement Between the European Community and Romania on Trade and Commercial and Economic Co-operation, O.J. L79/13 (1991).

[742] European Commission, The Community and Its Eastern Neighbours (1991), 3.

[743] Co-operation Agreement Between the EC and Czechoslovakia, O.J. L115/1 (1992); Co-operation Agreement Between the EC and Hungary, O.J. L116/1 (1992); and Co-operation Agreement Between the EC and Poland, O.J. L114/1 (1992); Co-operation Agreement Between the EC and Bulgaria, O.J. L323/2 (1993); and Co-operation Agreement Between the EC and Romania, O.J. L81/1 (1993).

[744] See, European Commission, Europe and the Process of Enlargement, EC Bulletin, Supp. 3/92 (1992).

assumption of these states into the European Union. Four states presently have such agreements, namely, Hungary, Poland, the Czech Republic and the Slovak Republic.[745] Despite their designation, these agreements are in fact free trade agreements which provide the following framework:

(a) The implementation of free movement of goods over 10 years, the necessary reductions being made on the basis of a distinction drawn between industrial goods and agricultural goods.
(b) The introduction of the rights of free movement of workers, the right of establishment and the right to supply services.
(c) Liberalisation of capital movements
(d) Competition policy (based on Articles 85 and 86 EC Treaty).
(e) Approximation of laws mechanisms.
(f) Economic co-operation.
(g) Cultural co-operation
(h) Financial co-operation.
(i) An institutional framework for implementation of decisions and measures.

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[745] Europe Agreement Establishing an Association Between the European Communities and Their Member States and the Republic of Hungary, O.J. L347/2 (1993); Europe Agreement Establishing an Association Between the European Communities and Their Member States and the Republic of Poland, O.J. L348/2 (1993); Europe Agreement Establishing an Association Between the European Communities and Their Member States and the Slovak Republic, O.J. L359/2 (1994); Europe Agreement Establishing an Association Between the European Communities and Their Member States and the Czech Republic, O.J. L360/2 (1993); Europe Agreement Establishing an Association Between the European Communities and Their Member States and the Romania, O.J. L357/2 (1994); Europe Agreement Establishing an Association Between the European Communities and Their Member States and Bulgaria, O.J. L358/2 (1993).

These instruments are the final step prior to formal application for membership of the European Union and in fact both Hungary and Poland have recently made such applications.[746] Now that these states have been integrated into this framework, the European Commission has now turned its attention to bilateral agreements with the Baltic states and the states of the former Soviet Union.[747]

Through this process, the European Union has successfully procured intensive commercial (and political) relationships with these states which allow considerable influence over the future shape of commercial relations between the European Union and these countries. The achievement of free trade, in a form compatible with the existing EC treaty provisions on the free movement of goods, is a considerable extension of a fundamental principle of Union law.

From a European Union point of view, the process of trade liberalisation with these states, and potentially more in the area, assists reduce trade barriers between these states and the European Union and throughout virtually all of continental Europe, with the European Union at the centre and the EEA Agreement and the bilateral obligations with the Eastern European countries acting as the legal basis for the operation of the system. This network has been established without needing to resort to negotiations at the multilateral

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[746] Hungarian Application lodged April 1, 1994; Polish Application lodged April 8, 1994. The anticipated accession of both these countries is approximately 2000.

[747] See, for example, Agreement on Free Trade and Trade-Related Matters Between the European Communities and the Republic of Latvia, O.J. L374/2 (1994); Agreement on Free Trade and Trade-Related Matters Between the European Communities and the Republic of Estonia, O.J. L373/2 (1994).

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(C) Mediterranean Area

The European Union has devoted considerable time and effort to ensure that its relationships with its neighbours in and around the Mediterranean area are placed on a formal legal basis.[748] It has successfully established commercial relations, on a bilateral basis, with virtually all of the countries bordering the Mediterranean. The commercial policy of the European Union for this region is based on a broad distinction between those Mediterranean countries situated in Southern Europe and those situated in North Africa and the Eastern Mediterranean.

As a general rule, those countries situated in Southern Europe has traditionally been allowed to enter association agreements with the European Union. Thus, prior to their accession, Spain, Portugal and Greece had their relationships with the Union regulated on such a basis while Turkey, Cyprus and Malta each have separate association agreements.[749] These association agreements are intended as a stage towards future membership of the European Union although to date the Union has resisted the application of Turkey for full membership.[750]

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[748] See generally, C.M. Fransen, "The EEC and the Mediterranean Area: Association and Co-operation Agreements", (1992) 5:2 Leiden Journal of Int'l Law 215.

[749] Agreement Establishing an Association Between the EEC and Turkey, O.J. L217/3687 (1964); Agreement Establishing an Association Between the EEC and Cyprus, O.J. L133/2 (1973); Agreement Establishing an Association Between the EEC and Malta, O.J. L61/2 (1971).

[750] The EU recently concluded a free trade agreement with Turkey in March 1995 and its terms were ratified by the European Parliament in November 1995.

The structure of these agreements is basically the same. They provide for the creation of an environment for the free movement of goods and the abolition of duties and quantitative restrictions. However, there is no right to free movement of persons[751], services or capital, while the European Union's rights to impose anti-dumping and anti-subsidy measures are expressly protected. The terms of these agreements are periodically supplemented by protocols dealing with related subjects such as financial activities.[752]

In contrast, the countries of Northern Africa and the eastern Mediterranean have only been allowed to enter co-operation agreements with the Union.[753] It is clear that the European Union does not envisage future membership for these countries and in fact the application for membership made by Algeria was rejected. The major exception is Israel which has been permitted to enter into a free trade agreement with the European Union but this was mainly for political reasons.[754]

These treaties deal with economic, technical and financial co-operation and have the stated objectives of

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[751] See R v Secretary of State, Ex Parte Nairn [1990] 1 CMLR 682.

[752] See for example, Protocol on Financial and Technical Co-operation Between the EEC and Malta, O.J. L180/47 (1989).

[753] Co-operation Agreement Between the EEC and Egypt, O.J. L268/2 (1978); Co-operation Agreement Between the EEC and Jordan, O.J. L268/2 (1978); Co-operation Agreement Between the EEC and Syria, O.J. L269/2 (1978); Co-operation Agreement Between the EEC and Lebanon, O.J. L267/2 (1978); Co-operation Agreement Between the EEC and Tunisia, O.J. L265/2 (1978); Co-operation Agreement Between the EEC and Algeria, O.J. L263/2 (1978); and Co-operation Agreement Between the EEC and Morocco, O.J. L264/2 (1978).

[754] Agreement Between the EEC and Israel, O.J. L136/3 (1975).

encouraging and promoting exports to the European Union from these countries. Tariff-free entry to the EC is provided for industrial products but only limited tariff concessions have been granted for agricultural products. Since agricultural production is the most important economic activities in many of these countries, the value of this concession is seriously undermined.

The individual contents of these treaties are, of course, tailored to meet the particular form of relationship between the European Union and the country concerned. However, all of these reserve the rights of the European Union to revert to anti-dumping, anti-subsidy and safeguard measures given the existence of the appropriate conditions.

(D) Africa and the Caribbean

The European Union system for the regulation of imports from the former colonies of Member States in Africa, the Caribbean and the Pacific, hardly requires detailed exposition in this work. It is suffice to say that the European Union regulates these imports through a series of periodically revised agreements, the most recent of which is known as Lomé IV negotiated in 1988-1989.[755]

The Lomé agreements grant those countries participating in the system tariff preferences to allow duty-free imports of industrial goods, but which are more restrictive for agricultural products which, in fact, such countries might have a comparative advantage in over producers in the European Union. In addition to the tariff concessions and access benefits, the Convention provides certain forms of financial support such as aid

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[755] See generally, European Commission, General Report of the Activities of the European Union (1995), 317-327.

to support export earnings and technical assistance mainly through aid projects.

The grant of preferential status under the Lomé programme does not prevent the application of anti-dumping measures on products that have been imported into the European Union.[756]

(E) Asia and the Far East

The European Union has entered a number of commercial and co-operation agreements with Asian countries[757] as well as with the Association of South-East Asian Nation (ASEAN).[758]

The terms of these agreements are broadly similar and are, for the most part, declaratory. Thus, they affirm MFN treatment for imports to the European Union and encourage economic co-operation in fields of mutual concern. There are also provisions to establish an institutional framework to facilitate dialogue between these governments and the European Union.

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[756] See, for example, Urea From Trinidad and Tobago, Commission Regulation (EEC) 1289/87, O.J. L121/11 (1987) [provisional duties]; and Denim From Macao, O.J. C73/3 (1989) [finding of no injury].

[757] Commercial Co-operation Agreement Between the EEC and Bangladesh, O.J. L319/2 (1976); Agreement on Trade and Economic Co-operation Between the EEC and China, O.J. L250/2 (1985); Agreement For Commercial and Economic Co-operation Between the EEC and India, O.J. L328/6 (1981); Commercial Co-operation Agreement Between the EEC and Pakistan, O.J. L168/2 (1976); and Agreement on Commercial Co-operation Between the EEC and Sri Lanka, O.J. L247/2 (1975).

[758] Co-operation Agreement Between the EEC and Indonesia, Malaysia, the Philippines, Singapore and Thailand - Member Countries of the ASEAN, O.J. L144/3 (1980).

The notable exception to this system is Japan. The European Union has not yet entered into a comprehensive trade and co-operation agreement with Japan which seems to be a surprising omission in light of the importance of that country as a trading partner.[759]

(F) Other Countries

A number of agreements regulate the European Union's relations with the remaining developed states of the international trading system with the notable exception of the United States. Thus, agreements are in place for the European Union's commercial relations with Canada[760] and many of the states of South America.[761] These arrangements contain broad general terms which are of limited practical importance.

While there is no general commercial agreement with the United States, there are a number of agreements concerning commercial matters between the two trade partners. Thus, in 1992 an agreement on anti-trust co-operation was negotiated to defuse the tension which had arisen as a consequence of both nations applying the principle of the extra-territorial effect of anti-trust laws.[762] In the same year, both countries negotiated an

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[759] On EU-Japan relations, see European Commission, Background Report on the European Community and Japan, Doc. ISEC/B24/90 (1990).

[760] Framework Agreement For Commercial and Economic Co-operation Between the EEC and Canada, O.J. L260/2 (1976).

[761] See for example, Framework Agreement For Co-operation Between the EEC and Brazil, O.J. L281/2 (1982).

[762] Agreement Between the United States and the European Community Regarding the Application of Competition Law, Council Decision 95/145/EC, ECSC, O.J. L95/45 (1995).

agreement to regulate certain activities in the aeronautical industry.[763]

The principal instrument through which the Union conducts its commercial relationships with non-ACP developing countries is through the Generalised System of Preferences (GSP) by which the Union provides favourable duty reductions on a unilateral basis for eligible countries. The preferences themselves are calculated on an annual basis but with reference to a ten-year plan.

Again most manufactured products are eligible for GSP treatment if the country of export has GSP-status, subject to ceilings for certain types of products. Agricultural products, on the other hand, are not granted as favourable treatment.

(G) Observations

The continued commitment of the European Union towards multilateral trade diplomacy must be assessed against the extensive background of bilateral agreements negotiated with third states. This framework has become so legally robust and well-structured that it exists as an infrastructure on which the European Union can, quite easily, conduct commercial relationships with most of its trading partners with the exception of the United States and Japan.

There must also be serious doubts about whether this structure and in particular the existence of Union-third state free trade agreements is compatible with the terms

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[763] Agreement Between the EEC and the United States on the Aeronautical Industry, O.J. L301/31 (1992).

of the GATT itself.[764] Article XXIV of the GATT allows the creation of free trade areas as long as such arrangements eliminate duties and restrictions on 'substantially all trade' between the members of the arrangement. In addition, the resulting barriers cannot be more restrictive vis-a-vis third states than was previously the case.

### (4) The Reluctance of the European Union to Use Unilateral Measures

The tendency of the European Union towards unilateralism has not been a pronounced feature of its external trade policy during the period being studied in this woek, ie. 1947-1994. Instead, the European Union concentrated more on bilateral trade diplomacy and resolving disputes within the GATT dispute settlement procedures and fora.

To a certain extent, this phenomenon reflects the more passive approach of the European Union to trade relations than the active, and some would say aggressive, approach taken by the United States in unilaterally enforcing its alleged international rights. This does not, of course, imply that the European Union acted in a manner more inconsistent with the terms of the GATT than the United States; it only means than it was less hypocritical. The European Union acted outside the parameters of the GATT with relative impunity but did not exacerbate this behaviour by targeting countries for unilateral coercive measures when, and if, these countries acted outside its perception of fair trade.

Again this is not to say for a moment that the European Union was reluctant to enforce its international rights.

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[764] See generally, F. Schoneveld, "The EEC and Free Trade Agreements", (1992) 26:5 JWT 59.

It did so often but normally within the mechanisms stipulated by the GATT. In fact, the volume of international claims brought by the European Union in this period was probably second only to that brought by the United States.

Against this background, it might seem rather anomalous that the European Union had in its arsenal of trade remedy laws a measure which had great potential for allowing the European Union to act unilaterally, namely the New Commercial Policy Instrument.[765] The existence of this measure caused concern among the European Union's trading partners for legitimate reasons. The NCPI had great potential for facilitating unilateral action. Certainly inside the European Union, some Member States, especially France, vigorously called for reform of this mechanism into an analogous measure to Section 301.[766]

In the following sections, the New Commercial Policy Instrument will be analyzed. The purpose of this analysis is to outline the considerable discretion which this measure conferred on the European Union for unilateralism and the flexibility which was inherent in its operation. After this analysis, we can evaluate whether or not the fear of these mechanisms among the European Union's trading partners was justified.

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[765] Council Regulation (EEC) 2641/84 (1984), O.J. L252/1 (1984). The replacement mechanism for the NCPI recently came into effect by virtue of Council Regulation (EC) 3286/94, O.J. L349/71 (1994), known as the Trade Barriers Regulation (TBR). This measure lays down procedures in the field of the common commercial policy in order to exercise the EU's rights under the international rules established under the WTO.

[766] Financial Times, December 7, 1993, 1.

(A) The New Commercial Policy Instrument

The introduction in 1984 of the New Commercial Policy Instrument (NCPI) amounted to recognition by the European Union that the fabric of the common commercial policy was not complete and needed to be strengthened notably in fields not covered by the then existing rules of administered protection.[767] In particular, a mechanism was considered necessary to defend 'vigorously' the legitimate interests of the Union although the nature of these interests is not is not expressly defined.[768]

The Instrument had two main policy objectives.[769] The first was to secure protection for the European Union markets from imports that were produced with the benefit of some form of unfair competitive advantage other than dumping or subsidisation. In this context, it was therefore an instrument of administered protectionism along similar policy lines as anti-dumping and anti-subsidy measures, and, not surprisingly, many of the fundamental concepts behind these two measures, such as injury to a Union industry and the concept of European Union interest, were reproduced in the NCPI.[770]

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[767] On the background to the measure, see E.L.M. Volker, "Community Law Regulations on Foreign Trade", in M. Hilf & E-U Petersmann (eds), National Constitutions and International Economic Law (1993), 137, 156-159.

[768] Recital 6, Council Regulation (EEC) 2641/84, O.J. L252/1 (1984).

[769] See generally, M.I.B. Arnold & M.C.E.J. Bronckers, "The EEC New Trade Policy Instrument: Some Comments on Its Application", (1988) 22:6 JWTL 19; and M.C.E.J. Bronckers, "Trade Laws Regarding Access to Foreign Markets", A Paper Given at the Annual Conference of the College of Europe, Brugge, September 15, 1989.

[770] See generally, M.C.E.J. Bronckers, "Private Responses to Foreign Unfair Trade Practices - United States and EEC Complaint Procedures", (1985) 6

The second goal was to dissuade the European Union's trading partners from engaging in, or permitting, certain types of unfair trade practices. It was in the pursuit of this objective that the element of unilateralism was manifested. In order to coerce foreign states to behave in a certain manner, it was considered necessary to apply pressure and indeed the adoption of such measures was expressly authorised in the basic regulation.

To achieve these objectives, the basic regulation created a complaints system through which both Member States and private individuals could lodge complaints with the European Commission alleging illicit foreign practices. The Commission then investigated these allegations before deciding whether or not measures would be required to counter the illicit practices alleged to exist.[771]

While at a first glance the NCPI had much in common with Section 301 of the United States trade laws, on a closer examination they had relatively few shared features in terms of substance. True, the Instrument was enacted slightly after it became clear that the United States was intending to make full use of this tool and in fact the basic regulation itself noted that NCPI was enacted to ensure that the European Union acted as effectively 'as its trading partners' in providing such relief. But, as we shall see later, a comparison of the two devices

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Northwestern Journal Int'l Law & Bus., 653, 716.; and F. Castillo de la Torre, "The EEC New Instrument of Trade Policy: Some Comments on the Latest Developments", (1993) 30:4 CMLR 687.

[771] See J.H.J. Bourgeois, "EC Rules Against Illicit Trade Practices", in B. Hawk (ed), Annual Proceedings of the Fordham Corporate Law Institute 1988; and M.B. Devine, "The Application of Regulation 2641/84 on Illicit Commercial Practices with Special Reference to the US", (1988) 22(4) Int'l Lawyer 1091.

shows interesting differences.[772]

(1) Grounds for Action

The purpose of the Instrument was to establish procedures intended to:

(1) respond to any illicit commercial practices with a view to removing any injury caused by the practice; and
(2) ensure the full exercise of the European Union's rights with regard to the commercial practices of third states.[773]

The right to lodge complaints on both these grounds was confined to Member States. Private individuals could initiate complaints only when based on allegations of illicit commercial practices.

While both grounds for action concerned violations of international commercial rights and practices, it is clear that the existence of a separate mechanism for dispute settlement in a particular agreement, such as Article XXIII(2) of the GATT, did not bar a complaint under the NCPI. In other words, the two systems existed in parallel. In the Fediol Case, the ECJ considered that the existence of international procedures for settlement of dispute, while not constituting a substantive grounds for identifying an illicit practice, did not prevent the applicant from seeking a remedy from the Union by way of a complaint.[774]

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[772] See text infra, pp.346-347.

[773] Article 1, Council Regulation 2641/84.

[774] EEC Seed Crushers and Oil Processors Federation (Fediol) v EC Commission, Case 70/87 [1991] 2 CMLR 489.

Illicit commercial practices were defined as 'any international trade practice attributable to third countries which was incompatible with international law or with the generally accepted rules'.[775] In other words, illicit practice were not synonymous with illegal practices. A particular commercial activity could constitute an illicit practice if it was contrary to generally accepted rules.

In deciding whether a measure was illicit, the legitimacy or otherwise of the measure under national law was not relevant. Thus, in one case, the European Commission accepted a complaint against an import ban imposed under Section 337 of the US trade laws. The basis of the claim was that this provision applied procedures which were less favourable to foreign producers than federal court procedures which are the normal procedurals for domestic parties.[776] This was alleged to be contrary to Article III(4) of the GATT in that the discrimination constituted a denial of national treatment.[777]

Illicit practices could take the form of both acts and omissions. Failure by the Indonesian government to enact laws or measures to protect record producers in the European Union from unauthorised copyright infringement constituted a basis for investigating a complaint from the European record industry.[778]

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[775] Article 2(1), Regulation 2412/84.

[776] For a discussion of this case see G. Denton, "The New Commercial Policy Instrument: Akzo v Du Pont", (1988) EL Rev 3.

[777] O.J. C25/2 (1986).

[778] International Federation of Phonogram Industries v Indonesia, O.J. C136/3 (1987).

In the same vein, a failure to enforce a national law enacted to implement a rule of international law could have amounted to an illicit commercial practice. For example, Thailand's failure to enforce its legislation, which although formally in terms compatible with the Berne Convention as revised, was regularly infringed, has been alleged to be an illicit practice.[779]

Under the NCPI, complaints could only be addressed against illicit practices that could be attributed to foreign states. In other words, if the practice was committed solely and exclusively by private individuals, there would be no actionable grounds under the Instrument.

The Full Exercise of the European Union's Rights

In terms of the concept of the 'full exercise of the European Union's international rights was widely drafted. The basic regulation provided that:

> 'The European Union's rights shall be those international trade rights of which it may avail itself either under international law or under generally accepted rules.'[780]

The exercise of these rights was linked to the GATT, particularly as regards dispute-settlement.[781]

(2) Remedies and Retaliation

If, after an examination, the third country alleged to

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[779] Pirate Sound Recordings in Thailand, O.J. C189/26 (1991).

[780] Article 2(2), Council Regulation 2641/84.

[781] Explanatory Memorandum, 4.

be engaged in the illicit practice had taken measures which were considered satisfactory the procedure could be terminated.[782] The most obvious illustration was repealing a measure found to be an illicit practice or enacting measures to rectify any lacunae in the national law.[783]

If, after an investigation, it was found that action was necessary in the interests of the European Union to respond to any illicit commercial practice with a view to removing any injury caused by the practice or to ensure full exercise of the Union's international commercial rights, 'appropriate measures' could be adopted on behalf of the European Union.[784]

The European Union ensured that any action taken in response to an illicit practice was, both in terms of procedure and substance, compatible with its international obligations.

Retaliatory measures could only be adopted if they were 'compatible with existing international obligations and procedures'. The Commission was empowered to recommend the adoption of measures of retaliation against any foreign country engaged in illicit practices causing injury to a Union complainant as long as the procedural dispute settlement steps had been exhausted.

The scope of the European Union's authority to adopt retaliatory measures was circumscribed by the requirement that such acts had to be 'compatible with

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[782] Article 9(2)(a), Council Regulation 2641/84.

[783] For example, International Federation of Phonogram Industries v Indonesia, supra note 784, was settled by the enactment of Article 48 of the Indonesian Copyright Law.

[784] Article 10(1), Council Regulation 2641/84.

existing international obligations and procedures'.[785] This implies that the European Union could not itself infringe the rules of international law when retaliating against an unfair commercial practice. Thus, unless the GATT authorised such measures, the Union could not unilaterally impose import restrictions or quantitative restrictions.

This also implies that, if measures were to be adopted against a GATT contracting party, the European Union would be obliged to obtain authorization from the CONTRACTING PARTIES before adopting any retaliatory measures simply because this was the procedure that the GATT specifies. Since the GATT authorised retaliatory restrictions in only one case, any complaints relating to the terms of the GATT were therefore unlikely to succeed.

In terms of form, three types of measures could have been adopted, namely:

(a) the suspension or withdrawal of any concession resulting from commercial policy negotiations;
(b) the rasing of existing customs duties or the introduction of any other charge on imports; and
(c) the introduction of quantitative restrictions or any other measures modifying import or export conditions or otherwise affecting trade with the third country concerned.[786]

Any measures adopted had to be tailored with a view to removing the injury caused by the illicit practice.[787]

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[785] Article 10(2), Council Regulation 2641/84.

[786] Article 10(3), Council Regulation 2641/84.

[787] Article 10(1)(a), Council Regulation 2641/84.

(3) Contrast Between the NCPI and Section 301

The NCPI and Section 301 of the United States trade law provided mechanisms for the potential unilateral application of countermeasures against foreign trade practices. While their aim was similar, the two measures had few features in common. In particular, the European Union made infrequent use of the Instrument in contrast to the United States.

In terms of scope of substantive grounds, the concept of illicit practice was considerably narrower than that of 'unfair foreign trade practices' used in Section 301.

There was an overriding obligation in the NCPI to comply with the Union's obligations under international law. In effect, this meant that any measure adopted by the Union would be subject to judicial review by the Court if an application was brought by an interested party with standing.

No such obligation is expressly stated in Section 301. The grounds for a complaint extended to 'acts inconsistent with trade agreements' or acts 'unjustifiable, unreasonable or discriminatory'. There is little doubt that a review of a measure enacted under Section 301 would not result in the measure being annulled solely because it was an act inconsistent with international law.

From a procedural perspective, the requirement in US legislation that a complainer be 'an interested party' was considerably broader in scope than the European Union industry definition in the Instrument.

It also seems likely that the procedural requirements

for a successful complaint were considerably higher under the NCPI than under Section 301. The need to establish sufficient evidence was a substantial hurdle to overcome from a complainers point of view. Even if not expressly stated, in practice the Commission applied this standard rigorously which helps explain the dearth of case law on this subject.

The scope of measures than could be deployed to counter unfair foreign trade practices also varied considerably between the two measures. Under Section 301, 'all appropriate and feasible action' could be taken, but under the NCPI measures were restricted to those compatible with existing international obligations and procedures.

While injury was required under Section 301, a complainer need only establish injury, and not material injury or serious injury. Further, the injury need not affect an American industry per se but it was sufficient that the foreign trade practice 'burdens or restricts United States commerce'. This is an extremely liberal definition of relevant injury.

### (4) Observations on the Effectiveness of the Instrument and its Compatibility with GATT

The NCPI did not prove to be as great a threat to the international trading system as Section 301 of the United States trade laws. In part, this was due to the rigorous nature of the provision, in terms of both substance and procedure, as well as the thorough investigation standards imposed by the Commission in its investigations. Both these factors combined to produce a relatively low number of complaints.

However, that is not to say that the complaint procedure

established was absolutely ineffective. Even the threat of lodging a complaint could discourage a third country from continuing a practice. For example, when EU producers of Scotch whisky publicised the fact that they were considering lodging a complaint against the Bulgarian government for allowing the sale of local liquor under the designation of 'Scotch whisky', the Bulgarian government immediately entered into negotiations with the producers before enacting measures to prevent this practice.[788] Similarly, the threat of measures prompted the Indonesian govern to change its legislation for the protection of copyright.

But, there were a number of shortcomings from the perspective of a complainer.

First, by linking the measure to the GATT dispute settlement, it effectively required the exhaustion of all international remedies before measures could be adopted. GATT dispute settlement took a notoriously long time and there were very few instances when the GATT authorised the use of countermeasures. In response to this criticism, it can be pointed out that frequently GATT disputes were settled out of court. It was not always necessary for the complaint to proceed to formal settlement. Naturally such an expedited settlement can be preferable for all interested parties.

Second, the whole mechanism was fraught with possibilities for upsetting foreign relations with other governments. In addition, the measure of discretion given to the European Commission was also a factor which mitigated against the effectiveness of the mechanism.

Judicial review of measures under the NCPI was also a

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[788] Arnold & Bronckers, supra note 769, 36.

matter which raised concerns. While Member States and complainers had standing to complain, foreign producers could encounter difficulties in establishing standing, and in particular direct and individual concern under Article 173(2) of the EC Treaty, when the measures in question were directed against foreign states. This in fact closed this avenue off to foreign producers wishing to challenge the measure.

### (5) Continued Commitment of the European Union to Multilateralism

Since the trade policy of the European Union has been more passive, especially in terms of unilateral measures, than that of the United States, it is not surprising that its trade policy objectives are different. In addition, many trade policy objectives are secured by means of bilateral commercial agreements which circumvents or relieves the pressures for more ambitious goals in trade negotiations.

During the Uruguay Round, the principal aim of the European Union was to secure agreement in the following areas:

(a) Significant cuts in tariffs and duties on imports.
(b) The reduction of non-tariff barriers to trade by the negotiation of stricter disciplines to prevent abuse of such measures, procedures and practices.
(c) The extension of the GATT rules in areas of trade which were, in the past, subject to special regimes such as agriculture, textiles and clothing.
(d) A revision of many of the GATT rules to

improve their effectiveness and, in particular, the strengthening of the rules to prevent the use by the United States of unilateral trade measures.

(e) The expansion of the GATT rules and disciplines in areas other than trade in goods, especially trade in services (ie. banking, insurance, construction, telecommunications, transport and television)

(f) The protection of intellectual property rights and trade-related investment.[789]

Quite clearly, these are not as ambitious or exotic objectives as those of the United States. Similarly, they are not tailored to fit into a policy of unilateralism or coercion. These aims are little more than the expansion of the fundamental GATT principles into areas other than those traditionally regulated by the organisation.

For the most part, the European Commission believes that these objectives were secured in the final agreement.[790] Although this may have been the case, the European Union was not as successful in preventing the adoption of many rules which operate against its interests such as those for the elimination or reduction of export subsidies, the tightening of anti-dumping rules or the restraints on assistance for the development of aircraft.

It is difficult to claim that the European Union has abandoned the principle of multilateralism. The organisation has sent out different signals. On the one

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[789] European Commission, Background Report on the GATT Negotiations, Doc. ISEC/B6/91 (1991).

[790] European Commission, Global Agreement and Global Benefits: Report on the Conclusion of the Uruguay Round of Multilateral Trade Negotiations (1994).

hand, it has established an elaborate network of bilateral agreements to sustain its commercial policy. On the other hand, it has consistently rejected pressures to adopt a more aggressive posture on the use of its unilateral measures although this possibility has not been eliminated.

The explanation for this rather inchoate approach is two-fold. First, the interests of the different Member States inside the European Union inevitably result in a less decisive trade policy that for a unitary state. Second, the European Union tends to view trade negotiations as an opportunity for defending its existing measures rather than to specifically identify foreign trade practices considered to be detrimental to European Union interests. The only major exception to this last statement is, of course, the attempts to counter the continued use of Section 301 and its variants by the United States.

In the long-term, the continued commitment of the European Union to the principle of multilateralism may well decline with the negotiation of more comprehensive trade agreements such as those with Eastern Europe. In addition, the successful procurement of sector-specific agreements will also signal the decline in the importance of this principle in European Union external trade policy.

Finally, the litmus test of this commitment will, of course, be the attitude of the European Union towards the dispute settlement procedures which will in the future apply to a larger range of subjects. A willingness to implement panel decisions, which will be a significant deviation from its past policy, will be an indication of continued commitment while refusal or partial implement will indicate the contrary.

## (6) Observations

The European Union has progressed from being merely an advanced form of customs union into a more tangible supranational entity embracing political, economic and social objectives. Nevertheless, the European Union continues to rely strongly on the EC Treaty as a foundation or pillar upon which to place the political and social superstructure. While external trade policy has now become only one of a number of major policies of the European Union, it is still the primary point of contact on commercial matters between the European Union and third states.

The organisation is now composed of fifteen sovereign states whose commercial interests are diverse. This factor, together with the elaborate and incomplete decision-making processes within the organisation, is responsible for the inchoate and haphazard nature of its external trade policy. The variety of interests which coalesce as its external trade policy is virtually infinite. To name just a few, there are Member States national political, social and economic interests, private party interests, European Union interests, consumer interests, European industry interests and, of course, the interests of participants in the decision-making processes to maintain commercial relationships with trading partners.

This confusion of interests is reflected in the external trade profiles of the fifteen Member States which differ considerably. Some Member States are net exporters of goods and products while others are net importers. At the same time the importance of trade in services is more relevant to some Member States than others. Even within the area of trade in goods, some Member States

are more dependant on agricultural production than on industrial production while the converse is the case for others. The spread of diffuse economic and commercial interests among Member States is an important factor in the shaping of European Union external trade policy since it is the trade off of these interests which gives content to the final policy itself.

Yet, despite widespread recognition that the European Union's external trade policy is fragmented and ineffective, the Treaty on European Union made only slight amendments to Article 113, the constitutional foundation of the common commercial policy. One might have expected that this opportunity would have been taken to undertake a radical reform of the commercial policy to specify in more detail the powers and rights of the organisation vis-a-vis the European Union and its Member States on the one hand and the European Union and third states on the other hand.

Turning to the role of the European Union in the international trading system, it is relatively clear that the functioning of the European Union within the GATT system needs to be clarified once and for all. Its anomalous position is unsatisfactory bearing in mind the full participation of the European Union within the GATT system. Given that the GATT has transformed itself into the WTO and that the European Community has metamorphosised into a European Union, the time is right to end this saga once and for all and for some permanent relationship to be established between them in order to solidify the relationship.

At the same time, the commitment of the European Union towards multilateralism has been suspect in the last twenty years. It has placed a disproportionate emphasis on establishing bilateral trade relations with other

countries. Over time, this policy has become more threatening in two respects.

First, the European Union no longer needs bilateral commercial relationships with geographically proximate countries. It has extended its web of bilateral agreements well outside the area of Western Europe and reaching well into Eastern Europe, North Africa and the Far East. The notable exception is the failure to negotiate comprehensive bilateral agreements with its major trading partners such as the United States, Canada and Japan. Quite clearly, the European Union perceives tangible benefits in pursuing these relationships at the multilateral level presumably to water down the relative authority of these countries to negotiate direct concessions from the European Union.

Second, there has also been a deepening of these relationships. As we have seen, particularly among Eastern European countries, the change has been from purely co-operation agreements to more comprehensive free trade and association agreements. Similarly, in recent times, the re-negotiation of bilateral agreements with non-European countries frequently involves numerous non-commercial matters and is beginning to resemble the friendship, commerce and navigation framework established by the United States in the earlier part of this century. The linkage of aid with economic co-operation in these agreements is further evidence of this trend.

The negotiation of the European Economic Area Treaty was perhaps even more significant than the conclusion of the NAFTA because of both the size of the linkage in terms of population and the depth of the substantive arrangements involved. Much of the acquis communautaire now applies to the six EFTA countries which have signed

the Agreement. From a legal perspective, these states are de facto no longer considered part of the external commercial trade relationship of the European Union but rather as a partially integrated element in the internal market programme initiated by the European Union. Even although the arrangement has been in force for less than a single year already the momentum generated by the agreement for integration into the European Union has been manifested by the recent accessissons of three former EFTA states to full membership of the Union.

Turning eastward, the European Union has been very successful in extending and deepening its bilateral trade contacts in Eastern Europe. The negotiation of the Interim Agreements can be seen as the first stage of the economic absorption of these countries into the sphere of influence of the European Union. Negotiations with other states on new agreements in this area are also continuing. The promise of membership, financial assistance and co-operation has been extended as an incentive for these states to acquiesce to the trade policy wishes of the European Union.

There is a legitimate concern whether or not the erection of this bilateral commercial structure is in fact consistent with the GATT itself. The creation of this substructure beneath the multilateral system undermines the principle of multilateralism embodied in the GATT and permits the European Union to pursue its own trade policy agenda largely independently of multilateral constraints. The existence of this structure at the very least raises the question why such a framework is necessary when the European Union professes to adhere to the principle of multilateralism.

The existence of the New Commercial Policy Instrument is a more difficult phenomenon to explain. Most likely, the

European Union perceived the need for such an instrument when the United States indicated that Section 301 would be applied more aggressive, around 1980-1982. In the event that Section 301 measures were applied more liberally to the European Union, the best response would be to counter with measures under the NCPI. The motive for the existence of the measure was not therefore a genuine belief that a mechanism for such a response was GATT consistent but anticipatory self-defence.
In reality, this need has been more perceived than actual. Until recently, the United States had not adopted many measures against the European Union. Hence, the European Union refrained from emphasising the existence of the measure instead using the mechanism to pursue limited objectives against certain developing countries.

There are two further explanations for the limited use of the mechanism. First, the European Union quite simply had no nerve for a tit-for-tat exchange between Section 301 and the NCPI. Second, the European Union was reluctant to paint itself the same colour when it was able to stigmatize every use of Section 301 as an unfair measure, a policy which had broad support not only with other trading partners but also the GATT Director-General. This strategy allowed the European Union to take the higher moral ground when such measures were employed against it.

Comparison of the NCPI and Section 301 in fact highlights the different purposes of these measures. Section 301 was an instrument primarily available to United States industries to allow them to seek international redress for so-called unfair trade practices by third countries. The NCPI was more an instrument to allow the European Union to protect its

interests in a manner consistent with international law and the mechanism for complaints was only one part of the whole instrument.

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The Impact of International Law
on the Trading Policies of
the United States and the European Union
with Special Reference to the Regulation of
Subsidies, Dumping and Countervailing Measures

## Volume II

A Thesis Submitted for the
Degree of Doctor of Philosophy

by

Robert M MacLean LLB DipLP LLM

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# PART C

## ANALYSIS OF THE INTERNAL INSTITUTIONAL AND DECISION-MAKING PROCESSES WITHIN THE UNITED STATES AND THE EUROPEAN UNION

# 6 The Internal Institutional and Decision-Making Process in the Formulation of Trade Policy in the United States

It is the fundamental proposition of this thesis that international commercial obligations entered into by the United States exercised, during the period of investigation, only a nominal normative influence on its behaviour in the formulation of trade policy with third states. These commitments were only one element among many forces at work which cumulatively determined the policy of the United States in this field. This chapter will attempt to identify the most significant non-legal forces at work in the equation which ultimately defined the trade policy of the United States.

The starting point for doing so must be to analyze the governmental framework which provided the context for the formulation of trade policy. The political, legal and administrative mechanisms involved are fundamental to isolating the reasons why there was such a significant degree of divergence between the United States international obligations and its trade practices.

In general terms, two groups of participants can be isolated in the decision-making process. On the one hand, there is the United States government and its ancillary bodies and institutions. On the other hand, there are private interest groups. Traditionally, private interest groups in the United States have played a greater role than their counterparts in other countries in the formulation of trade policy, both as initiators of trade complaints, and as mobilisers of public opinion in favour of the adoption of particular legislative measures.

The role of governmental institutions, by which I mean the U.S. Executive and Congress as well as the numerous administrative agencies, becomes evident when an investigation of the constitutional foundation of trade policy is conducted. This reveals that the Executive and Legislative branches of government were locked in a conflict in which the mainly protectionist Congress was pitted against an Executive, which at least for the last three administrations have supported a relatively more active policy of trade liberalisation. Nevertheless, the prevailing emotion throughout the last decade in government circles has been for increased protection and for greater isolationism.

The role of private interest groups and private parties is more subtle and more difficult to quantify, although no less important. The two most obvious means through which private interest groups influence trade has been by increasing pressure, especially on Congress, for the adoption for more protectionist measures and the unhealthy reliance of certain United States industries on trade protection laws.

Trade protection laws are simply measures of administered protectionism. These mechanisms played an important role in United States trade policy, despite the fact that they were predominantly triggered by private complaints. Indeed, the structure of trade protection laws fits comfortably into the general framework of the decision-making process in United States trade policy.

The prospect of the enactment of national legislation or the imposition of administrative measures inconsistent with the international obligations of the United States would be significantly reduced if interested parties (both domestic and foreign) could challenge the validity

of such measures in the U.S. courts. In other words, if the U.S. courts permitted the judicial review of national measures against the applicable international standards, this would safeguard against the formulation of a trade policy inconsistent with the international rules. So, as a final matter, I shall consider in this chapter the degree to which the United States legislature and courts permitted challenges to be made against trade policy decisions based on international standards.

### (1) The Conflict Between the Executive and Legislative Branches of Government in the Formulation of Trade Policy in the United States

From a strictly black-letter constitutional point of view, prima facie the Congress exercises the greatest influence over trade policy. It is the Congress that has authority 'to lay and collect taxes, duties, imposts and excises' and 'to regulate commerce with foreign nations'.[791] Congress is also responsible for the discharge of functions relating to trade policy such as the approval of budgets for economic policy objectives, enacting legislation fixing the value of the currency, taxation, approving membership in international organisations, consenting to treaties, and confirming political appointments.[792] The Congress is therefore primarily charged with the maintenance of a broad framework of American economic policy.

In contrast, the constitutional powers of the Executive Branch are considerably more restricted. The most

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[791] Article I, Section 8, United States Constitution.

[792] See J.H. Barton & B.S. Fisher, International Trade and Investment (1986), 93-142.

important organic constitutional responsibility conferred on the President for the conduct of trade policy is the authority to negotiate treaties, including international trade agreements, subject to the advice and consent of a qualified majority of the Senate. In addition, the President has an inherent foreign affairs power to conduct international diplomacy in pursuit of his authority to negotiate international agreements.[793]

Nevertheless, the role of the Executive has been greatly enhanced by its ability to react quickly to international developments and to respond to the day-to-day administrative tasks required to implement trade policy, such as conducting international negotiations and supervising the implementation of measures of administered protection. This flexibility has allowed the de facto delegation of varying degrees of authority to conduct trade policy on behalf of the nation to the Executive. Yet, although Congress has been compelled to grant considerable negotiating powers and administrative functions to the Executive, it has never abandoned its influence of the formation of trade policy.[794]

At the end of the day, Congress has the ultimate sanction in that it can veto any trade package negotiated by the Executive with foreign countries. In fact, the only real constitutional pressure that the Executive could bring to the absolute exercise by Congress of its power to establish commercial policy with other nations is the Presidential veto which itself may be overruled by a two-thirds majority vote in

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[793] J.H. Jackson, "U.S. Constitutional Law Principles and Foreign Trade Law and Policy", in M. Hilf & E-U. Petersmann (eds), National Constitutions and International Economic Law (1993), 65, 67-70.

[794] P. Dymock & D. Vogt, "Protectionist Pressure in the U.S. Congress", (1983) 17 JWTL, 496-512.

Congress. Not surprisingly then, the Executive has traditionally had to rely on delegated legislative authority to influence decision-making on the issue of trade policy.

(A) Congressional Influence Prior to the Trade Agreements Act of 1979

At different periods in time, the influences of the President and Congress in the formulation of trade policy have varied relative to each other. From the passage of the disastrous Smoot-Hawley Tariff Act of 1930, until the early 1970s, Executive authority to execute trade policy continuously expanded.[795] During this period, some writers claim that the influence of the President was decisive in the formulation of trade policy.[796] Indeed, at the end of this period, more than twenty different Executive agencies exercised delegated powers in the field of trade policy.[797]

Until the Trade Act of 1974[798], a tacit understanding had prevailed between Congress and the Executive which allowed the President to take the initiative in proposing trade legislation. However, the 1974 statute was enacted during a period in which considerable

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[795] On the effects of the 1930 Act, see generally, E.E. Schattschneider, Politics, Pressures and the Tariff: A Study of Free Enterprise in Pressure Politics as Shown in the 1929-1930 Revision of the Tariff (1935).

[796] See S. Haggard, "The Institutional Foundations of Hegemony: Explaining the Reciprocal Trade Agreements Act of 1934", (1988) 42:1 International Organisations, 91-119; and D.A. Lake, "International Economic Structures and American Foreign Economic Policy", in J.A. Frieden & D.A. Lake (eds), International Political Economy (1987), 145-165.

[797] S.D. Cohen, The Making of United States International Economic Policy (1977), 57-60.

[798] 88 Stat. 1978 (1975).

Congressional suspicion had arisen in the activities of the President.[799] The passage of this legislation marked the transition from Executive branch leadership in trade policy to Congressional dominance and oversight in trade policy-making.

In this statute, Congress set about imposing limitations on the principal prerogative of the Executive in fashioning policy - the right to negotiate international agreements with other states. With the embarrassing experience of the Executive in the Anti-Dumping Code fiasco still in mind [800], Congress reimposed its will on the powers of the President to negotiate through two measures. First, it introduced greater direct Congressional controls on Executive discretion to negotiate during multilateral trade negotiations. Second, it successfully ensured an unprecedented level of Congressional participation in any subsequent multilateral trade negotiations.

The composition of these controls is interesting from a policy-making perspective. The statute conferred broad advance authority on the President to initiate negotiations to reduce non-tariff barriers and other trade distortions, but obliged the President to notify both the House of Representatives Ways and Means Committee and the Senate Finance Committee at least ninety days before entering into any agreement.[801]

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[799] See H.H. Koh, "Congressional Controls on Presidential Trade Policy-making After I.N.S. v Chadha", (1986) New York Journal of Int'l Law & Politics 1191, 1200-1208.

[800] See R.B. Long, "United States Law and the International Dumping Code", (1969) 3 International Lawyer 464, 472-489.

[801] Section 102, Trade Act of 1974.

While, prima facie, it might appear that these procedural rules could work to the advantage of the Executive, Congressional control took three forms. First, explicit parameters were set on the negotiating objectives of the President. For multilateral agreements, the overall negotiating objectives were expressly specified in the statute together with the sectoral objectives.[802] Authority was also conferred for the negotiation of bilateral agreements on the basis that such arrangements 'provide for mutually advantageous economic benefits'.[803]

Second, the authority of the President to enter into negotiations in the pursuit of trade policy was subject to time limits, embodied in the so-called 'sunset provision'. Under Section 101(a)(1) of the Act, this authority expired five years after the enactment of the statute. In the event that negotiations became protracted, the Executive would have to return to Congress to seek an extension of authority to negotiate.

Third, Congress imposed a legislative veto in its favour in no less than six separate provisions of the statute.[804] This mechanism allowed either House of the Congress to veto the adoption of implementing legislation, but again only as a whole, and not by way of amendment.

Additional restrictions on the ability of the President to negotiate were imposed by rigorous consultation obligations. The President was statutorily obliged to engage in extensive consultations with Congressional and private sector advisers and an extensive range of formal

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[802] Sections 103 and 104, Trade Act of 1974.

[803] Section 105, Trade Act of 1974.

[804] Koh, supra note 799, 1207.

certification and post-negotiation reporting requirements were imposed.[805] At the same time, a sizeable Congressional delegation was set up for participating in the multilateral stages of any trade discussions.[806]

These developments have signalled increased intervention on the part of Congress in the conduct of trade policy. The regime set up for the negotiation of trade agreements placed the Executive in a policy-making straight-jacket. While the Executive nominally retained the right to initiate negotiations, its discretion was fettered, firstly by the Congress setting the negotiating agenda, and secondly, by Congress retaining the right to reject any proposed trade package. Trade liberalisation measures negotiated at the multilateral level were therefore at the mercy of the whims of Congress, a body notoriously susceptible to the prevailing currents in the constituencies of its members.

(B) The Congressional Stranglehold on Presidential Control of International Trade Policy

While the Trade Agreements Act of 1979[807] was enacted ostensibly to incorporate the results of the Tokyo Round trade negotiations, even in this legislation, Congress took the opportunity to reinforce its domination of trade policy. Further, both the Trade and Tariff Act of 1984[808] and the Omnibus Trade and Competitiveness Act of

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[805] Sections 131-135, Trade Act of 1974.

[806] See J.H. Jackson et al (eds), Implementing the Tokyo Round (1985), 153.

[807] 93 Stat. 144 (1979).

[808] 98 Stat. 2948 (1984).

1988[809] bear the indelible marks of the hand of Congress in trade policy formulation.

The renewal of Presidential authority to conduct trade negotiations was extended in section 101 of the 1979 Act for an additional eight year period. But, supplementary restrictions were placed on the type of negotiations that could be pursued. In addition, for the first time in almost fifty years, Congress instructed the President to study and report within two years on the desirability of negotiating trade agreements with North American countries, including Canada, a significant departure from the prior multilateral orientation of trade policy.[810]

In the Trade and Tariff Act of 1984, Congress replaced these controls with even greater fetters on Presidential discretion in this field.[811] The 1984 Act was enacted on a wave of Congressional sympathy for domestic import-affected industries which had been denied administrative protection.[812] In this context, the statute was intended to achieve two objectives:

(a) To overrule undesirable decisions by the ITA and the ITC in the field of administered protection and to provide rules to regulate new issues that had arisen such as input dumping and upstream subsidies; and
(b) To limit the degree of discretion exercised by the Executive in administered protection

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[809] 102 Stat. 1107 (1988).

[810] Section 1104, Trade Agreements Act of 1979.

[811] 98 Stat. 2948 (1984).

[812] See J. Bello & A.F. Holmer, "The Trade and Tariff Act of 1984: The Road to Enactment", (1985) 19 International Lawyer, 287-292.

cases, particularly safeguard actions.[813]

The Executive was singled out for harsh criticism in the Trade Remedies Reform Bill of 1984 which eventually became part of the final statute. In the Report on the measure by the Trade Sub-Committee, direct attacks were made on the International Trade Administration (ITA), an Executive agency (part of the Department of Commerce) for failing to tighten the definition of countervailable subsidy and on the Executive for its decisions relating to foreign market value in anti-dumping determinations.[814]

The Trade Reform Bill also proposed two additional controversial measures to tackle foreign trade practices.[815] The first was export targeting, defined broadly as 'any government plan or scheme consisting of coordinated actions that is bestowed on a specific enterprise, industry or group, the effect of which is to assist the beneficiary to become more competitive in the export of any class of merchandise'. This proposal was inspired by the allegations made in the Houdaille machine tool case and in the charges of the American Semiconductor Industry Association.[816] New rules were suggested to prevent industrial targeting and the singling out of particular industries by governments for special treatment.

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[813] The exact details of these changes will be considered at various later stages in this work. In order to avoid repetition, it is unnecessary to consider their detail at this stage in the discussion.

[814] On the other hand, see F.O. Boadu, "Enforcing U.S. Foreign Trade Legislation: Is There a Need for Expanded Presidential Discretion?", (1990) 24:4 JWT 79.

[815] See I. M. Destler, American Trade Politics: System Under Stress (1986), 136-137.

[816] See infra, Chapter 9.

The second proposal addressed natural resource subsidies. The practice of the ITA in the past had been to declare such subsidies non-countervailable on the ground that they failed to satisfy the specificity test.[817]

The package of measures submitted in the Bill began to unravel in 1984 and the most drastic measures were dropped from the final text that became the 1984 Act. Neither the export targeting provisions nor the natural resource subsidies proposal was enacted into law. Nevertheless, these themes were both picked up again once the legislative momentum had once again gathered for the 1988 Act.[818]

Yet it appears that even the 1984 Act failed to assuage domestic critics of American trade policy. In 1985, over three hundred trade bills were introduced in Congress, indicating the continued level of dissatisfaction with the existing trade policy. In 1986, the House of Representatives proposed an omnibus trade bill which was described by President Reagan as 'kamikaze legislation'.[819] In the following year, both Houses of Congress passed separate bills which the President committed himself to vetoing in the event that either was passed to him for approval.

The Executive fought long and hard with the Congress to

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[817] See Carlise Tire & Rubber Co. v United States, 564 F.Supp. 834 (CIT 1983).

[818] Resource input subsidies were eventually made actionable under the countervailing duty law and export targeting was listed as an 'unreasonable or unjustifiable' foreign practice under Section 301 in the Omnibus Trade and Competitiveness Act of 1988.

[819] A.F. Holmer & J.H. Bello, "The 1988 Trade Bill: Savior or Scourge of the International Trading System?", (1989) 23:2 International Lawyer 523, 523.

dilute or remove most of the blatantly protectionist proposals. Among the provisions submitted to Congress for approval were measures designed to exclude permanently from the American market producers who repeatedly violated the trade protection laws, to require the President to automatically impose safeguard measures in the event of an affirmative injury determination by the ITC, to expand the definition of subsidy, to provide relief against all forms of diversionary dumping, to liberalise the anti-dumping rules in order to allow more successful actions and to impose trade sanctions against nations sponsoring terrorism.[820]

(C) The Omnibus Trade and Competitiveness Act of 1988 and the Present Position

Protectionist sentiments in the Congress built up prior to 1987 could not be suppressed and over the course of the next year, many elements in these bills were fashioned into the Omnibus Trade and Competitiveness Act of 1988 which was little more than a shopping list for Congressional pressure groups.[821] The international response to the 1988 Act was the lodging of protests against the content of the legislation with American diplomatic representatives.[822]

In the 1988 Act, Congress did extend the authority of the President to enter into negotiations for trade

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[820] Holmer & Bello, ibid, 524-525.

[821] 102 Stat. 1107 (1988). Reproduced at 28 ILM 399 (1989) and in K.R. Simmonds & B.H.W. Hill (eds), Law and Practice Under the GATT, Vol. 3, III.C.4 (May 1989).

[822] The European Community, with the support of a number of other countries, attacked the legislation at the GATT Council meeting of September 22, 1988; see International Trade Reports (BNA) Vol. 5, 1302 (September 1988).

agreements and to utilise the fast track procedure for implementing legislation.[823] This authority was however extended only until March 1, 1991, with the object in mind of a conclusion of the Uruguay Round negotiations in December 1990. The Executive therefore had to return to Congress to seek approval of this authority for a further two years[824] and then an additional nine months[825] in order to ensure the success of the negotiations.[826]

The 1988 Act reduced Presidential discretion to grant administered protection and introduced a number of blatantly protectionist measures to United States trade remedy laws.[827] In particular, acute criticism was levelled at the Administration's failure effectively to retaliate against foreign manufacturers under Section 301.[828] A number of other protectionist measures were also adopted which will form much of the subject-matter

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[823] Section 1103, Omnibus Trade and Competitiveness Act of 1988.

[824] The first extension was granted on May 24, 1991, and authority renewed for both the conclusion of the Uruguay Round and the NAFTA; Financial Times, May 25, 1991. On the background debates see Financial Times, May 23, 1991 and London Times, May 23, 1991.

[825] Fast track authority was extended for a further nine months by the Clinton Administration in March 1993, to expire on December 15, 1993; see Agencie Europe, No. 5927, 10 (25/3/93).

[826] On the fast track process itself, see A.F. Holmer & J.H. bello, "The Fast Track Debate: A Prescription for Pragmatism", (1992) 26 Int'l Lawyer 183.

[827] See K.J. Ashman, "The Omnibus Trade and Competitiveness Act of 1988: Insignificant Changes from Prior Law?", (1989) 7 Boston Univ. Int'l Law Journal, 115-153, 115-117.

[828] J.H. Bello & A.F. Holmer, "The Heart of the 1988 Trade Act: A Legislative History of the Amendments to Section 301", (1988) 24:2 Stanford Journal of Int'l Law, 1-44, 1-2.

in the forthcoming analysis of trade protection laws.

(D) Observations

The role of the Executive in the formulation of trade policy has therefore been gradually eroded by this progression of restrictive statutes and as we have seen a similar process can be detected in the Executive's authority to administer rules of trade policy. On the latter point, not only has Congress usurped to a large extent the administrative discretion conferred on the President, but at the same time, it has dramatically reduced the scope of Executive authority to conduct trade negotiations.

Although it is dangerous to over-generalise, it is more likely that the most recent three administrations can be characterised as more pro-trade liberalisation than the various Congresses that have convened during their periods in office.[829] The Bush and Clinton administrations in particular have been reluctant to exercise their discretion under either the safeguard legislation or the various manifestations of Section 301 of the Trade Act of 1974 which have the effect of granting relief to ailing industries.[830]

Similarly, while both administrations have presided over

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[829] On the track record of the Reagan administration, see M. Borrus & J. Goldstein, "United States Trade Protectionism: Institutions, Norms and Practices", (1987) 8 Northwestern Journal of Int'l Law & Business 328.

[830] Non-Rubber Footwear Import Relief Determination, 50 Fed Reg. 35, 205 (1985); reproduced in J.H. Jackson & W.J. Davey, International Economic Relations (Second edition, 1986), 570. See also Carbon and Steel Alloy products, 49 Fed. Reg. 5,838 (1984), and the commentary in P. Dwyer, "Rejection of Recommendation on Steel Import Regulation", (1985) Harvard Int'l Law Journal 287.

a considerable growth in the number of export restraint agreements, on the whole this has been to forestall action at Congressional level. Generally, it is true to say that the Executive is more willing to respond to the international currents of influence than the Congress because it is closely involved in international trade negotiations and is required to listen to the concerns of foreign governments over American trade practices.

Congressmen, on the other hand, are notoriously susceptible to respond to the wishes of their constituents and pressure groups. Since these pressures are mostly domestic, and because foreign concerns are rarely matters that are discussed in the floor of Congress, the legislature, particularly in the last decade, responds primarily to domestic concerns at the expense of the long-term interests of United States trade policy.

### (2) Reconciling National Commercial and Economic Interests and Concerns with International Commitments

In its most simple terms, the formulation of national commercial and economic policy requires a balance to be struck between diametrically opposite forces.[831] Domestic producers, manufacturers and their representatives exert enormous political pressure on the governmental decision-making process to preserve and protect favourable market conditions in domestic markets. This normally requires measures designed to

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[831] R.E. Baldwin, "The Political Economy of Post-War U.S. Trade Policy", in R.E. Baldwin & J.D. Richardson (eds), International Trade and Finance (Second edition, 1981), 64-77; and E. Grilli, "Macro-Economic Determinants of Trade Protection", (1988) 11 World Economy 313.

impede, or at least inhibit, access to the internal market for foreign competitors. In the present economic climate, this protection increasingly takes the form of non-tariff barriers.[832]

In opposition to these pressures are groups which advocate the reduction of national barriers to trade.[833] These groups are composed of domestic producers who wish to penetrate foreign markets and who recognise that such access is best achieved on a reciprocal basis, as well as foreign governments who wish to promote exports, private foreign manufacturers, exporters and importers and consumers whose interests lie in obtaining the best possible return on their income.[834]

National commercial policy is shaped by trading these interests off against each other and requires compromise between the wishes of domestic producers for greater protection and the goals of other groups which, for various reasons, collectively desire the uninhibited exchange of goods.

At the same time, other elements of national economic policy influence the profile of trade policy. Fiscal policy, trade imbalances, and volumes of international investment also are relevant. Each of these elements impinges on the nature of the trade policy adopted by a particular country, but in recent years inside the United States the most important factors is often deemed to be any trade imbalance. In the event that a country runs a persistent and substantial trade deficit, often

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[832] See G.C. Hufbauer et al., Trade Protection in the United States: Thirty One Case Studies (1986).

[833] See S.D. Cohen, The Making of U.S. International Economic Policy (1977), 41-117.

[834] See K.W. Abbott, "The Trading Nation's Dilemma", (1985) 26 Harvard Int'l Law Journal, 501-532, 503-504.

there is a growth of protectionist sentiment within internal political circles. This has occurred in the United States where there is immense political concern at the size of the trade deficit which has consistently and dramatically increased throughout the 1980s.

For the last twenty years, the United States government has directly linked that country's merchandise trade deficit with the need to decrease foreign imports and to prise open foreign markets. Thus the 1988 Act identifies as the principal negotiating objective in trade discussions the need to:

> "develop rules to address large and persistent global current account imbalances of countries, including imbalances which threaten the stability of the international trading system, by imposing greater responsibility on such countries to undertake policy changes aimed at restoring current account equilibrium, including expedited implementation of trade agreements where feasible and appropriate".[835]

Such a suggestion implies that United States trading partners should reduce their efficiency in order to allow its producers to capture greater shares of the market that they are entitled to in normal competitive situations. It also implies that trading partners with trade imbalances are somehow cheating by not implementing their international commitments. No doubt the United States would have been the first to vigorously protest at the inclusion of such an objective in the negotiating policy of one of its trading partners during the 1950s and 1960s, when it enjoyed a healthy trade surplus with most states.

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[835] Section 1101(b)(5), Omnibus Trade and Competitiveness Act of 1988.

Although the impulse behind this linkage has grown primarily from within Congressional circles, during the Reagan administration and throughout the Bush and Clinton administrations, there have been indications of sympathy with this view.[836] The use of measures of administered protectionism has been one of the most overt symptoms of the pursuit of a policy of attempting to redress the existing trade balance by impeding foreign imports.[837]

The growth of protectionist sentiments within the United States political system, particularly in Congress, can be traced back to the early 1970s, when the United States was faced with a trade deficit that pales into insignificance in contrast to the present figure. Since the first appearance of the persistent trade deficit in 1970, the United States has constantly retreated from an avowed policy of trade liberalisation towards greater protectionism, including increased administered protectionism. Further, the tendency of the United States to adopt autarkic policies has increased as its trade deficit has widened.[838]

The relationship between the trade deficit and the greater resort to measures of contingent protectionism is clearly illustrated by two developments at this time. First, the previously near-dormant countervailing duty mechanism was gradually revived. In the years

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[836] These issues are fully discussed, in the context of the present United States deficit, in R.H. Clarida, "That Trade Deficit, Protectionism and Policy Coordination", (1990) 13 World Economy 415.

[837] See generally, A.M. Rugman & A.D.M. Anderson, Administered Protection in America (1987).

[838] C.C. Carvounis, The United States Trade Deficit of the 1980s (1987), A.M. Solomon, The Dollar, Debt and the Trade Deficit (1987), and A.E. Burger, United States Trade Deficit: Causes, Consequences and Cures (1989).

immediately before the 1970 U.S. balance of payments deficit was announced, a record number of countervailing petitions were lodged against foreign products.[839] Almost immediately, after eight years of inactivity, the Treasury Department imposed countervailing duties in six instances in a twenty-one month period.[840]

Second, the Administration of the time made no attempt to disguise its belief that the economic problems of the United States were attributable to unfair foreign trade practices. Considerable blame for this malaise was placed on European subsidisation of agriculture and industrial production and a warning was issued to European trade partners that failure to achieve international reform of their subsidisation policy would necessitate retaliatory measures.[841]

The Nixon administration opted for a deliberate policy of arresting the decline in the trade figures by imposing trade restrictions. In an attempt to close a deficit of nine billion dollars, the Nixon administration severed the fixed parity between the dollar and gold, allowing the currency to float and thereby establishing more competitive prices for American exports, and imposed a ten percent surcharge on

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[839] B. Butler, "Countervailing Duties and Export Subsid-isation: A Reemerging Issue in International Trade", (1968) 9 Virginia Journal of Int'l Law, 82.

[840] P.B. Feller, "Mutiny Against the Bounty: An Examination of Subsidies, Border Tax Adjustments, and the Resurgence of the Countervailing Duty Law", (1969) 1 Law & Pol'y Int'l Bus., 17-76.

[841] Executive Branch GATT Studies, Tax Adjustments in International Trade: GATT Provisions and EEC Practices, 7-17 (1973), reproduced in J.H. Jackson & W.J. Davey, International economic Relations (Second edition, 1986), 785-789.

dutiable imports.[842] In addition, the President established the Williams Commission to report on changes required in American commercial policy. The Commission reported in July 1971, and recommended, inter alia, that access to the countervailing duty, anti-dumping and safeguards laws should be liberalised and that time limits should be established for investigations in order to apply pressure for affirmative decisions.[843]

We have observed that calls for greater protectionism are often based on the trade deficit.[844] While the sources and consequences of the present American economic shortcomings are outside the scope of the present work, it is a primary contention of this thesis that the greater the protectionist sentiment within the United States, the stronger the use of unilateral measures such as administered protection. It is therefore necessary to consider the effect of the trade deficit within American political circles.

There is little support for the proposition that the trade deficit of the 1980s and early 1990s is caused solely by consumer preferences for foreign goods. Three other causes have at least contributed to this situation: decreased relative efficiency of the economy, an overvalued currency, and the inability of the United States to impose its fiat on the international economy.

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[842] J.H. Jackson, "The New Economic Policy and the U.S. International Obligations", (1972) 66 AJIL 110-118.

[843] Williams Commission Report entitled International Economic Policy in an Interdependent World (July 1971); and J.H. Jackson, "The New Economic Policy and U.S. International Obligations", (1972) 66 AJIL, 110-118.

[844] For example, see R.O. Cunningham, "The Restatement as Prologue to Turmoil in the Law: A Commentary on the Restatement of U.S. International Trade Law", (1990)24 Int'l Lawyer 315, 318-319.

There is little doubt that the United States has not maintained the same degree of economic efficiency in relation to Japan and the newly industrialised nations of South-East Asia that it possessed in the 1960s.[845] While relative growth in the United States has marginalised, growth in these countries has increased relatively unimpeded. Labour and other costs in these countries are modest compared to the United States, and foreign companies have found investment in these areas attractive. The costs of transportation of these goods to the United States market can be easily absorbed into a final price lower than of comparable American products. While research and development continue mainly in the developed countries, the actual production of finished products, which accounts for the most considerable part of the final price, can be carried out in such countries with lower manufacturing overheads.[846]

American industries must compete in world markets in order to maintain growth. But the economic conditions within the United States, such as wage costs, labour laws, and taxes place such businesses at an economic disadvantage, although not necessarily an unfair disadvantage, in comparison to countries where these costs are minimal. Traditional industries are unable to withstand such competition, and without research and development into new products or services, new employment will not be generated. The United States is now only one producer among many in a truly international market place.

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[845] There are three principal elements in the determination of comparative advantage: capital, labour and resources. The United States probably now maintains limited advantages in terms of its capital resources and its skilled labour force.

[846] See generally, C.J. Brown, "United States Competitiveness in World Markets", (1986) New York Journal of Int'l Law & Politics 1075.

Industrial and economic policy are therefore of immense importance in maintaining international competitiveness.[847] Providing attractive conditions for investment and financing research and development are more likely to ensure a health economy than continued reliance on traditional industries which cannot compete with foreign producers on the simple premise of the principle of comparative advantage.

Failure to recognise and address changes in global economic perspectives and a persistent refusal to abandon outdated notions of fair and unfair trade also help explain the present economic predicament. These elements have created a deep-rooted fear of foreign competition and even when there was a substantial economic resurgence at the beginning of the 1980s, pressures to adopt protectionist measures did not subside in Congress.[848]

The second element that has contributed to the trade deficit has been an overvalued dollar at least for the first half of the 1980s. An overvalued currency makes exports more expensive and foreign imports more competitive. In the past, exchange rates were set essentially by trade flows. A current account surplus implied that the demand for the domestic currency exceeded the supply and the exchange rate ought to rise, all other factors remaining equal. Equally, a deficit would normally imply a decline in the exchange rate. This would render exports cheaper and redress the imbalance.

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[847] See the analysis in D.F. Burton, "Markets in Motion: U.S.-Japan Trade in the Fast Lane", (1986) 18 New York Journal of Int'l Law & Politics 1137.

[848] A.M. Rugman, "United States Protectionism and Canadian Trade Policy", (1986) 20 JWTL, 363-380.

However, throughout the 1970s and 1980s, capital transactions became progressively liberated until, in 1985, capital flows are approximately fifteen times greater than trade in goods.[849] For most purposes, capital can be equated to investment, and in the 1980s, the United States has been an attractive location for investment. First, in the early part of the 1980s, economic growth in the United States provided the incentive for investment. Second, the need to finance the growing budget deficit has required high interest rates which, in turn, attracted capital from Japan, Europe and the Middle East.

Throughout the 1980s the capacity of the United States to borrow on the strength of the dollar in the international market-place has exceeded the downward pressure exerted by artificially large imports and declining exports.[850] The dollar was not allowed to return to a value that realistically reflected its true value. This contributed to the mounting deficit and since no readjustment policy has been initiated, the deficit has persisted at around the same level.

The overvalued dollar created problems for manufacturers on both sides of the import-export equation. American consumers purchased cheaper foreign goods in place of American goods, thereby reducing sales of domestically produced goods. Domestic firms and labour unions vented their frustration at this practice by lobbying for protection in order to cut losses in both employment and output. At the same time, American industries could not sell their goods in foreign markets because they were

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[849] See Brown, supra note 846, 1079.

[850] See R.I. McKinnon, "Protectionism and the Misaligned Dollar: The Case For Monetary Coordination", in D. Salvatore, The Protectionist Threat to World Welfare (1987), 367-387.

comparatively more expensive than goods from other countries due to the artificial rate of the dollar.

The United States government has not been ignorant of this problem, but has instead chosen to adopt a policy of 'benign neglect' towards exchange rate policy.[851] The main response has been to seek informal agreements within the Group of Seven for exchange rate coordination. In 1985, the so-called Plaza Accord was agreed at the Group of Seven meeting in New York in an attempt to coordinate exchange rate policy among the seven leading industrial nations of the world.[852] In reality, this was nothing more than a gentlemen's agreement among the central banking figures in the United States, Germany and Japan, to devalue the dollar through intervention purchasing. The whole experiment was a failure and within eighteen months another understanding, the Louvre Accord, was agreed in February 1987.[853]

The Louvre Accord involved a coordinated effort to stabilize the value of the dollar within a range, or 'target zone', roughly equal to the value of the currency at that time. This time the range was maintained by a host of measures, including the raising of American interest rates and the tightening of monetary policy. After a period of less than a year, the dollar stabilised at its agreed level and for the most part, has remained stable to date.

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[851] See R.M. Kubarych, "Trade Policy and the Dollar", (1986) 18 New York Journal of Int'l Law & Politics 1113.

[852] D. Kenen, "Exchange Rate Management", (1987) May American Economic Review 194.

[853] R.H. Clarida, "That Trade Deficit, Protectionism and Policy Coordination", (1990) 13 World Economy 415, 433-436.

The third factor contributing to the inability of the United States to reduce its trade deficit has been the shifts in economic power within the international trading system.[854] The United States is no longer the principal or dominant economic power in the international trading system. During the 1970s and 1980s, both the European Union and Japan have emerged, for different reasons, as economic forces to be reckoned with by the United States.[855] This erosion of economic supremacy has required the United States to examine the ways in which it conducts business. It can no longer impose its ideas of trade policy on the international community.

Conflicts therefore arise because both the European Union and Japan maintain different commercial policy objectives from the United States. For example, the Union maintains that non-tariff barriers such as subsidies are legitimate social devices.[856] Similarly, the Japanese business community includes certain non-tariff barriers that contain sociological and cultural elements that defy regulation.[857]

But, it is possibly the expansion of the European Union from its original six Member States to fifteen Members, together with the vast network of free trade agreements

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[854] See R.E. Baldwin, "The New Protectionism: A Response to Shifts in National Economic Power", in D. Salvatore, The New Protectionist Threat to World Welfare (1987), 95-112, 99-102.

[855] See H. Lowenfeld, International Economic Law (Second edition, 1983), Vol. 6, 78-82.

[856] See H. Malmgrem, International Order for Public Subsidies (1977), 22.

[857] M. Matsushita, "The Legal Framework of Trade and Investment in Japan", (1986) 27 Harvard Int'l Law Journal, 361-388; and G.R. Saxonhouse & K. Yamamura, Law and Trade Issues of the Japanese Economy (1986), 3-55.

with the rest of Europe and its preferential trade agreements, that have placed definite limits on the scope of United States economic influence. Regardless of the trade policy of the European Union, its presently stands as the largest consumer market in the world. The United States is therefore obliged to give greater countenance to the concerns and interests of the European Union than would otherwise be the case if there were fifteen separate states.

As a result of these factors the trade deficit has increased and the internal pressure for both unilateralism in international commercial policy and for protectionism in general are presently more acute than at any other time in American economic history.[858] As a result of many factors, not least economic mismanagement, the United States presently confronts the largest trade deficit in its history, a fact that invariably invokes calls for greater protection.[859]

Many of the proposals made by the Executive to try to redress the trade deficit have assumed an air of absurdity. For example, the Structural Impediments Initiative (SII) was initiated by President Bush and Prime Minister Uno in Paris in July 1989 with the objective of formulating policies to reduce Japan's annual trade surplus with the United States.[860] The result was a report detailing a number of policy pledges by each side to reduce impediments to market

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[858] J. Bhagwati, Protectionism (1989), 48-59.

[859] See R.Z. Lawrence & R.E. Litan, "The Protectionist Prescription: Errors in Diagnosis and Cure", (1987) 1 Brookings Papers on Economic Activity, 289-310.

[860] Y.S. Lanneaux, "Joint Report of the United States-Japan Working Group on the Structural Impediments Initiative", (1991) 32 Harvard Int'l Law Journal 245.

penetration. On the Japanese side, this involved a commitment to spend 430 trillion yen (approximately US$28 trillion) on public investments on infrastructure between 1991 and the year 2000. Japan also agreed to remove measures blocking import-clearance and to encourage American investment.

In contrast, the United States undertook to reduce the Federal budget, to encourage joint-ventures and direct foreign investment, to deregulate certain sectors and to promote research and development. The naked imbalance of these pledges clearly illustrates which of the parties is the weaker trading partner.[861]

At the same time, the phrases 'level playing field' and 'fair trade' have been used by administrations as panaceas for all the United States economic ailments. Yet, it is clear that trade protectionism will not solve the trade deficit of the United States, which requires action in fiscal policy, industrial policy, exchange rate policy and controls over the budget deficit which currently attracts an artificial volume of foreign investment. It is more likely that protectionism will add to the economic plight of the United States by closing foreign markets to American products thereby strangling economic growth.

Meanwhile the rush towards 'administered' or 'contingent protectionism' has continued unabated.[862] American

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[861] Neither party was satisfied with the others progress on these commitments at the first review meeting; see Report on Meeting Between P.M. Kaifu and P. Bush, Newport Beach, United States, August 19, 1991, Oxford Analytica, Report. 910404 (1991).

[862] The origins of the terms 'administered' or 'contingent protectionism' have been attributed to De Grey. See R. deC Grey, Trade Policy in the 1980s: An Agenda For Canada-United States Relations (1981).See also J.M. Finger et al., "The Political Economy of

business claims that, although it can compete with foreign firms on equal terms, it cannot compete with the national treasuries of foreign governments and subsidy programmes, or against state monopolies perpetrating dumping, or against discriminatory non-tariff barriers. Yet, it is obvious that the use of measures of administered protection by American industries is not primarily to seek redress against specific unfair practices.

We shall now examine the use of administered protection devices by sectors of the American industry in order to demonstrate the truth of this assertion.

### (3) The Systematic Abuse of Trade Protection Laws by United States Domestic Industries

Among some of the more traditional industries in the United States, there is little doubt that there exists serious structural problems. Some of these problems may be attributed to the performance of foreign competitors. There is little doubt that, in countries where wage levels are low, overheads and production costs nominal, and employment laws lax, goods can be produced cheaper that in countries where these costs are greater. Since workers in the United States are paid higher than their counterparts in Singapore or Taiwan, it is inevitable that price undercutting will occur.

Similarly, it is also predictable that the traditional industries, in which basic and labour intensive products such as textiles and agricultural products are made, will be the first to suffer decline in the face of competition with those countries that have a simple

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Administered Protection", (1982) 72 American Economic Review, 452-466.

comparative advantage over the United States. Once these markets have been captured, production in such countries will move on to more advanced levels.

In response to this competition, many United States traditional industries have contracted. The remaining producers have fought a rearguard battle to survive mostly by resorting to measures of administered protection combined with government intervention, either in the form of subsidies or through diplomatic negotiations for the adoption of export restraint mechanisms.[863]

The United States trade protection laws lend themselves well to this type of conflict.[864] For the most part, initiation of investigations into alleged unfair trade practices is by way of private petition. Private parties also have the option of selecting the most appropriate forms of harassment or saturating the foreign competition with a volley of unfair trade allegations and investigations. The United States government, particularly the Congress, has openly condoned this form of aggression, and frequently has altered national legislation to allow a wider range of groups to participate in this process.[865]

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[863] See, G.C. Hufbauer, Trade Protection in the United States: 31 Case Studies (1986).

[864] Protection under U.S. anti-trust laws is notoriously more difficult to secure; J. Davidow, "The Relationship Between Anti-Trust Laws and Trade Laws in the United States", (1991) 14 World Economy 37.

[865] For example, see Section 626(c) of the Tariff Act of 1984 which extended standing to producers of grape in order to allow countervailing duty petitions to be lodged by that industry against imports of wine products. See also the panel report, United States - Definition of Industry Concerning Wine and Grape Products, GATT Doc SCM/71 (March 1986).

The strategies employed by the industries about to be discussed have varied but for the most part measures of contingent protection have been used as opening shots ultimately leading to some type of permanent, or at least long-term, relief often in the form of export restraint arrangements. In the event that these tactics prove ineffective, relief is often sought through Congressional bills sponsored by sympathetic Congressmen with large traditional industries in their constituencies. This medium of relief has, in the past, proved both amenable and effective.

Three industries have been selected for this purpose, the steel industry, automobiles and motorcycles, and consumer electronics.[866] Other sectors in which a similar strategy has been adopted include textiles, machine tools, footwear and chemicals.

(A) The Steel Industry

Steel production is an example of a labour-intensive and capital-intensive industry in which the comparative advantage once held by the United States and the Member States of the European Union has been gradually eroded by developing countries.[867]

The steel industry in the United States is characterised by a number of idiosyncratic traits, such as the periodic negotiation of wage increases by unions on behalf of workers, an unhealthy reliance on the United

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[866] On the general background of these industries, see W.R. Cline, "U.S. Trade and Industrial Policy: The Experience of Textiles, Steel and Automobiles", in P.R. Krugman (ed) Strategic Trade Policy and the New Economies (1986), 126.

[867] OECD, World Steel Trade Developments, 1960-1983 (1985); and OECD, The Steel Market in 1990 and the Outlook for 1991 (1991).

States automobile industry as a major purchaser and the lack of government regulation in production.[868] At the same time, it is also subject to the common problems of traditional industries such as sharp declines in national supplies of raw materials, the relative decreases in costs of transportation and a decline in unit labour costs of foreign producers relative to American producers.[869]

The United States steel industry appears to have gone through three distinct phases in combating foreign imports of steel. In the first stage, during the 1960s and early 1970s, the main target of countermeasures was the newly industrialised countries, most notably Japan.

In response to Japanese competition and from newly industrialised countries, more than 30 anti-dumping cases were filed in the 1960s by American steel producers.[870] In fact, the overwhelming majority of anti-dumping suits during this period were brought by steel producers. In 1969, the United States negotiated voluntary export restraint arrangements for a three year period with Japan.[871]

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[868] M.K. Levine, Inside International Trade Policy Formulation: A History of the 1982 US-EEC Steel Arrangement (1985), 1-8.

[869] It should be noted that the industry continues to remain heavily subsidised; see A.A. Anderson & A.M. Rugman, "Subsidies and the U.S. Steel Industry", (1989) 23:6 JWT 59.

[870] GATT, Trade Policy Review of the United States, 1989 (1990), 215.

[871] This arrangement was challenged by consumer organisations as being unconstitutional and anti-competitive. Both grounds of action were rejected by the Federal court; see Consumer Union of the United States Inc v Kissinger, 506 F.2d (1974), cert. denied, 95 S.Ct 2406 (1975).

These restraints were periodically renewed until 1977 when a trigger price mechanism was introduced in order to prevent a conflict with Japan caused by a series of twenty-three dumping complaints being lodged by American steel producers.[872] The trigger price mechanism involved the creation of a scheme to monitor the price of steel imports and to expedite anti-dumping investigations into imports below the trigger prices.

In the late 1970s and early 1980s, the second stage commenced with the main target being producers inside the European Union. An aggressive campaign was waged by the American steel industry to restrict the volume of European steel imports into the United States. In March 1980, the United States Steel Corporation filed multiple dumping complains against European steel producers.[873] A price trigger mechanism was agreed which incorporated quotas and the complaints were withdrawn.

Subsequently, in the light of the failure of the trigger price mechanism to provide relief, 132 anti-dumping and countervailing duty complaints were filed against European and other steel producers.[874] At the same time, a number of firms sought protection against European Union imports of steel through safeguard relief under section 201 of the Trade Act of 1974.

The ITC found the existence of injury in some of the safeguard investigations, but in the majority of cases,

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[872] A.M. Wolff, "International Competitiveness of American Industry: The Role of U.S. Trade Policy", in B.R. Scott & G.C. Lodge (eds), United States Competitiveness in the World Economy (1985), 301-327, 310-314.

[873] Wolff, ibid, 313.

[874] Levine, supra note 868, 26-36.

the President refused to grant relief.[875] For example, in 1983 investigation, President Reagan rejected the ITC's recommendations of quantitative restrictions on imports of certain steel products, in favour of temporary increases in tariffs on only a limited number of the products under investigation.[876]

Similarly, in the 1984 safeguard investigation, despite the finding of injury, the President rejected the proposed import relief on the grounds that it would not be in the national economic interest because such measures would increase prices, reduce jobs and undermine the domestic and international competitiveness of the United States steel-consuming industries.[877] Instead, a programme to facilitate the restructuring of the steel industry was introduced including negotiations for voluntary export restraint agreements with countries whose imports into the United States had increased significantly.[878]

The barrage of anti-dumping and countervailing complaints during this phase was in fact initiated by only seven steel companies. These firms can be divided into three groups: US Steel, the largest steel producer, Bethleham Steel, the second largest producer, and five smaller companies.[879] All complaints were filed by these companies on the same day.

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[875] For example, Stainless Steel and Alloy Tool Steel, Inv. No. TA-201-48 (1983).

[876] Presidential Proclamation No. 5074, July 19, 1983.

[877] In retrospect, it appears that this decision was correct; see ITC, Report on the Effects of the Steel Voluntary Restraint Agreement on U.S. Steel-Consuming Industries, USITC Pub. No. 2182 (May 1989).

[878] GATT Report, supra note 870, 216.

[879] Levine, supra note 868, 26.

In early 1982, the ITC reached a decision on the issue of preliminary material injury in the anti-dumping and countervailing actions and rejected almost half the complaints. However, those cases terminated represented only ten percent of imports covered by the original petitions. In June 1982, the ITA found the existence of countervailable subsidies on most European steel exports.

The majority of these complaints had been brought to impose pressure on the European Union to reach a negotiated settlement and, in this regard, the petitioners were ultimately successful. The U.S. Commerce Department entered discussions with the European Union on an agreed quota system for steel imports.[880] These restrictions were part of a wider scheme to allocate a fixed share of the United States steel market to foreign producers.[881]

There is little doubt that these quotas are inconsistent with the GATT for a number of reasons, including their discriminatory nature, their infringement of the obligation to refrain from introducing quantitative except under certain special conditions, and their inconsistency with the obligations of the United States under Article XIX.[882] Similarly, their economic effect on patterns of world trade in steel is profound as the

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[880] F. Benyon & J. Bourgeois, "The European Community - United States Steel Arrangement", (1984) 21 CML Rev. 305.

[881] See Exchange of Letters Between the European Community and the United States Concerning Steel Products, O.J. L215/2 (August 1983); and Commission Decision 2191/83/ECSC, O.J. L215/15 (August 1983).

[882] I. Pogany, "'Steel Wars' vs 'Star Wars': The Impact of the Voluntary Export Restraints on the GATT", in D.L. Perrott & I. Pogany (eds), Current Issues in International Business Law (1988), 68-88.

two parties involved are significant producers of steel.[883]

This arrangement continued until July 1989, when President Bush announced his so-called 'Steel Trade Liberalisation Program' which was scheduled to last until March 1992.[884] The continuation of the multilateral restraint arrangement was considered to be transitional pending the negotiation of a Multilateral Steel Arrangement to eliminate the trade distorting practices of the major steel-producing nations.

There are also similar agreements between the United States and the European Union to limit the volume of semi-finished steel, speciality steel and steel products imported into the United States.[885] In 1989, the threshold for semi-finished steel imports was 670,000 tons.[886] Similar quotas were applied to European Union exports of steel pipes and tubes to the United States.[887]

The third and latest round of this contest commenced in April 1992 with the initiation of a series of anti-

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[883] See C. Rhodes, "Managed Steel Trade and the GATT Countervailing Duty Code and the 1979 Trade Act", (1988) 12:2 World Competition 57.

[884] R. Carbaugh & D. Wassink, "Steel Voluntary Restraint Agreements and Steel-Using Industries", (1991) 25:4 JWT 73, 84.

[885] See J. McKinney & K.A. Rowley, "Voluntary Restraint Arrangements on Steel Imports: Policy Developments and Sectoral Effects", (1989) 23:3 JWT 69.

[886] Council Decision 89/634/EEC, on the Conclusion of an Arrangement with the United States Covering Trade in Certain Steel Products, O.J. L368/96 (Dec. 1989).

[887] Council Decision 89/635/EEC, on an Arrangement with the United States Regarding Trade in Steel Pipes and Tubes, O.J. L368/97 (Dec. 1989).

dumping and countervailing complaints against European and South American steel producers.[888] These complaints were lodged against a number of manufacturers of speciality steel in the United Kingdom, France, Germany, Spain, Italy and Belgium.

The most notable aspect of the petitions was the high level of duties sought by the American producers. Countervailing duties of 10 percent, 20 percent and 25 percent were sought respectively against British, German and French producers, but anti-dumping duties of 53 percent, 69 percent and 79 percent respectively were requested against these same companies.

In November 1992, after the ITC made affirmative preliminary injury determinations in July of that year[889], the ITA announced that provisional countervailing duties of up to 59% were to be imposed on these imports after the preliminary investigations had been concluded. In more than fifty percent of these cases, the preliminary rulings were subsequently confirmed in the final determinations.[890] Not surprisingly, on January 27, 1993, the Department of Commerce also announced affirmative dumping findings in 27 of the 42 anti-dumping investigations which were conducted at the request of the industry.[891]

Quite clearly, these actions had been precipitated by

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[888] 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, Inv. Nos 701-TA-319-354, (1993) 5:1 WTM 64.

[889] Ibid.

[890] Financial Times, February 20, 1993.

[891] Financial Times, January 29, 1993.

the failure of negotiations on a Multilateral Steel Agreement to replace the voluntary restraints which exist in the United States market. The European Commission reacted to the introduction of the measures by refusing to continue the discussions on a multilateral agreement on steel and no such arrangement was incorporated into the Final Act of the Uruguay Round.

In the final analysis, by employing these devices, the American steel industry is almost fully isolated from the effects of international competition in steel production. The volume of imports is restricted to artificially fixed levels and trade in steel to the United States is fully managed.

(B) Motor Vehicles and Motor Cycles

The production of vehicles has been one of the most confrontational issues in United States - Japan relations. Increasing imports of foreign vehicles are seen as substantially contributing to the United States trade deficit. Yet, the North American motor vehicle industry is, for the most part, responsible for its own demise. The vast proportion of American- built motor vehicles are intended for use on North American roads and are too large or consume too much fuel for use on the roads of other countries.

The microeconomic problems of the American car industry in the early 1980s were summed up in one ITC investigation as follows:

(1) A general decline in demand due to increased costs of car ownership and operation;
(2) A permanent shift in consumer preferences to smaller, more fuel efficient vehicles and a

failure by the industry to respond to this change in preference;

(3) A substantially negative accounting impact resulting from extraordinary investment to transform the industry; and

(4) The success of foreign manufacturers in direct competition.[892]

The sheer size of the American vehicle industry has ensured that it has significant lobbying power in the U.S. Congress. Solutions to the problems of the industry have been sought not only in this means, but also through the use of trade protection laws. The most important device in this struggle has been the safeguards legislation.[893]

The first action raised by the American automobile industry was a safeguard investigation commenced in 1980. This petition was started by the United Automobile Workers union and the Ford Motor Company joined the action a few months later.[894]

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[892] Certain Motor Vehicles and Certain Chassis and Bodies Therefore, Inv. No. TA-201-44 (1980), reproduced in J.H. Jackson & W.J. Davey, International Economic Problems (Second edition, 1986), 573-584.

[893] On safeguard actions in general, see P.C. Rosenthal & R.H. Gilbert, "The 1988 Amendments to Section 201: It Isn't Just for Relief Anymore", (1989) 20 Law & Pol'y Int'l Bus. 403; J.M. Staples, "Section 603, Standing and the Outsourcing Domestic Industry: The ITC's Disappointing Conclusion of Escape Clause Action in Industrial Forklift Trucks", (1988) 20 Law & Pol'y Int'l Bus. 109; and K.C. Kennedy, "Presidential Authority Under Section 337, Section 301 and the Escape Clause: The Case for Less Discretion", (1987) 20 Cornell Int'l Law J. 127.

[894] For a detailed analysis of this case, see P. Stern & A. Wechsler, "Escape Clause Relief and Recessions: An Economic and Legal Look at Section 201", in G.R. Saxonhouse & K. Yamamura, Law and Trade Issues of the Japanese Economy (1986), 195.

In its decision, the ITC was split over the issue of whether or not there was sufficient injury to recommend relief.[895] Chairman Alberger, Vice-Chairman Calhoun and Commissioner Stern were in the majority deciding against granting relief. However, there was no degree of consistency in the methodology of the majority in reaching this conclusion. Nevertheless, the one significant common feature was the majority's reliance upon the general recession of the time being the most significant cause of injury.

President Reagan had, however, made a number of pledges to the American automobile industry to provide relief against Japanese car manufacturers.[896] Further, the automobile industry had substantial support in Congress. After the negative determination in the 1980 safeguards action, the United Auto Workers union took its case back to Congress and demanded action through legislation. Considerable sympathy was generated for the position of the industry and one Senator described the ITC decision as a 'monumental error' while another openly expressed his determination to obtain import quotas against Japanese vehicles.

Informal discussions were opened between both governments with a view to establishing voluntary restraints on Japanese imports of cars. These discussions culminated in an Exchange of Letters between the governments setting quotas on the number of cars originating in Japan that could enter the American market.[897] This agreement was intended to last from

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[895] Certain Motor Vehicles and Certain Chassis and Bodies Therefor, supra note 892, 581.

[896] New York Times, May 2, 1981.

[897] Exchange of Letters Between the United States Government and the Government of Japan, reproduced in Jackson & Davey, supra note 892, 619-622.

April 1981 for a period of three years.

The 1981 agreement between Japan and the United States limited the number of Japanese cars to an upper limit of 1.68 units as a transitional, temporary and transitional step. This arrangement was extended for a further year in 1984 and the limit of imports adjusted to 1.85 million units. In March 1985, President Reagan announced that no further extension of this arrangement would be sought. The rationale for this decision was not that the reasons for protection had evaporated but because a Federal Trade Commission report had estimated that the restrictions had channelled a subsidy worth US$ 750 million each year from American consumers to Japanese car markers.[898]

There is also little doubt that between 1983 and 1985 the restraint agreements allowed the American automobile industry to adjust substantially to the increased competition from Japanese manufacturers. In these three years, production of passenger cars in the United States grew by 33.6%, 14.6% and 5.3% respectively.[899] However, since 1986, production again declined and imports increased. It is noticeable that the increased imports of foreign cars were of non-Japanese origin and included vehicles made in Korea and the European Union.

The American motor cycle industry has also taken advantage of Section 201 to petition for relief, again against predominantly Japanese manufacturers. In September 1982, the Harley-Davidson Motor Company petitioned the ITC for relief from imports of heavyweight motorcycles, engines and power train subassemblies for such vehicles. After a six months

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[898] GATT Report, supra note 870, 220.

[899] Ibid, 221.

investigation, again the Commission was divided on whether relief should be granted or not, but this time the majority favoured the provision of relief.[900]

The decision was unique for a number of reasons.[901] First, the domestic industry under examination consisted of three companies, Harley Davidson, Honda of America and Kawasaki U.S.. Thus, two Japanese subsidiaries were included in the relevant domestic industry in an investigation against their parent companies.

Second, the issue of serious injury was vigorously contested by the opposing parties.[902] The majority in the case found that the most serious cause of the injury was the increased imports of motorcycles and this factor was more significant than the general recession of that time. This decision contrasted with that found in the investigation into automobiles and much of the change of policy in the Commission can be attributed to its change of personnel in the intervening period. During this period, President Reagan was able to appoint three new Commissioners onto the ITC, all of whom reached an affirmative determination in this investigation. The remaining members rendered decisions urging the continuation of the previous policy of refraining to provide relief unless the injury was caused by non-recession-related factors.

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[900] The final report was issued as, Heavyweight Motorcycles and Engines and Power Train Subassemblies Therefor, Inv. No. TA-201-47 (1983).

[901] For an extensive analysis of the decision, see J. Hatch, "The Harley-Davidson Case: Escaping the Escape Clause", (1984) 16 Journal of Law & Pol'y Int'l Business 325.

[902] See P. Stern & A. Wechsler, "Escape Clause Relief and Recessions: An Economic and Legal Look at Section 201", in G.R. Saxonhouse & K. Yamamura, Law and Trade Issues of the Japanese Economy (1986), 195, 204-205.

Third, the President took the unusual step of adopting the recommendation of the ITC for relief in whole. This decision is also unusual when it is considered that the relief recommended was a draconian increase in tariffs of 45 percent.

The increased tariff protection was originally granted for a five year period from April 1983, with a digressive tariff rate quota on imports. In fact, the relief was terminated by President Reagan in October 1987.

Both the automobile and the motorcycle industries demonstrate an unusual profile in their use of safeguard measures. Obviously, both industries felt there was legitimate grounds for obtaining relief under the safeguard provisions. Anti-dumping actions are rare in the automobile sector, although in 1988, Hyundi of Canada was alleged to have been engaged in dumping vehicles and parts into the United States market. Countervailing complaints are equally rare. However, statutory relief is not as rare and the support for these industries in Congress is both enormous and bipartisan.

(C) Consumer Electronics and the Semiconductor Industry

The rapid growth policy of Japan in the 1950s and 1960s and the foreign market strategies of Japanese companies gave rise to fears in the United States that Japanese producers would dominate the consumer electronic industry.[903] These concerns were manifested in a number of trade remedy cases against Japanese electronic goods

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[903] See K. Yamamura & J. Vandenberg, "Japan's Rapid-growth Policy on Trial", in G.R. Saxonhouse and K. Yamamura (eds), Law and Trade Issues of the Japanese Economy (1988), 238-283.

in the early 1970s. The continued success of the policy, combined with effective market penetration by Japanese consumer goods manufacturers, has meant that trade protection complaints, particularly anti-dumping petitions, have been widely used to impede the entry of consumer electronics into the market.

One of the earliest precedents for the adoption of trade remedy measures to impede the flow of consumer electronics was against Japanese imports of televisions sets. In 1971, after a complaint by Zenith, a finding of dumping was made against a number of Japanese manufacturers of television sets.[904] This determination was made at a time when production of television sets in the United States had decreased 50 percent between 1966 and 1970, the number of firms involved in production had dramatically declined and there was severe and sustained price competition.[905] At the same time, law suits were filed by the same company alleging predatory pricing and attempted monopolisation contrary to the Sherman Act as well as countervailing duty actions.[906]

Litigation in the United States court to resolve these allegations lasted more than fifteen years, with two American companies alleging the unfair practices claiming $360 million and $900 million in damages. The decisions ultimately rendered on the substantive issues were as follows:

(a) Anti-trust violations: Litigation continuing.

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[904] Television Sets From Japan, Inv. No. AA 1921-66 (1971); 10 ILM 423 (1971).

[905] Yamamura & Vandenberg, supra note 903, 259.

[906] See K.W. Almstdet, "International Price Discrimination and the Anti-Dumping Act", (1981) 13 Law & Pol'y Int'l Bus. 747.

(b) Dumping allegations: Final duties upheld.[907]

(c) Countervailing complaint: The U.S. Supreme court rejected the contention that non-excessive remissions of indirect taxes constituted a bounty of grant under the countervailing duty legislation.[908]

Zenith has continued its relentless war against Japanese manufacturers of televisions sets to the present day. In the latest case, Zenith has alleged that three Japanese manufacturers (Fujitsu, Mitsubishi and NEC) engaged in dumping throughout 1982 to 1987.[909]

Dumping complaints and Section 337 petitions against Japanese manufacturers of consumer electronics such as photocopies, photographic equipment, video recorders, stereo equipment and telecommunications equipment are frequent, although not as coordinated as is the case with other sectors of the American economy.[910] The principal exception is semiconductors where the domestic industry was able to present a united front to foreign producers of competing products.

In 1977, many of the American semiconductor-producing firms formed a trade association with the specific intention of responding to the commercial expansion of Japanese producers into the United States market. This

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[907] Zenith Radio Corporation v United States, 710 F.2d 806 (Federal Cir. 1983).

[908] Zenith Radio Corporation v United States, 437 U.S. 443, 98 S.Ct 2441 (1978).

[909] Zenith Electronics Corporation v United States, Slip Op. 90-132 (1991); reproduced in (1991) 3:1 WTM 167.

[910] See, for example, Iwatsu Electric Co and Ors v United States (1991), reproduced at (1991) 3:2 WTM 1; Color Picture Tubes From Canada, Japan and Korea (1988), reproduced at (1988) 22:3 JWT 95-100.

success could be largely attributed to the industrial policy of the Japanese government which revolved around support for high technology industries in the form of financial aid and limited anti-trust relief for research and development.

At the time, this industry was one of the most successful and in 1982 held over fifty percent of the world market. True, the Japanese market remained relatively closed, but other markets, particularly in Europe, were extremely lucrative. This success was also achieved without excessive government support for the industry which contrasted with the positions in Japan and the European Union. It seems therefore that the American industry was not countering Japanese imports to protect itself from economic injury in the domestic market, but to preserve its position in the world market.

The tactics of the U.S. Semiconductor Association were to lobby Congress for subsidies to offset research and development subsidies by the Japanese government, and when this proved ineffective, to petition for the imposition of anti-dumping as well as Section 301 relief. Countervailing duty actions were generally considered to be ineffective despite the fact that government assistance in the production of Japanese semi-conductors was indisputable because the level of such duties is dependant on the amount of the subsidy. In the case of semi-conductor production, the duty imposed would be an insignificant amount per unit because of the enormous volume of production and sales of the devices.

The opening shots of the battle were fired with the filing in 1985 of a Section 301 petition with the U.S. Trade Representative (USTR) alleging that the Japanese

government had erected barriers to trade to impede American exports in June 1985.[911] The USTR entered into dialogue with the Japanese government to resolve the problems of market access. The eventual outcome of these discussions was the Semiconductor Arrangement of September 1986.

Even before the progress of these discussions was clear, a number of American semiconductor producers commenced an anti-dumping action alleging that four Japanese companies were selling erasable programmable read-only memory semiconductors (EPROMS) at less than fair value in the United States.[912] Similarly, in December 1985, another investigation was initiated, this time by the Department of Commerce, into sales by Japanese companies of dynamic random-access memory semiconductors of 256 kilobits and above (256k DRAMs).[913]

The Commerce Department decided to self-initiate the third complaint into the dumping of 256K DRAMs by Japanese companies under considerable pressure from both the industry and Congress.[914] Against this background, the ITC issued a preliminary finding of material injury in the 256k DRAM investigation and the ITA concluded that these semiconductors were in fact being sold in the market at less than fair value. Preliminary anti-dumping duties of between 20% and 110% were imposed on a

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[911] Japanese Semiconductors, 50 Federal Register 28,866 (1985).

[912] Erasable Programmable Read Only Memories From Japan, 50 Federal Register 41,230 (1985).

[913] Dynamic Random Access Memory Semiconductors of 64K and Above From Japan, 50 Federal Register 51, 450 (1985).

[914] J. Grenwald, "Protectionism and United States Economic Policy", (1987) 23 Stanford Journal of Int'l Law 233, 255-256.

company-specific basis.[915] Similarly, preliminary dumping duties of between 22% and 188% were imposed in the EPROM investigation.[916]

A fourth complaint, this time alleging the dumping of 64k DRAMs was commenced by American producers, ended with the imposition of producer-specific anti-dumping duties ranging between 12% and 35%.[917] The remaining investigations were superseded by the negotiation of the Semiconductor Arrangement between Japan and the United States.[918]

The Semiconductor Agreement of September 1986 is divided into three main sections dealing with access to the Japanese market, dumping by Japanese producers and general enforcement provisions.[919]

There is little doubt that the Semiconductor Agreement between these parties is one-sided. In return for onerous monitoring and market-sharing obligations, the Japanese government obtained little more than a commitment from the American government that, at least

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[915] Dynamic Random Access Memory Semiconductors of 256 Kilobits and Above From Japan, 51 Federal Register 4,661 (1986); 51 Federal Register 9,475 (1986).

[916] Erasable Programmable Read Only Memories From Japan, 51 Federal Register 9067 (1986).

[917] Dynamic Random Access Memory Semiconductors of 64k and Above From Japan, 51 Federal Register 21,781 (1986).

[918] On the background to the whole anti-dumping problem, see Y.Y. Lee, "Japanese Dumping of Semiconductors", (1986) 27 Harvard Journal of Int'l Law 753 and D. Hirsch, "The Semiconductor Arrangement", (1987) 28 Harvard Int'l Law Journal 175, 178.

[919] Arrangement Between the Government of Japan and the Government of the United States of America Concerning Trade in Semiconductor Products, 20 ILM 106 (1986).

for a short time, Japanese producers would continue to have unimpeded access to the American market. More realistically, the threat of the closure of the American market to Japanese producers provided the main incentive to the Japanese government to negotiate this agreement. This was a clear example of the United States nakedly using its sheer economic size as leverage to control foreign competition.

Viewed from a global perspective, the Semiconductor Agreement is two things. First, it is a market-sharing agreement whereby both parties have carved up the globe between their producers. Second, it is a price-fixing agreement because the price of these products on the world market is regulated by the terms of the Agreement itself and the power of the Department of Commerce to determine the relevant levels of foreign market values. In the anti-trust laws or competition laws of the majority of developed countries, such an arrangement would be struck down on both these grounds as being anti-competitive and illegal.

It is not surprising that the European Union took this view when challenging the arrangement in the GATT.[920] In the absence of international competition rules, the European Union based its complaint on allegations of violations of relevant GATT provisions.[921] The Union claimed that the third country monitoring obligations placed on the government of Japan, the conditions for access to the Japanese market and the lack of transparency surrounding the whole arrangement

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[920] GATT Report, supra note 870, 218.

[921] On the problems facing the panel on the applicable GATT law, see J.C. Kingery, "The United States - Japan Semiconductor Arrangement and the GATT: Operating in a Legal Vacuum", (1989) 25:2 Stanford Journal of Int'l Law 467.

contravened the General Agreement.[922]

The panel found in favour of the European Union. The arrangement itself, as far as it constituted a coherent system for restricting exports, contravened Article XI(1) of the GATT which prohibits quantitative restrictions on both imports and exports. The monitoring system was singled out for criticism on the basis that 'administrative guidance' of export prices was incompatible with Article XI(1). The report was adopted at the Council Session held in March 1989.[923]

However, the agreement itself was not struck down, only certain infringing provisions. Certain technical adjustments were made to the terms of the arrangement regarding third-country monitoring. Data collection on export prices was to be provided only after exports have been made and the Supply and Demand Forecast Committee, the agency within MITI set up to monitor exports, was abolished.[924] The panel investigation was therefore unsuccessful in striking down the international cartel erected by Japan and the United States in the agreement but, in the absence of international competition rules, the impact of the report was always limited.

The next stage in this saga has already commenced. Negotiations opened in 1991 between the United States and Japan for a bilateral accord covering trade in integrated circuits against a background of similar complaints threatened by American producers of these products. The main stumbling block is the United States assistance on a minimum Japanese market share for United

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[922] Japan- Restrictions on Exports of Semiconductors, GATT BISD, 35th Supplement 116 (1988).

[923] GATT Report, supra note 870, 218.

[924] Ibid.

States semiconductor chips.[925] The original proposal for a 20% market share was rejected by Japan although negotiations are continuing at present.

### (4) The Limits of International Trade Regulation - The Rejection of the Incorporation of International Trade Rules in U.S. Domestic Law

If the provisions of the GATT and the terms of the international agreements negotiated at the Tokyo and Uruguay Rounds could be enforced in the United States courts, this would both discourage the enactment of legislation inconsistent with international obligations and would allow interested private parties to challenge such legislation with the very real prospect of obtaining effective redress.[926]

The denial of the right to challenge domestic legislation against the international obligations of the United States creates a fundamental asymmetry between the rights of nationals and those of foreign parties.[927] It can be generally assumed that, in the vast majority of cases, litigation for a declaration that national legislation is inconsistent with the international obligations of that state will be initiated by foreign interest groups. At the same time it can also be assumed

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[925] Oxford Analytica, Report No. 910404 (19/8/1991).

[926] On the policy issues involved in such a development, see J.H. Jackson, "Status of Treaties in Domestic Legal Systems: A Policy Analysis", (1992) 86:2 AJIL 310.

[927] On the point of standing in such cases, see F.L. Morrison & R.E. Hudec, "Judicial Protection of Individual Rights under the Foreign Trade Laws of the United States", in M. Hilf & E-U Petersmann (eds), National Constitutions and International Economic Law (1993) 91-133.

that inconsistent legislation of administrative practices will have been adopted for the benefit of domestic producer groups.

The fundamental asymmetry is created by allowing nationals to rely a body of national laws, superficially modelled on international agreements but which in practice often bear little relationship to the international rules, while refusing to allow foreign groups to challenge the consistency of these national rules against the international standards. In other words, foreign interests groups are refused a constitutional point of reference in the construction and interpretation of national rules against international principles.

Such discrimination could be effectively eradicated by simply allowing judicial review of statutes allegedly incorporating international obligations into domestic law. This would compel the courts to give direct effect to international obligations and remove any asymmetry caused by de facto discrimination. The effect of any imbalance is simply to rob parties that are the victims of discriminatory measures of the right to challenge such measures.

For the purposes of defining the rights of individuals in United States law to rely upon international trade agreements a distinction must be made between the General Agreement itself, the Tokyo Round Codes and the Uruguay Round Agreements. Each of these have separate implications in American trade law and important differences exist among them.

(A) The General Agreement on Tariffs and Trade

Since the Executive has maintained that the authority to

sign the GATT was derived from the Reciprocal Trade Agreements Act of 1934[928], the text of the General Agreement has never been submitted to the Senate for approval. Therefore, from a constitutional perspective, the GATT is an Executive Agreement based on a prior grant of authority to the President from Congress. Whether or not the GATT is a valid Executive Agreement turns on whether the Executive acted intra vires of its powers under the 1934 Act as amended. If the GATT is a valid Executive Agreement its provisions have a limited authority in United States internal law, and if not individuals cannot rely on its terms before national courts and tribunals.

The most serious objection that can be made to the constitutional validity of this Executive Agreement is that the substantive obligations of the GATT exceed those that the President had authority to negotiate.[929] Although the 1934 Act authorised the President to enter obligations relating to import restrictions, the GATT also contains substantive rules relating to export restrictions.[930] For example, the rules contained in Article XVI pertaining to subsidies concern matters of domestic economic development and not import restrictions. Also, the obligation under Article III to extend national treatment to imports from GATT contracting parties is an issue of internal policy regulation. Finally, the institutional provisions of the GATT give rise to concerns in Congress that it was in fact an international organisation in the guise of a

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[928] 59 Stat. 410 (1935).

[929] R.E. Hudec, "The Legal Status of the GATT in the Domestic Law of the United States", in M. Hilf et al., The European Community and the GATT (1986), 187-249, 203-204.

[930] Articles VIII, X, XI, XIII and XX of the GATT.

treaty.[931]

In fact, for several decades, Congress habitually included qualifications in trade legislation declaring that statutes authorising the negotiation of trade agreements could not be construed as recognition of United States involvement in the GATT.[932] Even the Trade Act of 1974 provides that the annual appropriations for the payment of GATT administrative expenses 'do not imply approval or disapproval by Congress of all articles of the GATT.'[933]

Assuming that the GATT has been constitutionally approved, the next question concerns its force in American law and in particular whether an individual can rely on a provision of the General Agreement to overturn an inconsistent preceding or subsequent legislative measure. However, the effect of the GATT in domestic law is, at the very least, ambiguous.

In assessing the validity of the GATT in domestic law, a distinction must be made between the substantive provisions relating to tariffs and those relating to non-tariff barriers. Articles I and II of the GATT contain the general principles relating to the Most-Favoured-Nation treatment of goods from other

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[931] J.H. Jackson, "The GATT in United States Domestic Law", (1967) 66 Michigan Law Review, 250-329, 257.

[932] In the extensions of trade authority immediately after the GATT entered into force, and particularly in 1953, 1954, 1955 and 1958, Congress added a clause to the statute which specified that "the enactment of this Act shall not be construed to determine or indicate approval or disapproval by the Congress of the Executive Agreement known as the GATT", 67 Stat. 472 (1953), 68 Stat. 360 (1954), 69 Stat. 162 (1955), and 72 Stat. 673 (1958).

[933] Section 121(12)(d), Trade Act of 1974, 88 Stat. 1978 (1975).

contracting parties and neither of these articles was subject to the limitations imposed by the Protocol of Provisional Application.

The leading case on the legality of tariff concessions promulgated by the President as part of trade agreements with foreign nations is United States v Yoshida International Inc..[934] In this case, the plaintiff challenged the legal propriety of a Presidential Proclamation made in 1971 imposing a ten percent surcharge on imports in an attempt to reverse the onset on a trade deficit. The plaintiff's argument was that the President had violated the terms of the GATT by this action and that this action was therefore unconstitutional.

The court acknowledged that the surcharge in question violated the GATT but held that since the GATT was not a treaty which had been ratified by Congress, it did not usurp the authority delegated to the Executive by Congress through the 1934 Act which was a federal statute enacted in accordance with the Constitution. The Court held that the statute gave the President express authority to terminate a proclamation ratifying a treaty. In effect, the Court therefore held that the GATT does not prevail over a federal statute, nor action taken on the basis of such legislation, in the event of a conflict.

The effect of the non-tariff obligations contained in the GATT depends on the self-executing nature of the provision in question.[935] A number of GATT provisions

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[934] 526 F. 2nd 560 (CCPA 1975).

[935] On the doctrine of self-execution, see Y. Iwasawa, "The Doctrine of Self-Executing Treaties in the United States: A Critical Analysis", (1986) 26 Virginia Journal of Int'l Law 627; S. Riesenfeld, "The Doctrine

are phrased in language which is clearly intended to be self-executing. Thus, products from other contracting parties 'shall' be accorded treatment no less favourable than that accorded to like products of national origin.[936] No countervailing duty 'shall be levied' on any product of the territory of a contracting party in excess of any amount equal to the estimated bounty.[937] Similarly, all customs fees imposed in connection with importation 'shall be limited in amount' to the approximate costs of the service rendered.[938]

Yet the GATT was given effect through terms of the Protocol of Provisional Application which limits the application of Part II of the GATT to existing legislative provisions. Further, if it is accepted that the GATT was incorporated into United States law through the operation of section 350 of the 1934 Act, the presumption against self-execution is further substantiated.

Nevertheless, the President did proclaim the whole of the GATT in 1947, believing that this was a valid exercise of his powers under the 1934 Act, as extended, and supplemented by his inherent foreign affairs powers.[939] The GATT provisions on non-tariff barriers may therefore have force of law by virtue, not of the fact that they are self-executing, but because they were validly proclaimed by the President.

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of Self-Executing Treaties", (1980) 74 AJIL 892; and J.J. Paust, "Self-Executing Treaties", (1988) 82 AJIL 760.

[936] Article III(4), GATT.

[937] Article V(3), GATT.

[938] Article VIII(1), GATT.

[939] See Jackson, supra note 931, Appendix B, 316-317.

Legal rights and duties may be created by Presidential proclamations, although these acts do not have the equivalent force to federal legislation, and a number of cases support the theory that the GATT has force in American law by virtue of Presidential proclamation. But, in the event of a conflict between a Presidential proclamation and a federal statute, the American courts have expressly declared that the will of the Congress will prevail.[940] The sole concession to the force of the GATT in federal law is that the courts will endeavour to interpret legislation in order to avoid a conflict between the General Agreement and the legislation in question.[941]

Although in theory, individual American states cannot competently legislate over matters concerning commerce with foreign nations since this is an issue reserved to the exclusive competence of the Federal authorities, on a number of occasions state legislation has indirectly conflicted with the provisions of the GATT.[942] This has been a common phenomenon in relation to state 'Buy America' legislation which requires state organs and agencies to discriminate in favour of American suppliers and producers for the purposes of procurement.

A conflict between this type of legislation and Article III of the GATT has frequently arisen and a number of

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[940] Select Tire Salvage Co v United States, 386 F. 2nd 1008 (1967); and American Express Co. v United States, 332 F. Supp. 191 (1971), affirmed 472 F. 2nd 1050 (1973).

[941] Zenith Radio Corporation v United States, 437 U.S. 443 (1978).

[942] Japan Line Limited v County of Los Angeles, 441 U.S. 434 (1979); and Xerox Corp v Harris County, 459 U.S. 145 (1982).

cases have been heard on this point.[943] These decisions however offer little indication as to whether the courts consider that the state legislation is reviewable on the basis of the GATT as a self-executing Executive Agreement or as a non-self executing Executive Agreement that has been given the force of law through Presidential proclamation. Regardless of which route has been taken by the courts, it is clear that the General Agreement has a very limited use for individuals to challenge legislation or administrative practices that conflict with its terms.

In practice, the relevance of the GATT as an instrument for individuals to challenge inconsistent legislation has become less significant in light of the various agreements that were established at the Tokyo Round to tackle non-tariff barriers. These agreements contain considerably more detailed obligations than the general terms of the GATT. Can individuals rely on the terms of these agreements to challenge inconsistent national legislation or administrative practices?

(B) The Tokyo Round Codes

Executive authority to engage in trade negotiations was granted in the Trade Act of 1974. Section 101 of this statute reenacts the power to negotiate and proclaim tariff reductions, but at the same time removes all reference to authority to proclaim modifications of other import restrictions. In place of this broad mandate, Congress delegated authority to negotiate on a

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[943] Territory of Hawaii v Ho, 41 Hawaii 565 (1957); Baldwin-Lima-Hamilton Corporation v Superior Court, 208 Cal; American Institute for Imported Steel v County of Erie, 58 Misc. 2nd 1059 (1968); and KSB Technical Sales Corporation v North Jersey Water Supply Corporation, 75 N.J. 272 (1977), appeal dismissed, 435 U.S. 982 (1978).

variety of specific non-tariff matters.[944]

This authority was subject to one major limitation, namely, that all trade agreements had to be given effect by Federal legislation. Section 102(c) of the 1974 Act specified that any such agreements 'shall take effect with respect to the United States only if the appropriate implementing legislation is enacted by Congress'. In other words, from the outset none of the Agreements entered at the Tokyo Round were to be considered self-executing.

The tariff concessions negotiated at the Tokyo Round discussions were proclaimed in 1979 by the President.[945] All the agreements relating to non-tariff barriers were submitted to Congress for approval under the 'fast track' procedure introduced by the 1974 Act. The fast track procedure allowed the President to enter into negotiations on those subjects covered by Sections 101 and 102 of the Trade Act of 1974. Ninety days prior to signing the final text, the President notified Congress of progress made and consulted the major Congressional committees concerned with the subjects covered in the proposed agreements.

The adoption of a number of these agreements, including the Subsidies Code, the Anti-Dumping Code, the Government Procurement Code, the Technical Standards Code, the Customs Valuation Code and the Agreement on Trade in Civil Aircraft, required amendments to Federal law. The only Codes that did not entail amendments to Federal law were the Agreement on Import Licensing Procedures, the International Dairy Agreement and the

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[944] See J.H. Jackson et al., Implementing the Tokyo Round (1985), 146-147.

[945] Presidential Proclamation No. 4707, 44 Federal Register 72,348 (1979).

Agreement on Bovine Meat. However, all the negotiated Codes were submitted to Congress for approval.

Congressional approval did not incorporate these Codes directly into United States domestic law but merely gave the President authority to accept these obligations on behalf of the United States. In fact, by specifying the legal rights and duties under domestic law in subsequent parts of the statute, the Congress appears to have circumvented the direct legal effect of these agreements by transforming the agreements into equivalent domestic legislation.

In section 2 of the Trade Agreements Act of 1979, Congress 'approved' all fourteen agreements but approval was not equated to ratification in the constitutional sense of that term, only to endorsement permitted the President to accept the Agreements on behalf of the United States. In order to completely dispelled the possibility that the Codes could ever be considered self-executing, section 3 of the 1979 Act creates a number of rules for the reconciliation of the texts of the agreements with the terms of the statute. There are two rules in particular that require reiteration:

(1) No provision of any trade agreement approved by Congress under the 1979 Act which is in conflict with any statutory term shall be given effect under the laws of the United States.[946]

(2) Neither the entry into force with respect to the United States of any agreement approved under the statute nor the enactment of the statute itself, shall be construed as creating any private right of action or remedy for

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[946] Section 3(a), Trade Agreements Act of 1979.

> which a provision has not been explicitly made under the statute or another law of the United States.[947]

The conclusion that must be reached is that the Tokyo Round Agreements themselves are not part of American internal law.[948] The sole rights, duties and remedies of individuals are contained in the 1979 Act. Thus, if an administering authority imposed countervailing or anti-dumping duties in a manner that conflicts with the 1979 Code on these subjects, an individual cannot bring an action against the authority in an American court to bring the conduct into line with the international obligations incurred by the United States.

The inability of individuals to invoke the terms of the GATT or related international agreements to challenge inconsistent national legislation or administrative practices sets limitations on the efficiency of these international agreements as standards of national conduct. The direct enforceability of these international rules in national courts would ensure that national measures are not enacted in conflict with their provisions.

The obvious defence to such criticism is that many of the trading partners of the United States also do not allow direct challenges by individuals on national measures that are inconsistent with international trade obligations. It is therefore necessary that, as part of any package of measures agreed at multilateral trade negotiations, a general obligation is also included to the effect that contracting parties are obliged to give individuals directly enforceable rights derived from the

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[947] Section 3(f), Trade Agreements Act of 1979.

[948] Morrison & Hudec, supra note 927, 229.

international obligations that are agreed by the parties.

(C) The Uruguay Round Agreements

Presidential authority to negotiate trade agreements at the Uruguay Round is structured on the format established for the Tokyo Round. Again, there is a division in powers between agreements relating to the treatment of tariffs and the treatment of non-tariff barriers.

The Omnibus Trade and Competitiveness Act of 1988 instructs the President to proclaim tariff reductions, modifications or increases as may be required to carry out his duties in the negotiating process, bearing in mind the overall negotiating objectives specified in that statute.[949] This authority does not extent to reductions in duty rates of more than fifty percent of the previous rate, unless the existing rate of duty is less than five percent in which case the proclamation is valid.[950]

The powers of the Executive to implement legislation for the incorporation of international obligations relating to non-tariff barriers to trade are again severely restricted. Section 1103(a) of the 1988 Act states that any agreement negotiated under the authority vested in the statute will enter force only if:

> (1) the President, at least ninety calender days before the date on which he enters into the trade agreement, notifies the House of Representatives and the Senate of his intention to enter into the

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[949] Section 1102(1)(B).

[950] Section 1102(a)(2).

agreement and promptly thereafter publishes notice of such an intention in the Federal Register; and

(2) after entering into the agreement, the President submits the document to the House of Representatives and the Senate containing a copy of the final legal text of the agreement together with:

(i) a draft of an implementing bill;

(ii) a statement of any administrative action proposed to be taken in the implementation process;

(iii) a statement of the changes that will be required to the existing law.

It therefore appears that no agreement negotiated at the Uruguay Round will have direct effect in the United States and individuals cannot rely on the terms of such agreements to challenge inconsistent legislation.

**(6) Observations**

There is no single body with all-embracing authority to conduct trade policy in the United States. The division of responsibility for this task between the Executive and the Congress is a schism at the governmental level in the formulation of a coherent trade policy. This tension has repeatedly been manifested in many destructive forms.

In any event, Congress has never been willing to relinquish control over trade policy formulation to the Executive agencies. When Congress has disagreed with the policy adopted by the administration in such matters, it has either shackled the further negotiating activities of the Executive or simply enacted legislation to alter the purported direction of the policy initiated by the

Executive.

This tendency is ironic in light of the disastrous history of Congressional control over trade policy. In the early 1970's and latterly in the late 1980s, Congressional interference in trade policy concerns has been the major cause of the promotion of isolationism and unilateralism in the direction of trade policy. Congress has tinkered with too much of the trade legislation underpinning the policy generally with a view to granting greater protection to American industries or to penalise foreign producers or competitors allegedly engaging in purported unfair trade practices. Despite the practical handicaps involved, the Congress has even been successful in securing representation in trade negotiations for which the Executive is responsible.

Equally, Congress has been successful in influencing the direction of the policy by using the so-called fast track procedure which is not in fact the grant of a benefit to the Executive but rather a means of ensuring that Congress retains a greater degree of control during negotiations. This participation means that individual Congressmen can ensure that the interests of their individual constituencies can be taken into account in discussions which are intended to have an international flavour.

In addition, Congress has been directly responsible for tailor-made protection to certain industries. For example, the meddling in the countervailing and anti-dumping legislation to provide protection to specific industries has the fingerprints of Congressional interference. Resource input subsidies, for example, were made actionable under the 1984 Act despite the views of the judiciary and foreign governments and even

the opposition of the Executive. The sheer volume of trade protection measures during the mid-1980s also illustrates the desire of certain Congressmen to use trade policy as a platform for achieving political objectives through obtaining protection for local industries.

Turning to private party interest groups, these can be classified into two general categories. On the one hand, there are those producers who are suffering adverse consequences as a direct result of foreign competition and who genuinely require protection. On the other hand, there are domestic producers who are competitive in the international market-place and who require market access to foreign countries. At various times in United States history, one of these groups has prevailed over the other. However, since the 1970s, the voices of domestic producers requiring protection have been heard more loudly than producers engaging in exporting. The trade deficit of the United States since this date also indicates that this is the case.

It should also be remembered that in the formulation of national commercial and economic policy, there are many factors to take into consideration not just trade balances in the simple formulation of imports versus exports. Nevertheless, over the last twenty or so years, the United States government has been obsessed by its merchandise trade deficits with certain countries and has on numerous occasions identified the need to grant protection to improve its balance of trade position. The need to grant this protection seems to exist regardless of whether the protection is granted in the form of anti-dumping measures, countervailing duties, safeguard measures or Section 301 relief.

The linkage of the deficit with unfair trading practices

is not legitimate. The trade deficit is continuously used as a justification for attacking so-called unfair trade practices but the converse is never the case. Any decrease in the deficit does not relieve this pressure on foreign producers. Nor is the deficit linked to decreasing or declining competitiveness of U.S. industries. In addition, the purported relationship gives the United States an apparent, but in fact unreal, moral high ground for conducting or justifying its trade protection measures.

It has become a very tiresome aspect of United States trade policy to accuse its trading partners of cheating in terms of the international rules and pointing to its own deficit as a consequence of such practices. First, it is a hypocritical approach insofar as the United States is certainly not free of sin in this respect. But, more importantly, too often allegations of unfair trade practices are used simply as a pretext for introducing measures without any violation having been established. The result is more protectionist measures and a contraction in the volume of foreign imports at the expense of consumers and industrial users of the products.

In addition, it is too easy to point to foreign trade practices and activities as a panacea for the blame for declining competitiveness and inept governmental policies. While economic analysis is not within the realm of this thesis, there have been numerous theories to explain the growing deficit on the declining international competitiveness of American goods which in turn is due to internal factors. For example, consumer preferences for superior goods, the decreasing relative efficiency of the United States economy, excessive wage bills and an overvalued currency are only a few of the many internal factors which are frequently cited as a

cause of this decline.

However, we should not forget that the international market is now truly global. The United States competitiveness has become a relative matter. Growth in a number of the newly-industrialised countries has far outstripped growth in the American economy. Many countries also have more attractive comparative advantages in certain areas of production over the United States. The cost of labour is the most obvious example. Often low labour costs is simply the lower material expectations of the populations of such countries and lower standards of living and not because of lax labour laws or the manipulation of taxation policies.

The traditional industries of the United States have undoubtedly been unable to withstand international competition and hence these have been the first industries to lobby for protection. Although harsh, the substitution of hi-tech industries for traditional industries is merely one illustration of economic progress within a country and it may be the case that the United States can no longer afford to sustain these traditional industries while at the same time promoting new generation industries and the supply of services.This is quite simply a fact of economic reality. Cheaper sources for these products are now found elsewhere and penalising new generation industries by requiring them to rely on uncompetitive traditional industries may prove to be long-term folly.

Regardless of the factors which have created this situation, there is considerable pressure inside the United States for protection of certain industries and the reaction of the Bush and Clinton administrations has been generally to promote these interests over the long-

term strategic interests of the country. While proclaiming the merits of greater trade liberalisation both administrations have been responsible for a considerable array of protectionist measures. In particular, they have both passively acquiesced in measures of administered protection being deployed in blatantly protectionist strategies by domestic industries.

Many United States industries have systematically abused the trade protection mechanisms for their own benefit. The steel industry, for example, with its idiosyncratic qualities have been a substantial beneficiary of this process. Motor vehicle producers have also benefited. Instead of adjusting their production cycles to the demands of international competition, they have continued to make uncompetitive and inefficient vehicles while protected by a screen of protectionist measures.

The consumer electronics industry and the semi-conductor industry have been equally as active and the result is that trade in semi-conductors cannot be described as free and, in fact, is better described as being conducted in a global cartel composes primarily of American and Japanese producers. This situation has antagonised many developed countries including the European Union.

The effect of measures of United States trade policy which are inconsistent with the international rules could be suppressed if the United States was willing to allow review of national laws with international standards. Such a change of policy would create a far more fair and equitable environment for foreign producers. The United States Congress has vigorously resisted this option and hence many of the statutes which form the basis of American trade policy cannot be

reviewed against the international standards at the request of interested parties, whether they be domestic or foreign.

Similarly, the Congress deliberately circumscribed the authority of the Tokyo Round Codes by denying the direct effect of these agreements in national law. A similar approach is likely for the Uruguay Round Agreements quite simply because these agreements have been negotiated on a similar basis to those of 1979, namely the fast track procedure. This is unfortunate, but not unexpected given the pressured that are presently being exerted by domestic interests groups.

# 7 The Internal Institutional and Decision-Making Processes in the Formulation of European Union Trade Policy

The internal decision-making processes of the European Union bear little resemblance to those of the United States, or any other sovereign state for that matter; they are a reflection of the fact that the European Union is a supranational organisation. To understand the processes at work inside the European Union in the formulation of trade policy, it is first necessary to investigate the constitutional framework in which the formulation of policy is conducted. This reveals the existence of a number of tensions inside the European Union between different Member States and even between separate institutions themselves.

As a general principle, the Council of Ministers (which represents the interests of the Member States) guards against any usurpation of its authority by other institutions. Yet inside the Council itself, Member States are often at odds with each other as to how European Union trade policy should be conducted. The result is an ineffective process for formulating trade policy and one which, by its nature, undermines compliance with the international obligations of the European Union.

Institutional disharmony is only part of the explanation for the widespread violations of the GATT committed by the European Union. The other part is that internal European Union policy requirements often compete with international duties and again when conflict occurs the resolution is not always a successful one from the point of view of the GATT legal order. The most obvious clashes arise where the European Union internally regulates commercial matters relating to goods and products. Hence, the Common Agricultural Policy, the

Single Internal Market Policy and the Union Competition Policy are the areas where internal European Union policies can contravene the terms of the GATT or its related Agreements.

The interests of private parties in the formulation of trade policy are not so obvious in the European Union decision-making process with one exception, namely the initiation of anti-dumping proceedings. Nevertheless, since this aspect of trade policy is significant, it is necessary to consider this more fully and I shall consider the grant of protection in this form to certain European Union sectors. Hence, I shall focus on the role of private interest groups in securing this protection.

Finally, since abusive behaviour by the European Union could effectively be addressed by the incorporation of international obligations into the European Union legal system, as a final matter before reaching conclusions, I shall consider briefly the reluctance of the European Union, and the European Court, to incorporate rules of international trade law into European Union law.

### (1) Institutional Tensions Within the European Union in the Formulation of Trade Policy

The European Union is a creation of international law albeit that it has tangible institutions and its own legal order. Instead of a unitary or federal government, it has organs which act in the interests of different groups. Thus, broadly speaking, the Commission embodies the interests of the European Union as set out in the constitutional treaties, the European Parliament represents the interests of the peoples of Europe and the Council of Ministers safeguards the interests of the Member States.

Since these organs have different interests to protect, it is hardly surprising that friction exist among them. It must therefore be recognised that there are tensions within the organisation itself particularly between the Council of Ministers - the embodiment of national interests within the institutional structure - and other European Union organs, most notably the Commission.[951] In fact, tension is even often manifested inside these organs themselves, most notably within the Council of Ministers where the Member States perpetually compete with each other to promote their own interests.

In the area of trade policy formulation the Council of Ministers jealously guards its authority. However, for practical reasons, Member States have had no option but to tolerate the exercise of certain administrative tasks by the Commission. The Commission is therefore the initiator of policy within the European Union itself and negotiates trade agreements with third states. The Council of Ministers acts upon the proposals of the Commission and has the final decision in the adoption of measures. In addition, the Commission administers the commercial defence measures of the European Union but

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[951] These tensions are not so evident between the Council and Commission on the one hand and the European Parliament on the other hand due to the relative lack of authority of the Parliament in trade policy matters. Until recently, the powers of Parliament in this area were limited to approval of association agreements under Article 228. After the amendments made by the Treaty on European Union, these powers have increased to a certain degree. Now, the assent of the Parliament must be obtained in the case of agreements establishing a specific institutional framework by organising co-operation procedures, agreements having important budgetary implications and agreements involving amendment of an act adopted under the joint legislative procedure; Article 228(3) EC Treaty. It is further provided that the Council must consult the European Parliament in all other cases except for tariff and trade agreements under Article 113(3) EC Treaty.

the Council enacts definitive duties.[952]

Even in matters where the Commission has competence to act, the Member States have been successful in establishing administrative controls over the activities of the Commission. The main tools that the Council wields over the Commission in the field of trade policy take two forms: (a) the creation of a network of committees to facilitate consultations between Member States and the Commission in administrative matters concerning the implementation of trade policy; and (b) tight controls over any mandate given to the Commission to conduct negotiations with third states. Both these mechanisms warrant further examination since both are important in the formulation of trade policy.

(A) Council - Commission Consultation Committee Framework

An extensive network of committees has been established on a subject-by-subject basis to facilitate co-operation and consultations between the Member States and the Commission. In the field of trade policy, the most important committees are the 113 Committee and the Anti-dumping Committee but other committees have been established in areas such as the management of agricultural markets and the interpretation of rules of origin.

Authority to establish a committee to co-ordinate dialogue between the Commission and the Council, or more precisely the Member States, on the negotiation and conclusion of agreements implementing trade policy is specified in Article 113(3) of the EC Treaty and hence this particular committee is known as the '113

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[952] On the proposed reforms of the present procedures, see text infra Chapter 11.

Committee'.[953] Its primary function is to assist the Commission in trade negotiations and, at least in theory, its role is consultative.

Legally at least, the 113 Committee cannot block Commission initiatives. Its function is to clarify the Council's negotiating directives as discussions progress and to act as a sounding board on which the Commission may gauge the degree of acceptability of proposals which have emerged during negotiations.[954]

The influence of the 113 Committee over trade issues is best illustrated by an example. Thus, in the discussions over the negotiations with a number of Eastern European countries for the 1993 arrangements for imports of steel a number of Member State representatives raised both technical and legal arguments to the proposals of the Commission. The major legal objection concerned the legal basis for the proposed measures. Article 71 of the

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[953] The Committee is composed of representatives from all Member States together with the relevant functionnaires from the Commission. The exact composition varies according to subject-matter under discussion. If the Committee is debating agriculture, the national representatives will be from their respective agricultural ministries while the Commission will be represented by staff from DG I (external affairs) dealing with agricultural negotiations.

[954] While the Committee is designated as a consultative body, the Commission shows great deference to its views for three reasons. First, the Committee meetings are an opportunity to size up any objections by Member States which may arise at a later stage in the approval process. Second, it provides a forum to put the Commission's point of view on matters and to provide notice of developments in the negotiation process. Third, the Commission will not jeopardise its repudiation in international trade negotiations by running against the tide of opinion in the Committee which ultimately reflects the views of the Council. See J.H.J. Bourgeois, "Trade Policy-Making Institutions and Procedures in the European Community", in M. Hilf & E-U Petersmann (eds) National Constitutions and International Economic Law (1993), 175, 191.

ECSC Treaty gives Member States full power over trade policy matters relating to steel products. Hence, it was the Member States that are responsible for the final structure.[955] The lack of consensus among the Member States representatives in the Committee was the principal cause of the European Commission failing to reach an acceptable solution to the future regime for imports of steel from the region.

The Anti-dumping Committee is composed on a similar basis.[956] It has been established to allow individual Member States to express their views on any measures proposed by the Commission under the European Union legislation authorising the imposition of anti-dumping measures. The Commission is not obliged to adapt its proposals to take into account the views of the national representatives, but naturally any objections voiced in the Committee by the national representatives may resurface when the proposal for anti-dumping measures is submitted to the Council of Ministers for approval.[957]

The range of measures which are considered in the Committee is considerable. According to the 1988 basic anti-dumping regulation, the Commission is required to consult with the Committee if a finding of dumping or subsidisation exists, if injury exists, when causation has been established and where the Commission suggests that anti-dumping measures are appropriate to prevent

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[955] Europe, No. 5897, p.9 (January 14, 1993).

[956] The composition of the Committee is prescribed by Article 6(1) of Council Regulation (EEC) 2423/88 (1988), O.J. L209/1 (1988).

[957] Voting on the adoption of anti-dumping measures was, until recently, by qualified majority in the Council: Article 12(1), ibid. This requirement has now been changed to a simple majority; see Article 9(4), Council Regulation (EC) 3283/94, O.J. L349/1 (1994).

injury.[958] In practice, the Commission consults the Committee at all stages of an investigation, from the submission of a complaint to a request for a review of a finding. Thus, the political impact of the Member States in any anti-dumping proceeding is significant.[959]

(B) Controls Over Negotiating Mandates

The Commission is rarely, if ever, given carte blanche to conduct negotiations with third states on trade policy matters particular when such negotiations involve a major trading partner. Article 228 of the EC Treaty outlines the procedure for the negotiation and approval of such agreements but there is little mention of the control exercised by the Council over the Commission in such matters. In fact, in practice, it is the Council which establishes the framework for conducting negotiations, even though the actual discussions are handled by the Commission.[960]

An insight into this process may be gleaned from

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[958] Article 6(4), ibid.

[959] Issues raised at such meetings include criticism of like product determinations, the calculation of material injury, the use of analogue countries in the case of imports from non-market-economy countries, recommendations of provisional duties, opposition on the grounds of protecting consumer interests, assertions of Union industry interest and the calculation of constructed value in dumping investigations. In other words, there are few subjects in which national representatives feel obliged to leave to the sole responsibility of the Commission.

[960] It is now clear from the new Article 228 of the EC Treaty inserted by the Treaty on European Union that the Council must authorise the Commission before the Commission can open negotiations, that the Council may appoint of committee to assist the Commission in the negotiations and that the Council can issue directives to the Commission for the conduct of negotiations. In the past, these practices were standard procedure but now they have been given formal legal status.

examining for a moment the procedure employed during the Tokyo Round of MTNs. From a European Union perspective, the impetus for the negotiations stemmed from a joint EC-US declaration supporting another round of trade negotiations[961] which was subsequently endorsed at the first meeting of the Heads of State and Government in Paris in October 1972.[962] The Commission was requested to prepare an options report outlining a negotiating strategy and identifying policy objectives.[963] Substantial alterations were made to this proposal before the Council approved the final negotiating mandate in June 1973.[964]

Although the Commission's authority to negotiate was contained in the 1973 mandate, the Council appears to have felt the need to formalise this power and subsequently, in February 1975, it adopted a number of directives intended to clarify the exact negotiating powers and authority of the Commission.[965] It is not absolutely clear whether or not the Council believed that the Commission was exceeding its negotiating mandate but the adoption of the measure was an instance of the Council stamping its authority over the future direction of the discussions.[966]

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[961] European Commission, Bulletin, Vol. 5/3, 58-60 (1972).

[962] European Commission, Bulletin, Vol. 5/10 15-25 (1972).

[963] European Commission, Bulletin, Supp. 2 (1973).

[964] European Commission, Bulletin, Vol. 6/6, Para. 2342 (1973).

[965] European Commission, Bulletin, Vol. 8/2, Para. 2301 (1975).

[966] See J-V. Louis, "The EEC and the Implementation of the GATT Tokyo Round Results", in J.H. Jackson (ed), Implementing the Tokyo Round (1985), 21-76, 27-28.

Even the Commission's power to conduct the actual negotiations was not left unsupervised. The Article 113 Committee was fully involved at all stages in the negotiations to ensure Council influence over the negotiation of commitments. The resolution of contentious issues generally required fresh authority from the Council in the form of adjustments to the primary directive.

The terms of Tokyo Codes were submitted to the Council in February and March 1979.[967] After deliberating over the contents of the agreements, the Council approved the authority of the Commission to proceed with signature.[968] The Commission thereafter signed the Code on behalf of the European Union.

The ratification of the Code was not, however, straightforward. The Committee of Permanent Representatives (COREPER) had established an ad hoc working group to consider the legal implications of ratification including, inter alia, the issue of the participation of Member States in the ratification process. Within this forum, representatives were seriously divided as to whether the Codes were European Union agreements or mixed agreements.[969] The Commission's view was that the Codes fell within the scope of the EC Treaty and, in particular, under Article 113. This position was

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[967] See European Commission, GATT MTNs - Final Report on the Multilateral Trade Negotiations in Geneva, COM (79) 514 (1979).

[968] European Commission, Bulletin, Vol. 12/6, Para. 1.2.2 (1979).

[969] See J.H.J. Bourgeois, "The Tokyo Round Agreements on Technical Barriers and on Government Procurement in International and EEC Perspective", (1982) 19 CML Rev. 5-33, 21.

supported by reference to the ERTA decision.[970] In contrast, members of the Working Group asserted that certain subject-matters within the Government Procurement Code, the Technical Standards Code and the Agreement on Trade in Civil Aircraft, fell outside the scope of European Union competence.

Eventually a compromise was reached whereby the European Union approved all the Codes but the Technical Standards Code and the Agreement on Trade in Civil Aircraft could be ratified by Member States if they wished. Therefore, in its decision ratifying the Codes, the Council 'approved' the agreements annexed as an appendix and authorised the President of the Council and other representatives 'to take such steps as are required to bind the European Community'.[971]

The differences of opinion among the Member States as to the mandate given to the Commission have rarely been as contentious as the dispute over oilseeds production assistance with the United States. The reluctance of the French government to agree to implement the second GATT Panel Report on subsidies to oilseed producers[972] provoked the United States into threatening in November 1992 to impose 200% duties on imports of certain Union products, the cost of which to European Union producers would have been approximately $300 million each year.[973] The legal basis for this action was Section 301 of the

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[970] EC Commission v EC Council [ERTA], Case 22/70 [1971] ECR 263; [1971] CMLR 335.

[971] Council Decision 156/80/EEC, O.J. L78/1 (1980).

[972] GATT Panel Report, Follow-Up on the Panel Report on EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins, GATT Doc DS28/R (March 16, 1992).

[973] Europe, Agence Internationale D'Information Pour La Presse, No. 5852, p.9 (November 6, 1992).

Trade Act of 1974 and, according to the United States authorities, was justified because the European Union had failed to comply with its international obligations.[974]

To avoid the application of these measures, the EC Commissioner responsible for agriculture, Commissioner MacSharry, entered into negotiations with his American counterpart to secure an agreement which would avert the application of the measures. These negotiations produced the so-called 'Blair House accord' which was in fact merely a draft agreement which required approval by the Council either on its own or as part of the Uruguay Round Final Act.[975] The agreement was a detailed plan to reduce European direct subsidies to its oilseed sector by introducing payments on a per hectare basis and subject to a maximum ceiling.[976]

When Commissioner MacSharry presented the proposal to the Council of Ministers a number of countries, particularly France, expressed the view that he had exceeded his negotiating mandate and that the agreement was null and void even although it was only a draft.[977] The matter was not placed on the agenda of the General Affairs Council due to the opposition of France which

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[974] Interestingly, the Director-General of the GATT, Arthur Dunkel, stated that the proposed U.S. measures were contrary to the obligations of the Contracting Parties towards the functioning of an efficient and credible multilateral system but appeared to condone the action on the basis of the 'non-application by the Community of recommendations imposed by the GATT under the proper procedures for the settlement of trade disputes' (authors translation); Europe, No. 5854, p.6 (November 9, 92).

[975] Europe, No. 5862, p.7 (November 21, 1992).

[976] On the details of the agreement, see Europe, No. 5926 pp.7-8 (February 24, 1993).

[977] Europe, No. 5871, p.1 (December 7, 1992).

adopted a number of spoiling tactics including the insistence on a compatibility and feasibility study of the proposal with the CAP reform proposals. In fact, the French Prime Minister, Pierre Beregovoy stated that France intended to use 'all means necessary' to prevent the Council considering the issue.[978]

France maintained a consistent position on this matter until the conclusion of the Uruguay Round negotiations, claiming that the accord was ultra vires of the powers of the Commission. Eventually, this opposition was successful and the United States modified its expectations under the original accord in order to allow the conclusion of the Round of negotiations.[979] The French government, however, only accepted this compromise after obtaining a considerable number of concessions.[980] Once the terms of the revised accord had been approved, the way was cleared for Agricultural Commissioner Steichen to finalise the Uruguay Round agreement on agriculture.[981]

The episode illustrates the difficulties faced by the European Commission in implementing its mandate in the face of dissension within the Council of Ministers. Such difficulties rarely occur within a single sovereign state even although the government may be divided. The

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[978] Europe, No. 5925, p.7 (February 23, 1993).

[979] The United States agreed to the following modifications: (a) the exemption of the then existing stockpile of 25 million tonnes of oilseeds from the terms of the accord; (b) a switch in the base year from which subsidised exports must be cut back from the 1986-89 average to 1992; and (c) an extension from six to eight years of the 'peace clause' under which the United States would not challenge the European Union's export subsidy regime.

[980] Financial Times, 1, December 6, 1993.

[981] Financial Times, 7, December 7, 1993.

need to take into consideration the interests of fifteen separate states in this process not only substantially increases the difficulties of the Commission in the negotiating process but also undermines the credibility of the Commission in the process.

### (2) Conflicts Between the Common Commercial Policy and Other European Union Policies

Over the last 35 years, the European Union has evolved special common policies to regulate particular commercial and economic matters inside the organisation. At a very general level, the European Union was originally conceived to further political and social cohesion through economic integration which required the approximation of policies among the Member States to promote the harmonious development of economic activities, to permit continuous and balanced expansion within the organisation and to promote closer relations among the Member States.[982]

The achievement of these objectives requires the establishment and effective running of particular common economic and commercial policies throughout the European Union, most notably the Common Agricultural Policy (CAP), the internal market programme and a competition policy. Other significant policies include regional and state aid[983] and an industrial policy.

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[982] See the original Article 2, EC Treaty.

[983] On state aid in the EU see, European Commission, Practice Note on State Aids to Public Undertakings in the Manufacturing Sector, O.J. C273/2 (1991); reproduced at [1992] 2 CMLR 369; and J. Gilchrist & D. Deacon, "Curbing Subsidies", in P. Montagnon (ed) European Competition Policy (1990), 31-51.

The formulation of these policies is based on a variety of internal European Union interests which are not always predicated on purely economic or commercial rationales. Often these interests clash with the standards of conduct set at the international level for particular matters.[984] Herein lies a fundamental reason why the European Union often appears to act outside the international norms of behaviour set down by the GATT and its associated bodies.

Quite simply, when faced with these competing interests, the European Union has opted to take the easier course of action and to ignore the international rules. Equally, the European Union frequently has had little regard for those international rules which indirectly impinge on the contents of some of these common policies. Often no attempt is even made to achieve consistency.

Often the inconsistency is a question of degree - not all the policy will be outside the international rules, but only particular rules and administrative practices. Nevertheless, the point is that, in the past, the European Union has enacted a number of internal policy measures which are at least prima facie in conflict with the international rules.[985]

(A) Agricultural Policy

Agriculture has a special status under the Treaty of Rome and is dealt with at the European Union level

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[984] See S. Woolcock, "The European Acquis and Multilateral Trade Rules: Are They Compatible?", (1993) 31:4 Journal of Common Market Studies 539.

[985] See P. Montagnon, "The Trade Policy Connection", in Montegnon, supra note 983, 76-98.

through the Common Agricultural Policy (CAP).[986] The purposes of this policy are numerous and, in some cases, laudable.[987] But, at least until recently, the bulk of agricultural commodities produced and consumed in the European Union are isolated from competition in the world markets through a system of variable levies. At the same time, farm incomes have been supported mainly through price support. This has substantially contributed to the existing distortions in the world agricultural market-place.

While internal pressure for reforms accounted to a considerable degree for the need to reform the CAP, as we have seen, the United States, among other trading partners attempted, at an early stage to use the provisions of the Subsidies Code and the General Agreement itself, as leverage for reform[988]. Even although the GATT panels ruled against the European Union, particularly in the investigation into Union exports of wheat, the Union paid little attention to accommodating the views of third states in the formulation of the CAP.

The most important conflict between the CAP and the trade policy of the European Union, as far as its international obligations are concerned, arose over the issue of production subsidies for oilseeds. The facts behind this case have been described earlier and need no reiteration.[989] It need only be pointed out that the panel concluded in December 1989 that the European Union

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[986] Articles 38 to 47 EC Treaty.

[987] See generally, J. Usher, The Common Agricultural Policy of the European Community (1989).

[988] See text, supra 102-112.

[989] See EC - Payments and Subsidies to Processors of Oilseeds, GATT Doc L/6627 (1989); (1990) 2:2 WTM 5.

regulations providing for payments to seed processors, as far as these were conditional on the purchase of oilseeds of European Union origin, were inconsistent with Articles II and III(4) of the GATT.[990] The panel recommended that the CONTRACTING PARTIES 'request' the European Union to bring these regulations into conformity with the relevant terms of the General Agreement.

Despite substantial internal opposition from within the European Union itself from certain Member States, eventually a new oilseeds production support regime was introduced.[991] In place of the original system which provides target and intervention prices for oilseeds produced in the Union on a per tonne basis, the new system involved direct payments to producers of oilseeds on a per hectare basis.[992]

Dissatisfied with this refusal, the United States requested a second opinion from the panel to rule whether the revised regime was consistent with the same provisions of the GATT.[993]

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[990] EC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins, GATT Doc. L/6627; reproduced in GATT BISD, 37th Supplement 86 (1991).

[991] Council Regulation (EEC) 3766/91, O.J. L356/17 (12/12/91).

[992] The two important elements of this system were that: (a) the price received from the sale of Union oilseeds in the Union market was determined, in part, by the price of competing imports; and
(b) a direct per hectare payment was received by producers depending on average historic yields of oilseeds in the region of production.

[993] This procedure was introduced by Para. I.3 of the Decision Concerning Improvements to the GATT Dispute Settlement Rules and Procedures, reproduced in GATT,

The reconstituted panel held that the original finding had been based, not on the specific method of delivering production subsidies, but rather on the '[Union's] systematic denial...of the benefits reasonably to be expected from the reciprocal exchange of tariff concessions'.[994] The panel observed that the new support system had retained the essential features that had led to the original decision against the European Union. The subsidies in the revised regime were still production subsidies specific to the product which was the subject of the tariff concession, namely oilseeds.[995] The system continued to protect producers from the effects of movements in international prices. Although the panel accepted that the violations under Article III of the GATT had been rectified, the European Union had continued to nullify and impair concessions granted to other contracting parties as a result of the production subsidy scheme introduced under the new regulation.[996]

While the panel's original mandate was to recommend necessary measures to rectify the deficiencies in the first regime, it concluded that there was no reason for the CONTRACTING PARTIES to continue to defer consideration of further action in relation to remedying the impairment of tariff concessions and declared that the CONTRACTING PARTIES 'should, if so requested by the United States, consider further action under Article

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BISD, 36th Supplement 61 (1990).

[994] Follow Up on the Panel Report on EEC - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins, GATT Doc. DS28/R (March 16, 1992), GATT BISD, 39th Supplement 91 (1993).

[995] Ibid, Para. 83.

[996] Ibid, Para. 85.

XXIII:2 of the General Agreement'.[997]

The reaction of the European Union was again to dismiss the significance of the ruling. [998] In fact, the European Union even used a subsequent meeting of farm ministers at the OECD to try to convince the United States that a negotiated settlement was the only solution.

Of course this resulted in the United States threatening to impose retaliatory tariffs on goods originating in the European Union.[999] In fact, the United States suspended a limited number of tariff concessions shortly after the decision was announced.[1000] Eventually the matter was resolved as part of the Uruguay Round package.

There is little doubt that the shape of the CAP directly affects European Union trade policy. If the terms of the CAP are inconsistent with the European Union's international obligations under the GATT system, the result will inevitably be conflict. How the Union addresses that problem is a question of fundamental importance in its trade relations with third countries. There has, however, in the past been a degree of asymmetry between the impact of agricultural policy on

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[997] Ibid, Para. 92.

[998] The European Commissioner for Agriculture at the time, MacSharry, is on record as stating that the panel's findings were 'not acceptable to us, therefore there is no conclusion of the matter'; Financial Times, p.6, March 27, 1992.

[999] On May 29, 1992, the Bush administration published a list specifying $1 billion worth of European products on which it intended to impose punitive import tariffs of 100%; Financial Times, p.1, May 29, 1992.

[1000] European Commission, Press Briefings, June 11, 1992.

trade policy on the one hand and trade policy on agricultural policy on the other hand. History indicates that the European Union's agricultural policy had a greater impact on trade policy than was the converse case. The European Union appeared to have believed that the CAP was an internal matter and paid little respect to its international obligations concerning agriculture. The CAP was therefore a thorn in the side of the Union when conducting trade policy.

There are some signs that trade policy will play a far more significant role in the shaping of agricultural policy than was previously so. Evidence to support this proposition can be gained from the developments occurring at the Uruguay Round of agricultural negotiations. The Union's offer at the Brussels meeting in December 1990 was obviously drafted in light of the need to reform the present CAP. Opposition to reform of the CAP resulted in the Commission having to submit two sets of proposals and the Council only agreed on the second set after seven attempts before the offer on agriculture could be made at the Brussels meeting.[1001]

The exact nature of the proposals need not detain us here. The important point is that even after these efforts, the United States and the Cairns Group rejected the European Union position. It was this opposition that prompted the Commission to submit further proposals to the Council. As the rapporteur to the European Parliament Committee on External Economic Relations observed:

> 'Whereas there are many good internal reasons for reform, a link inevitably exists between the GATT-

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[1001] European Parliament, Working Document on CAP Reform and External Trade, Doc No. PE 151.425 (June 27, 1991).

> negotiations on agricultural trade on the one hand and the timing and contents of the [CAP reform] proposals on the other'[1002]

In February 1991, the Commission submitted proposals outlining a reform programme, known as the 'MacSharry I Package'.[1003] In these proposals, it was generally recognised that the then existing form of the CAP was inconsistent on a number of grounds with the existing GATT obligations of the European Union and that it acted as a substantial impediment to the negotiation of a new GATT agreement on agriculture.

These proposals were not accepted by the Council and the Commission formulated new proposals known as the 'MacSharry II Package' which were presented to the Council on July 15, 1991.[1004] The main emphasis of the package was to address the root deficiencies in the existing system, namely the relationship between production and price guarantees for produce grown. Direct payments were to be substituted for indirect assistance.[1005] Eventually, the Member States farm ministers agreed on May 22, 1992, to begin to implement the proposed reforms to the CAP.[1006] This scheme was

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[1002] Ibid, 4.

[1003] European Commission, The Development and Future of the CAP COM(91) 100 (1991).

[1004] European Commission, The Development and Future of the CAP, Follow-Up to the Reflections Paper COM (1991) 258/3 (1991).

[1005] On the legislation required, see European Commission, Reform of the CAP - Legislation Measures to Accompany the Reform of the Market Support Mechanisms COM (19) 415 (1991).

[1006] The essence of these reforms is as follows: (a) a movement away from expenditure of £23 billion each year on fixing EU food prices to the making of direct financial payments to farmers; (b) grain intervention

introduced in a series of measures in 1993 and is adjusted annually.[1007]

The final GATT agreement on agriculture was essentially negotiated after bilateral discussions between the European Union and the United States which contained the following key elements[1008]:

(a) The arrangements were to be phased in over a six-year period.
(b) Over this six year period, the total support to the agricultural sectors of the two countries, measured in terms of Aggregate Measures of Support (AMS), was to be reduced by 20% compared with a base period between 1986-1988.
(c) Direct acreage and headage payments granted within the framework of 'production limiting programmes' were not to be calculated as part of the AMS and were not subject to reduction.
(d) All border protection measures were to be converted into conventional tariffs and, compared to the 1986-1988 base period, reduced by an average of 36% over six years.
(e) A special safeguard clause was included to allow the EU to add a 'variable element' to the tariff if the world market price for a

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prices to be cut by 29%, beef intervention prices to be cut by 15%, butter intervention prices to be cut by 5%; (c) agricultural land use to be reduced by 15%; and (d) farmers to be paid 45 ECUs per tonne of grain if they adhere to the land set aside rule; see Council of the European Communities, General Secretariat, Press Release 6539/92, 1579th Council Meeting -Agriculture 18-21 May 1992 (1992)

[1007] European Commission, The Agricultural Situation in the Community, 1992 Report (1993), 9-17.

[1008] Europe, November 27, 1992, 1.

commodity falls by more than 15% below its 1986-1988 average.

(f) A minimum access clause applied which require import opportunities be opened to allow imports to capture 3% (rising to 5% at the end of the six years period) of domestic consumption.

(g) Expenditure on export subsidies, calculated on a product-by-product basis, was to be reduced by 36% over six years compared with average annual expenditure in the period 1986-1990.

(h) The volume of subsidised exports, on a product-by-product basis, was to be reduced by 21% over the six year period, compared with the average annual volumes exported in the 1986-1990 period. Processed products were not, however, covered by this undertaking.

On the whole, this understanding formed the core of the final text although slight modifications were made to percentages, reference periods and time scales.[1009]

The question which arises is whether the reformed CAP is consistent with the GATT rules and, in particular the settlement on agriculture reached in the Uruguay Round Final Act. Although the European Commission has stressed the compatibility of the reformed CAP with the international regime[1010], there are grounds for

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[1009] In particular, the United States conceded a less radical phase in period for the reduction of export subsidies, an exemption of existing stocks from the package and the creation of a peace clause to limit United States challenges to the legality of EU export subsidy practices for a period of eight years.

[1010] DTI, The Uruguay Round of Multilateral Trade Negotiations, Cmnd No. 2579, 12-14 (May 1994).

scepticism.[1011]

First, the reforms did not include all farm produce. For example, sugar was excluded from the reforms but clearly the Agricultural Agreement envisages its application to all agricultural products. Second, the reforms do not include the change to the concept of tariffication agreed by the European Union. Third, future expenditure under the revised CAP will have to comply with the limits set out in the terms of the agreement. Fourth, the manner in which the terms of the Agreement are implemented may not be exactly consistent with the amendments envisaged in the Agreement.[1012]

(B) Internal Market Programme

As the European Union is itself an organisation of states, its internal commercial structure has an impact on patterns of international trade. For example, the objective of reducing or eliminating intra-Union trade barriers through trade liberalisation principles such as the free movement of goods and services is of particular

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[1011] See also, A. Swinback, "CAP Reform 1992", 31:3 Journal of Common Market Studies 359.

[1012] This doubt arises from opposition within the European Union to certain aspects of the Uruguay Round Final Act. For example, France introduced a number of preconditions to its ratification of the Agricultural Agreement. First, that its farming community will not suffer any greater loss of production under the Agreement than as agreed under the May 1992 reform of the CAP. This requires other Member States to absorb production cuts to meet the necessary limits. Second, for compensation for any loss of production from the EU budget. Third, that the NCPI is strengthened and used more aggressively for the protection of the interests of the EU and the Member States; see Financial Times, 8, December 8, 1993. As regards the commitment to protect France's agricultural community from further production cut backs, the European Union that the GATT restrictions will 'not increase the restraints of the reformed CAP'; Financial Times, 3, December 13, 1993.

concern to European Union trading partners because the process should have the indirect effect of reducing trade barriers for the movement of goods or the supply of services from their national producers once inside the Union.

One would think that the reduction of intra-Union trade barriers would receive a positive response from European Union trading partners. However, in general, the converse has largely been the case.[1013] This reaction has been caused by two factors. The European Union, at least initially, promoted the programme as a means of obtaining reciprocal concessions from trading partners. For example, outlining the scope and purpose of the programme in 1985, the European Commission pointed out that:

> "The commercial identity of the Community must be consolidated so that our trading partners will not be given the benefit of a wider market without themselves making similar concessions.'[1014]

In addition, the 'Fortress Europe' mentality of some trading partners has been, to some extent, raised by two perceptions. First, these trading partners are sceptical that all quantitative restrictions and voluntary restraint agreements maintained by individual Member States will be abolished despite the overall objective of the programme to create a single market. Secondly, measures of harmonisation required to standardise national laws regulating commerce are perceived by some

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[1013] See E. Stein et al., "European Trade 1992: Fortress or Partnership?", (1989) Proc ASIL 332; and Financial Times, 8, April 17, 1991.

[1014] White Paper From the Commission to the European Council, Para. 19, Commission Doc. No. COM (85) 310 (June 1985).

trade partners as themselves creating additional barriers to trade.[1015]

Generally speaking, the policy of extracting reciprocal trade benefits from trading partners as the quid pro quo for internal liberalisation has, despite the statements of the Commission, not been taken seriously by the European Union's institutions. In certain cases, the Commission has been willing to listen to the concerns of trading partners when drafting proposals, especially in the harmonisation of laws relating to services. However, the same cannot be said of the second category of concerns and this issue merits closer consideration.

(1) Reduction in Quantitative Restrictions Maintained by Member States

The completion of the internal market requires the elimination of all measures maintained by individual Member States against third countries and the replacement of national restrictions with measures at the European Union level, where necessary for the protection of Union interests.

Article 115 permits Member States, in certain circumstances, to retain quantitative restrictions vis-a-vis products originating from third states. In the past, this provision was used by Member States either to renew pre-Union measures or to introduce new

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[1015] On progress towards completion of the internal market, see European Commission, Seventh Report of the Commission to the Council and the European Parliament Concerning the Implementation of the White Paper on the Completion of the Internal Market, COM (92) 383 Final (1992); and Sutherland Committee Report, The Single Market After 1992 - Meeting the Challenge (1993).

restrictions after consultations with the Commission.[1016]

In fact, following on the expiry of the original transitional period, Member States continued to apply for extensions or renewals of bilateral trade agreements on the ground that they were essential to avoid disruptions of normal commercial relations. The Commission's policy was to permit such extensions or renewals as long as the restrictions:

(a) did not constitute an obstacle to the opening up of Union negotiations with the third countries nor obstruct the subsequent transfer of the commercial substance to Union agreements; and
(b) did not hinder the adoption of measures necessary to complete the standardisation of import arrangements applied by Member States.[1017]

Article 115 was also been interpreted relatively liberally, with the approval of the European Court, even although it was an exception to Article 113 and should be strictly construed. Such measures were often justified by individual Member States as necessary to resolve particular problems which were not considered

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[1016] See M.C.J. Bronckers, "A Legal Analysis of Protectionist Measures Affecting Japanese Imports into the European Community - Revisited", in P. Volker (ed) Protectionism in the European Community (Second edition, 1988), 70.

[1017] Council Decision 69/494/EEC on the Progressive Standardisation of Agreements Concerning Commercial Relations Between Member States and Third Countries, O.J. L326/39 (1969) as renewed from time to time. See, for example, Council Decision 91/509 (1991), O.J. L272/85 (1991); and Council Decision 92/53 (1992), O.J. L22/55 (1992).

appropriate for European Union-wide protective measures.[1018]

Before 1986, the Commission did not manifest any particular reluctance to authorise Member States to adopt quantitative restrictions under the authority conferred upon it by Article 115(1). As proof of this attitude, a GATT Report cites France as maintaining no less than 71 quantitative import restrictions on goods as diverse as food products, consumer electronics, watches and clocks, and integrated circuits in 1990.[1019] The same report confirms that Italy had 48 similar measures in force. The same is true of European Union-authorised national measures. In 1990, individual Member States were authorised by the Commission to restrict trade with third states in 79 cases.[1020]

There is little doubt that, at this time, the incidence of measures maintained by individual Member States against products from non-Union countries was high and had the effect of insulating the national domestic market from external competition often contrary to both the letter and the spirit of the GATT.

In its White paper proposing the internal market programme, the Commission expressly acknowledged that the absence of a complete internal market could be attributed, in part, to the continued use of national import quotas and national protective measures. The proposal specifically envisaged the abolition of such

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[1018] See Council Decision 76/386 (1976), O.J. L101/53 (1976) and Council Decision 89/54 (1989), O.J. L23/44 (1989).

[1019] GATT, First Trade Policy Review Mechanism EEC (1990), 12.

[1020] Ibid.

measures by the end of 1992.[1021]

To its credit, the Commission has in fact already moved to eliminate quantitative restrictions maintained by individual Member States for certain products originating in non-Union countries. Between 1991 and 1992, two important steps were taken to reduce quantitative restrictions. In October 1991[1022] and September 1992[1023], the number of permitted restrictions was reduced to 30 in the case of France and to 19 in the case of Italy.

At the same time, a procedure has been created to allow such measures to exist at a Union-wide level. For protection to be given, the Commission indicated that Member States will have to demonstrate that there exists a European Union-wide - as opposed to Member States - problem.[1024] In any event, one possible loophole in this policy is that Member States interests will be equated with Union interests, leading to virtually the same level of protection in certain areas.

Again, while the internal market programme is intended to achieve, among other objectives, the free circulation of goods as prescribed by Article 10 of the EC Treaty, it is unlikely that the legislative programme of the Commission in this area will close all existing loopholes. For example, while the European Commission has reduced the derogations for the common arrangement

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[1021] Commission White Paper, supra note 1014, Paras 35-36.

[1022] Council Regulation (EEC) 2978/91, O.J. L284/5 (1991).

[1023] Council Regulation (EEC) 2875/92, O.J. L287/1 (1992).

[1024] See GATT, Second Trade Policy Review Mechanism EEC (1994), 67.

on exports[1025], notable exceptions exist such as in the case of arms exports.[1026]

Further, in spite of the commitment expressed by the Commission to remove such protective measures, the Union has continued to negotiate voluntary export restraint agreements with third countries. For example, in 1991, reciprocal undertakings were exchanged between the Union and Japan[1027] concerning imports of Japanese vehicles into the Union.[1028] These measures will be put into effect at the end of 1992 and will apply until the end of 1999. During this period, the understanding applies three principles:

(a) the Union market will be harmonised and imports will be gradually liberalised in countries still applying restrictions;
(b) exports from Japan will be 'moderated' according to certain market assumptions concerning supply and demand trends but in the period imports of cars from Japan are not to exceed 1,230,000 vehicles for a market of 15.1 million vehicles
(c) every six months joint monitoring will be conducted to ensure that the understanding is

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[1025] GATT, Second Trade Policy Review Mechanism EEC (1993), Vol II, 94-96.

[1026] But see, Draft Strategic Exports Regulation, COM (90) 317 Final (1992); [1992] 3 CMLR 221.

[1027] For a general view of EC-Japan relations, see Council, A Consistent and Global Approach: A Review of the Community's Relations with Japan, COM (92) Doc 219 (1992).

[1028] Transnational Arrangement for the Import of Japanese Motor Cars into the Community, EC Bulletin, Vol. 24, No. 7/8, Para 1.3.34 (31/7/91).

correctly applied.[1029]

The policy of the European Union towards quantitative restrictions with third countries is more than a little haphazardous. Whether or not Member States will abolish all existing national restrictions without substitution of Union-wide measures of protection remains to be seen. If this is achieved, then the scepticism of trading partners that the internal market programme will not reduce the level of grey area protection maintained by the Union members will have been vindicated.

(2) Trade Barriers Caused by Harmonisation

It is a prerequisite to the creation of a single market for national technical standards be harmonised to ensure that the flow of goods and services, and for that matter labour and capital, throughout the Union is not impeded unreasonably. But, at the same time, harmonisation measures are primarily in the interests of the Member States and these interests are not always shared with third states. The consequence of this choice of priorities is that measures adopted for the purposes of harmonisation can have serious trade implications.

This is particularly so in the case of absolute prohibitions on trade in certain products. One example of such a measure occurred in 1985 when the Council adopted a directive prohibiting the use of certain types

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[1029] In June 1993, the EU attempted to renegotiate the terms of this arrangement after reports that the European market for vehicles would decline by 17% over the next ten years. One of the main reasons for the attempt to re-negotiate was the change in the views of the European Commission on vehicles manufacturer in UK plants which were not originally included in the permitted quotas. The reversal in views was caused after pressure was exerted by France and Germany on the Commission to protect their vehicle industries; London Times, p.12, June 13, 1993.

of hormones in animal feedstuffs.[1030] In addition to this ban, the directive also prohibited sales of beef from animals reared on feedstuffs containing the hormone which extended to imports from third countries. The health implications of human consumption of such products were not absolutely clear and so the measure was highly contentious and was adopted against the votes of the United Kingdom and Denmark.[1031]

In fact, these hormones were used widely by United States cattle farmers and the practical effect of this measure was to prohibit imports of beef from the United States when these substances were involved. The United States protested to the European Union that the measure was not scientifically justified and acted as a technical barrier to trade contrary to the GATT.[1032] Under the circumstances, the United States felt that retaliatory measures were required and applied punitive duties on a list of imports from the Union estimated to be worth approximately $100 million to Union producers

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[1030] Council Directive 85/649 (1985), O.J. L382/228 (1985).

[1031] Even within the EU the adoption of the measure caused internal conflict. The legitimacy of the measure was doubtful first because evidence supporting the proposition that the hormones in question were dangerous was insubstantial and because the directive was adopted not on the basis of Article 100 of the EC Treaty, which requires unanimity, but on Article 43, which concerns measures dealing with agriculture, by a qualified majority. The United Kingdom challenged the legitimacy of the directive on the ground that unanimity was required for the adoption of the measure and not a qualified majority. The Court rejected this argument put forward by the UK, but annulled the directive on the basis of a more technical procedural defect; United Kingdom v EC Council [Re: Hormones], Case 68/86 [1988] ECR 855.

[1032] See European Parliament Background Papers, Committee on External Relations, Doc No. PE 141.199, 9 (16.5.90).

each year.[1033]

In response, on January 23, 1989, the Council authorised a list of European Union countermeasures but delayed implementation pending a possible negotiated settlement.[1034] The matter was eventually referred to the GATT Standard Code Committee for resolution and a task force of European and American officials were appointed in February 1989 to establish a certification scheme on meat products.

Other proposals relating to the harmonisation and mutual recognition of standards have raised international concerns. For example, the technical requirements for the interworking of telecommunications terminal equipment with the networks have been cited as standards that limit trade opportunities, particularly in new and innovative markets.

Certain services directives also have caused problems on the international front. Originally at least three measures, concerning banking, investment services and life assurance, required reciprocity before a company from a non-Union country was permitted access to provide these services.[1035] The principle of reciprocity requires third countries to extend to European Union suppliers of services access to their market on comparable conditions to those provided for foreign suppliers in the European Union market.

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[1033] EC Bulletin 22/1, Para. 2.2.7 (1989).

[1034] Ibid.

[1035] These measures were finally enacted as: Council Directive 89/646 [Second Banking Directive], O.J. L386/1 (1989); Council Directive 90/619 [Investment Services Directive], O.J. L330/50 (1990); and Council Directive 90/618 [Second Life Assurance Directive], O.J. L(8/11/90).

Not all states have open markets in these services and some contain structural impediments. For example, the United States does not have a universal banking system and banks are established on a state-by-state basis. It also maintains a distinction between commercial and investment banking which prevents U.S. banks from entering into securities transactions.[1036] Thus, the United States companies would have been unable to trade in the European Union in these areas because Union companies are not be entitled to the freedoms granted in the Union market.[1037]

The United States complained that a 'national treatment standard' was more appropriate that a standard of reciprocity.[1038] The Commission subsequently revised its proposals in April 1989 to reflect the concerns of other countries, including the United States. In place of the reciprocity requirement, the precondition for allowing foreign companies access to these European Union service markets is the need to show 'comparable effective market access'.[1039] Now the Commission is required to examine the relevant legislation of a state to determine whether or not a sufficient degree of market access is granted to Union companies. In the event that the Commission's findings are negative, negotiations may be entered into with a view to establishing satisfactory market access.

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[1036] Glass-Steagall Act of 1933, 48 Stat. 162 (1933).

[1037] See European Commission, Report From the Commission to the Council on Treatment Accorded in Third Countries to Community Institutions and Insurance Companies, Sec (92) 1343 Final (July 1992).

[1038] See M.A. Goldstein, "1992 and the FCN and OECD Obligations of EEC Member States to the United States in the Financial Services Area", (1990) 30 Virginia J. Int'l Law 189, 223.

[1039] See, for example, Article 9(3) Second Banking Directive and Article 9(3) Second Life Assurance Directive.

The so-called 'Television Without Frontiers Directive' has also caused several trade problems.[1040] This directive, which came into effect on October 3, 1991, charts out the framework of a single European market in broadcasting. But the measure requires broadcasters to reserve a substantial proportion of transmission time for 'European material'. This amounts to a de facto local content requirement, but the European Union argues that the measure concerns trade in services and not goods and therefore the applicability of the General Agreement is at least questionable. The United States has, however, requested consultations regarding this measure although at present the dispute has not been resolved.

Finally, the directive on public procurement for supplies and works in the excluded sectors (water, energy, transportation and telecommunications) was the source of considerable friction between the European Union and the United States.[1041] The measure was intended to harmonise the public procurement criteria of the Member States in order to reduce this barrier to trade. Its purpose is essentially to liberalise the supply of goods and services to the public sector by reducing discrimination.

The directive contained reciprocity conditions for the procurement of goods from third states. If the originating country is not legally committed to ensuring effective market access for EU companies, the directive allows procurement authorities to disregard bids with more than 50% content from that country. Any such bids must be rejected if their price advantages over

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[1040] Council Directive 89/552/EEC, O.J. L298/1 (1989).

[1041] Council Directive 93/38/EC O.J. L199/84 (1993).

equivalent tenders from other sources is less than 3%.[1042]

This measure provoked the United States into identifying the EU as a country operating a 'significant and persistent pattern of discrimination' against the United States products and services under Section 301.[1043] Discussions were held between President Clinton and President of the Commission Delors in March 1993 in an attempt to avoid the imposition of unilateral measures and a compromise reached which applied the reciprocity provisions only to telecommunications.[1044] In fact, the United States was dissatisfied with the manner in which this compromise was implemented and on May 28, 1993, imposed limited import tariffs on EU goods.[1045] In response, the European Union retaliated with approximately equivalent sanctions on June 9, 1993. These measures continue to apply although both parties are involved in bilateral discussions to resolve the matter.[1046]

(C) Competition Policy

At least in theory, European Union measures to tackle unfair trade practices and those for dealing with anti-competitive arrangements share the same policy objective, namely the removal of artificial distortions

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[1042] Article 29, ibid.

[1043] European Commission, Press Briefings, May 14, 1992.

[1044] London Times, p.18, March 6, 1993; London Times, p.11, March 30, 1993.

[1045] The estimated cost of these sanctions was approximately $20 million in lost exports.

[1046] GATT, Second Trade Policy Review Mechanism (1993), 91-93.

in the Union market-place.[1047] In the circumstances, it could be assumed that the two policies would be dove-tailed at the European Union level. Closer inspection reveals that this is not the case at all. In fact, the use of anti-dumping measures - the principal instrument in combating unfair trade practices committed by parties from third states - is frequently incompatible with the objectives sought in competition policy.[1048]

Within the European Union, competition policy takes a different form from anti-trust law in the United States in that it is policy-oriented. It has a more flexible form than the more legalistic American system. This is evidenced by the fact that the European Commission administers competition policy throughout the Union while in the United States, anti-trust law is applied primarily through the courts as opposed to administrative bodies.

True, the fabric of European competition policy is enshrined in Articles 85 and 86 of the EC Treaty, but the European Commission has a significant degree of discretion in implementing the policy, albeit that this discretion is subject to review by the European Court. It is in the administration of this particular policy that inconsistencies arise with the CCP.

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[1047] See M. Mendes, Antitrust in a World of Interrelated Economies (1991), 19-44; and F. Snyder, "Ideologies of Competition in European Community", (1989) 52 MLR 149.

[1048] See generally, P. Vandoren, "The Interface Between Anti-Dumping and Competition Law in the EC", (1986) 2 LIEI 3; J. Temple Lang, "Reconciling EC Antitrust and Anti-Dumping Policy", (1988) Fordham Corp. Law Inst. 7; J.H.J. Bourgeois, "Antitrust and Trade Policy: A Peaceful Coexistence", (1989) 17 Int'l Business Lawyer 116; and M. Clough, "Conflicts Between EEC Anti-dumping and Competition Law", (1992) 5 ECLR 222.

The interaction of competition policy and trade policy is reciprocal; each impinges on the other.[1049] The application of trade policy measures can have serious anti-competitive implications and, at the same time, the implementation of competition policy affects trade policy.[1050] It is therefore necessary to consider their impact on each other in both dimensions. At the same time, there are also serious conflicts in the methodologies which are applied in such investigations which also warrant discussion.

(1) The effect of trade policy measures on competition policy

The operation of trade policy measures, particularly so-called 'commercial defence instruments', can cause serious anti-competitive effects within the European Union. This is because these measures often involve the intervention of European Union agencies in the normal processes of supply and demand that determine the price of particular products. The imposition of an anti-dumping duty, for example, will in itself distort competition simply because it has the effect of artificially raising prices and decreasing demand from foreign suppliers. Other practices distorting competition are less obvious.

The Commission regularly accepts price undertakings from foreign companies as a means of establishing a floor

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[1049] J.H.J. Bourgeois, "Trade Measures, Competition Policy and the Consumer: EC Perspective", A Paper Presented at the Annual Conference on EC and US Trade Laws, Brugge, Belgium, September 15, 1989; and OECD Working Party on Competition and International Trade, Report on Anti-Dumping and Competition Policy, Doc. No. DAFFE/CLP/WP1 (93) 2 (February 1993), Chapter 5.

[1050] See generally, R. Kulms, "Competition, Trade Policy and the Competition Policy in the EEC: The Example of Anti-Dumping", (1990) 27 CML Rev. 285.

price for imports of particular products.[1051] In other words, the Commission is actively establishing a price level for such products and naturally European Union producers will react to the fixing of such prices by adjusting their prices. From a competition point of view, the internal Union effect of such an undertaking is to increase the prices of Union-produced products that would otherwise have been lower in reaction to the foreign competition.

Agreements among competitors fixing prices are, however, absolutely prohibited as a matter of competition policy. In the classic case, Vereeniging van Cementhandelaren v EC Commission, the Commission declared as incompatible with Union competition law an arrangement among cement producers in the Netherlands agreeing prices to third parties, even although the arrangement applied only to Dutch producers and no other Union producers.[1052] Similarly, when seven producers of roofing felt in Belgium concluded an agreement establishing production quotas for each of them and a system of checks and compensation where these were exceeded, the Commission declared the contract illegal.[1053]

If price undertakings are accepted by the Commission, these often amount to little more than de facto price fixing, the only difference being that it is the Commission that is fixing the prices between Union and foreign producers. Creating artificial levels for import prices will have the effect of establishing a floor price within the Union at which Union producers can set

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[1051] See, for example, EPROMS From Japan, O.J. L65/42 (1991).

[1052] Case 8/72 [1972] ECR 977.

[1053] Belasco SA v EC Commission, Case 246/86 [1989] ECR 2117.

their products in an artificial competitive environment.

In a similar vein, private cartels between individuals inside the Union which operate to regulate supplies or production are considered illegal[1054], but voluntary restraint agreements negotiated under the auspices of the Commission appear to be acceptable in certain circumstances.[1055] In fact, in one case, the Commission defended such practices by declaring:

> 'Measures taken in pursuance of trade agreements between the Union and Japan...are acts of external policy which are outside the scope of Article 85 of the EC Treaty'.[1056]

This appears to suggest the existence of a hierarchy of policy within the Commission. Certainly, the Commission could not possibly be suggesting that external relations policy and competition policy operate in different spheres, never overlapping or interacting. There is undoubtedly a tangible relationship between both because measures adopted as trade protection measures impinge on the competitive environment that exists within the Union market-place.

Voluntary export restraints and anti-dumping duties may even be imposed where there exists only one or two Union producers if this is deemed to be in the strategic

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[1054] See Stichting Sigarettenindustrie v EC Commission, Cases 240-242/82 [1988] ECR 3831.

[1055] See Gijlstra, "Anti-dumping Policy of the EEC in Practice", in J.H.J. Bourgeois (ed), Protectionism and the European Community (1983), 151.

[1056] Franco-Japanese Ball-Bearing Agreement, O.J. L343/19 (1974).

interests of the Union.[1057] This is even so if such measures enhances the commercial position of a few companies in the Union to such an extent that they have a duopoly or an oligopoly within the Union. In such cases, the application of Article 86 seems to be suspended.

A number of procedural aspects of anti-dumping actions also involve anti-competitive implications. For example, an anti-dumping complaint must be lodged by a producer or group of producers 'acting on behalf of a Union industry'.[1058] In order to make complaints, Union producers often form alliances to ensure that the complaint is made on behalf of a sufficient majority of Union producers. For example, in EPROMS From Japan, the complaint was filed by the European Electronic Component Manufacturers' Association (EECMA) which is in fact composed of the main Union producers of semiconductors.[1059]

But the very idea of Union industries co-operating in this manner is anti-competitive. It is not, for instance, an example of co-operation for the purposes of producing an improved product. Rather, it involves a group of producers collaborating for the purposes of countering the activities of foreign competitors.

The Commission has, on a few occasions, acknowledged the sensitivity of the anti-competitive implications in administering the anti-dumping laws. Thus, in one case the Commission declined to accept price undertakings

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[1057] See DRAMs From the Republic of Korea, O.J. L272/13 (1992).

[1058] Article 5, Council Regulation (EEC) 2423/88, O.J. L209/1 (1988).

[1059] Council Regulation (EEC) 577/91, O.J. L65/1 (1991).

offered by a company after an affirmative dumping finding because it was deemed 'not in the Union's interest to accept the undertakings offered because of the effect these price undertakings could have...on the competitive situation and structure of the market'.[1060]

However, on the whole, the Commission rarely makes anti-dumping decisions based on the potential anti-competitive effects of a measure. More importantly, until recently, the Commission declined to consider anti-competitive aspects when considering which measures are appropriate to a particular situation. For example, in Calcium Metal From the PRC and the Soviet Union, the Commission declined to take into account the fact that the main EU producer of the products under investigation had refused to supply the main importer with supplies of the product contrary to Article 86 of the EC Treaty.[1061]

The European Court has since reversed this approach and considered the refusal to supply as a contributing factor to the injury caused to the industry and a factor which the Commission was wrong to ignore.[1062] Hence, the Commission is instructed to take into account anti-competitive practices in its determination of material injury but not necessary in the calculation of dumping duties or to treat such behaviour as a rationale for excluding the complainer from an investigation.

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[1060] Glycine From Japan, O.J. 218/1 (1985).

[1061] O.J. L271/1 (1989).

[1062] Extramet Industrie SA v EC Council Case C358/89 [1993] 2 CMLR 619.

(2) The impact of the application of competition law on European Union trade policy

Article 85 of the EC Treaty prohibits agreements, decisions and concerted practices between undertakings if such arrangements restrict or distort competition to a degree which affects trade between Member States. At the same time, Article 86 prohibits the abuse by any undertakings of a dominant position within the Union again when such practices affect trade between Member States.

The application of these rules is, however, occasionally inconsistent with the rules that the Union has established for the operation of its trade policy. The main concern is that different rules can apply to Union producers and foreign manufacturers even if both undertakings are engaged in production of the same goods and the same commercial practices.

Perhaps the major instance of such discrimination concerns the different treatment of Union industries and foreign producers when both are alleged to have engaged in practices that amount to dumping.

As far as Union producers are concerned, intra-Union dumping is permitted as long as such practices do not involve any element of predatory pricing. True, Article 91(1) of the EC Treaty does purport to prohibit intra-Union dumping but this is only during the transitional period. The relevant anti-competitive practice, as far as Union producers are concerned, is predatory pricing not dumping stricto sensu. In other words, even although two producers - one Union one foreign - are engaged in identical unfair practices, from a legal perspective two separate concepts are applied to their activities. The important point is that the preconditions for

establishing dumping are considerably less onerous than for proving the existence of predatory pricing.

In competition law, predatory pricing requires proof of certain behaviour on the part of the dominant undertaking before an infraction is committed. In the leading decision on predatory pricing, ECS/AKZO, the Commission, in establishing the element of intent, pointed to the systematic offering of lower prices to customers of a rival undertaking, selective price cuts, exclusivity agreements, and special offers.[1063]

As far as the present writer is aware, the ECS/AKZO Case is the first opportunity the European Court has had to consider the concept of predatory pricing in EC competition law.[1064] This points to the rarity of such cases particularly in contrast to the number of anti-dumping investigations carried out each year by the Commission. However, the Court did not fully substantiate the Commission's original findings regarding intent. Rather the Court formulated a cost-based methodology to establish the presence of predatory pricing.

The Court held that pricing goods at below average variable costs (i.e. costs that vary in proportion to the quantity of production) by an undertaking in a dominant position seeking to eliminate a competitor is an abuse. A dominant undertaking could be presumed to have no interest in selling goods at below average variable cost unless such a pricing policy was intended

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[1063] ECS/AKZO, Commission Decision IV/30.698, O.J. L374/1 (1985); [1986] 3 CMLR 273.

[1064] AKZO Chemie BV v EC Commission Case 62/86 [1993] 5 CMLR 197. See also the analysis presented in N. Levy, "Case Comment on AKZO v EC Commission", (1992) 29:2 CMLR 415.

to eliminate a competitor and thereafter profit from its exit from the market.

But the Court seems to have confused the issue of intent when considering sales at below average total costs (i.e. variable costs plus fixed costs), but above average costs because, in such circumstances, it required proof of some predatory purpose. Since purpose involves intent, the Court did in fact establish an intent prerequisite where the pricing is at below average total costs. Indirectly, this confirms that the element of intent is required to establish predatory pricing in at least certain circumstances.

In a more recent decision, the European Commission attacked a Swedish company supplying aseptic packaging for certain liquid food-stuffs on the grounds, inter alia, that it had engaged in a general application of discriminatory pricing and ad hoc predatory pricing aimed at eliminating competitors.[1065] Among other abuses of its dominant position, the undertaking under investigation was found to have engaged in a general pricing policy of applying discriminatory pricing towards customers and ad hoc predatory pricing designed to eliminate competitors. The intention to indulge in such practices was derived from the behaviour of the company which involved the application of profits made in aseptic packaging in which it held a virtual monopoly to cover its losses on sales of other packaging in which there was competition.

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[1065] Tetra Pak II, Commission Decision IV/310.43, O.J. L72/1 (1992). See the judgment of the CFI in Tetra Pak Rausing v EC Commission, Case T83/89, Judgment of October 6, 1994.

### (3) Lack of Co-operation Inside the European Commission

From the perspective of internal co-ordination and co-operation within the Commission, there is clearly an element of disharmony between DG IC which conducts anti-dumping investigations and DG IV which conducts competition investigations. Neither directorate has the right to intervene in the work of the other even although often the investigations are closely related. Nor has either department the right to be consulted by the other, although as a matter of courtesy in fact both do so.[1066] The main point is that neither department has the authority to assert its views against the other.

Of course there are rare instances of co-operation between these directorates. The most notable example of co-operation on this basis occurred in the investigation into glycine originating from Japan. A Union producer of glycine lodged an anti-dumping complaint against two Japanese producers but in fact the Union producer held a dominant position itself in the Union market. This raised concerns that, if anti-dumping duties were imposed, these would have the effect of enhancing the dominant position of the Union producer. DG IV drew this factor to the attention of the anti-dumping investigators in DG IC and, as a result, the final anti-dumping duties imposed were levied at less than 50% of the margin of injury found to exist.[1067]

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[1066] See Disodium Carbonate From the USA [provisional measures], O.J. L83/8 (1995).

[1067] Glycine From Japan, Council Regulation (EEC) 2322/85, O.J. L218/1 (1985).

### (3) The Grant of Protection to European Union Industries

In common with their American counterparts, a number of Union industries have taken conspicuous advantage of the existence of the Union's trade protection laws to reduce the effect of international competition on their commercial activities.[1068]

It is in lobbying for the use of these measures that private interest groups appear to have the greatest influence over the shape of European Union trade policy. The influence of private groups in the formulation of general trade policy is not as direct as in the case of the United States since, again in general terms, within the Union, the somewhat byzantine and elaborate nature of the constitutional set up of the Union tends to discourage lobbying at the Union level in favour of placing pressure on national authorities.

Similarly, for a variety of reasons, Union industries tend to place considerably greater emphasis on anti-dumping measures than on the other measures of commercial defence. This is simply because protection under the countervailing laws is, as a matter of policy, more difficult to obtain within the Union. The Union prefers to provide relief through its trade remedy law in the form of anti-dumping measures as opposed to anti-subsidy or safeguard measures. Relief is relatively infrequently provided in either of these two forms. The same is true of measures adopted under the New Commercial Policy Instrument. But, in contrast, anti-dumping proceedings are relatively common and this has been the principal mechanism used by Union industries to

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[1068] E.A. Vermulst, "Dumping in the United States and the European Community: A Comparative Analysis", (1984) 10 Legal Issues in European Integration 103.

harass foreign businesses.

While there are many industries which have benefited from anti-dumping measures, the notable industries employing such strategies are the steel industries, the chemical industry and the consumer electronics industry. Of the anti-dumping measures imposed by the Union between 1980 and 1990, over half of these measures related to chemicals and allied products followed by consumer electronics and steel products. Other notable sectors given protection include mechanical machinery and textiles.[1069] It is therefore appropriate to examine at least two of these main industries in order to ascertain the exact nature of the commercial policies pursued by these industries to imports from non-Union countries.

(A) The Steel Industry

Steel production in the Union has traditionally held a special status mainly due to the fact that steel, together with coal, was one of the first sectors regulated at the Union level.[1070] The steel industry in the Union is characterised by a considerable degree of government intervention by both Member States and the Union. In the past, this intervention has taken two forms. First, there is a substantial amount of state ownership in the sector at national level. Second, a large volume of financial assistance is provided by the Union and national governments to ensure the continued

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[1069] European Commission, Ninth Annual Report of the Commission on the Community's Anti-Dumping and Anti-Subsidy Activities (1990), Annex H.

[1070] European Coal and Steel Community Treaty, signed in Paris on April 18, 1951. It should be noted that this agreement is due to expire in 2002 after which time the products covered by the agreement will be regulated under the EC Treaty.

survival of the industry.[1071] The future of the industry and the degree of protection it receives are therefore matters of considerable national interests to many national governments.

In addition to production of steel, the steel industry in the context which we are discussing, includes further-stage product manufacture. It includes first-stage and second-stage products such as steel wire, steel coils, steel tubes, welded sheet steel and galvanised sheet steel. For the purposes of examining the measures of protection granted to the steel industry, all these related products are included.

In general terms, from around 1975, the Union steel industry has found itself in severe economic difficulties. Among the factors blamed for its problems was the fact that the common market for steel is closely linked to the world market, as regards both exports and imports, and the prices of steel goods had progressively become more and more artificial.[1072] In response to this situation, the Commission took a number of internal measures to adjust trading conditions in the Union market.[1073] These measures essentially consisted of the introduction of guidance prices and mandatory minimum prices for certain steel products.[1074]

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[1071] European Commission, Second Survey on State Aids in the European Community (July 1990), Annex XB.

[1072] European Commission, Ninth General Report on the Activities of the European Community (1975), 172.

[1073] EC Bulletin, 10/3, Para. 2.1.17 (1977).

[1074] This price system under the steel arrangement was in fact challenged before the European Court but the Court upheld the legitimacy of the policy on the basis that the arrangement was the least harmful system that the Commission could adopt in the circumstances; see Rumi v EC Commission, Case 258/80 [1982] ECR 437.

This so-called 'anti-crisis' policy has been continued but, in addition, in 1979 the Union negotiated a number of bilateral import restriction agreements with the countries which exported steel to the Union.[1075] These bilateral restraint agreements have come to characterise the Union's external trade with third countries in steel products. However, there is little doubt that their existence stems from the threat of the imposition of anti-dumping measures in their absence.

The Union steel industry has therefore largely been shielded from the effects of international competition through a network of bilateral restrictions which allow the Union authorities to regulate supply and demand of steel products. Nevertheless, Union steel producers and manufacturers of later-stage products have made considerable use of the Union measures of administered protection particularly anti-dumping measures.

The profile of the use of measures of administered protection by the Union steel industry, in the broad sense of that term, is interesting for a number of reasons.

Most significantly, notwithstanding that different steel product manufacturers have different commercial interests, the lodging of anti-dumping complaints by manufacturers of different steel products can be broadly classified into three time periods, 1977-78, 1982 and 1991-92. This grouping raises suspicions of a concerted effort by the steel industry to obtain protection in the form of anti-dumping measures.

In the first period, between 1977 and 1978, anti-dumping petitions were lodged on behalf of producers of iron and

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[1075] European Commission, Twelfth General Report on the Activities of the European Community (1978), 251.

steel sheet[1076], iron and steel coils[1077], galvanised sheet steel[1078], pig iron[1079], steel and wire rod[1080], stainless steel bars[1081] and seamless steel tubes[1082]

It is interesting to observe that the countries subject to these investigations were predominantly the same, namely Australia, Brazil, Japan and the countries of Eastern Europe (Bulgaria, Czechoslovakia, the GDR, Hungary, Poland and Roumania). In virtually all of these investigations provisional duties were imposed and definitive measures taken in the majority of cases.

The strategy of the Union steel industry in seeking protection in this form therefore paid handsome

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[1076] Sheets and Plates of Iron and Steel From Australia, Bulgaria, Czechoslovakia, the GDR, Hungary, Japan, Poland, Roumania and Spain, O.J. C19/7 (1978); Sheets and Plates of Iron and Steel From Czechoslovakia, Japan, South Korea and Spain, O.J. C19/9 (1978).

[1077] Iron or Steel Coils From Australia, Bulgaria, Czechoslovakia, Hungary, Japan, Poland, South Korea, Spain and the USSR, O.J. C19/10 (1978); and Iron or Steel Coils From Greece, O.J. C311/4 (1978).

[1078] Galvanised Steel Sheets and Plates From Australia, Bulgaria, Canada, Czechoslovakia, the GDR, Japan, Poland and Spain, O.J. C19/7 (1978); Galvanised Steel Sheets and Plates From Finland, O.J. C27/3 (1978); and Galvanised Steel Sheets and Plates From Austria, O.J. C41/2 (1978).

[1079] Haematite Pig Iron From Brazil, O.J. C187/2 (1977); Haematite Pig Iron From Canada, O.J. C19/8 (1978); and Graphite Spheroidal Pig Iron From Brazil, O.J. C311/4 (1978).

[1080] Wire Rod From Australia, Czechoslovakia, Hungary, Japan, Poland and Spain, O.J. C19/11 (1978); and Alloy Steel Wire Rod From Spain, O.J. C48/3 (1979).

[1081] Stainless Steel Bars From Brazil, O.J. C317/3 (1979) [Anti-subsidy investigation].

[1082] Seamless Tubes of Non-Alloyed Steel From Spain, O.J. C264/2 (1979); and Seamless Steel Tubes From Spain, O.J. C264/2 (1979) [Anti-subsidy investigation].

dividends. But, the industry reaped an extra bonus when, as a result of the pressure imposed by the lodging of such a vast number of complaints, fifteen countries - representing 70% of Union steel imports - entered into 'arrangements' with the Union that may best be described as voluntary restraint agreements. These countries included, not surprisingly perhaps, Australia, Japan, and the countries of Eastern Europe, but not Brazil.[1083]

The express purpose of these arrangements was to establish a sufficiently strong price discipline for imports to prevent disruption of the Union market. In fact, these arrangements limited the amount of steel products being imported by requiring suppliers from these countries to abide by the principle of 'the preservation of traditional trade patterns'. In other words, imports were restricted to their 1976 levels with an allowance being made for forecasted falls in consumption.

These arrangements were amended in 1981 to allow anti-dumping proceedings to be initiated where products had been imported at prices that seriously and persistently undercut the established prices.[1084] This allowed the Commission to open investigations into alleged dumping where imports entered the Union at prices lower than the base prices. This amendment allowed a second salvo of anti-dumping complaints from Union steel producers in 1982. Other proceedings were brought against products from countries which did not have an arrangement with the Union.

In that year, petitions were lodged by producers of iron

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[1083] European Commission, Twelfth General Report on the Activities of the European Community, 251-52 (1979).

[1084] European Commission, Sixteenth General Report on the Activities of the European Community, 239 (1983).

and steel coils[1085] , sheets and plates of iron and steel[1086], welded steel and iron tubes[1087], sheet steel[1088], and steel tubes and pipes.[1089] Again the vast majority of these complaints successfully procured anti-dumping measures.

The resolution of these investigations was pursued in two ways. First, the existing arrangements with third countries were tightened to prevent the flow of imports at below the prices set by the Union with the threat of further duties in the event of non-compliance. Second, agreements were negotiated with those countries that were not parties to arrangements, in similar terms to those already in force with other states.

This framework of arrangements appears to have been relatively successful from a Union industry point of view. Notwithstanding a minor flurry of anti-dumping complaints between 1985 and 1986[1090], the industry did not feel compelled to lodge a substantial number of complaints until 1990.

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[1085] Iron or Steel Coils From Argentina, Brazil, Canada and Venezuela, O.J. C303/4 (1982).

[1086] Sheets and Plates of Iron or Steel From Brazil, O.J. C70/3 (1982).

[1087] Welded Steel or Iron Tubes From Roumania, O.J. C299/2 (1981).

[1088] Sheets and Plates of Iron or Steel From Brazil, O.J. C146/4 (1982) [Anti-subsidy investigation].

[1089] Tubes and Pipe Fittings From Spain, O.J. C142/3 (1983).

[1090] See Steel Wire Rod From Brazil, Portugal, Trinidad and Tobago and Venezuela, O.J. C48/2 (1985); Sheets of Plates of Steel or Iron From Yugoslavia, O.J. C38/3 (1986); Sheets of Plates of Steel or Iron From Mexico, O.J. C308/2 (1986); and Tubes and Pipe Fittings of Cast Iron From Brazil, Japan, Taiwan and Yugoslavia, O.J. C77/3 (1985).

However, in 1990, complaints were lodged against imports of semi-finished alloy steel[1091], bars of alloy steel[1092], welded wire mesh[1093] and wire rod[1094] while in 1991, petitioners were lodged in respect of pig iron[1095] and stainless steel tubes.[1096]

(B) Chemical Industry

Since 1980, in all but one year, anti-dumping investigations into chemical and allied products accounted for the greater volume of investigations opened by the Commission when take on a sector-specific basis. In fact, between 1980-82 and 1984-86, investigations into these products accounted for more than 40% of all investigations opened by the Commission[1097], although since 1987, the proportion of such proceedings has declined slightly to an annual level of around 30% of investigations.[1098] Trade in

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[1091] Semi-Finished Products of Alloy Steel From Turkey, O.J. C144/5 (1990); Semi-Finished Products of Alloy Steel From Brazil, O.J. C144/5 (1990).

[1092] Merchant Bars and Rods of Alloy Steel From Turkey, O.J. C144/4 (1990).

[1093] Welded Wire Mesh From Yugoslavia, O.J. C188/7 (1990).

[1094] Wire Rod From Brazil, O.J. C296/3 (1990); Wire Rod From Argentina, Egypt, Trinidad and Tobago, Turkey and Yugoslavia, O.J. C310/9 (1990).

[1095] Haematic Pig Iron From Turkey and the USSR, O.J. C246/9 (1991).

[1096] Seamless Steel Tubes From Hungary, Poland, Czechoslovakia and Yugoslavia, O.J. C321/7 (1991).

[1097] European Commission, Fifth Annual Report of the Commission on the Community's Anti-Dumping and Anti-Subsidy Activities, Annex 1, Com (88) 92 Final (1988).

[1098] European Commission, Tenth Annual Report of the Commission on the Community's Anti-Dumping and Anti-Subsidy Activities, Annex 1, Com (92) 716 Final (1992).

chemicals is therefore one of the most heavily regulated areas in terms of anti-dumping measures applied.

Analysis of the exact profile of Union industry activities in this area is complicated because of the large variety of chemical products affected. But, basically the target of the majority of such complaints have been basic chemical compounds (simple compounds of two or more elements) and tertiary chemical compounds (advanced compounds produced after first or second stage processing). Research-derived chemical products, such as pharmaceuticals and medicinal products are rarely the subject of such measures. Thus, it can be said with confidence that the use of anti-dumping complaints by the chemical industries has been concentrated in only one or two specific sectors of the industry.

Another interesting aspect of the use of such measures is that certain countries have been singled-out for especially harsh treatment. Complaints are most frequently launched against the countries of Eastern Europe, China and Korea. In the last four years, eleven investigations have been opened into exports of chemical compounds from China.[1099] Similarly, the Soviet Union[1100] and the Eastern European countries[1101] have

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[1099] Magnesite (Dead Burned) From China, O.J. C276/3 (1991); Magnesite (Caustic Burned) From China, O.J. C279/10 (1991); Dihydrostreptomyein From China and Japan, O.J. C186/33 (1990); Tungsten Ores and Concentrates From China, O.J. C2/5 (1989); Silicon Metal From China, O.J. C26/8 (1989); Barium Chloride From China and the GDR, O.J. C308/7 (1988); Tungstic Oxide and Acid From China, O.J. C322/6 1988); Tungsten Metal Powder From China and Korea, O.J. C322/6 (1988); Tungsten Carbide From China and Korea, O.J. C322/7 (1988); Ammonium Paratungstate From China and Korea, O.J. C322/4 (1988); and Calcium Metal From China and the USSR, O.J. C20/3 (1988).

[1100] Ferrochrome From Albania and the USSR, O.J. C252/11 (1990); Potassium Chloride From the USSR, O.J. C274/18 (1990); Potassium Permanganate From the USSR,

been particularly susceptible to attack.

There is also substantial evidence that in certain sectors of the industry, chemical companies have been lodging anti-dumping complaints against foreign importers in order to reinforce their position in the market and even, in some cases, as part of a strategy to establish price and production controls within the Union market contrary to Article 85(1) of the EC Treaty.[1102]

In production and marketing of three chemical products, we have the benefit of Commission anti-competition investigations which allow us to examine this phenomenon more closely. The conclusions of these investigations provide a basis for analysis of how, in some cases, chemical companies have employed anti-dumping complaints to capture greater control over the Union market by impeding foreign goods while themselves engaging in unfair commercial practices.[1103]

The first investigation concerned the production and sale of polyethylene. In December 1988, the Commission found a large number of companies guilty of operating a cartel for the production and distribution of this product throughout the Union during the period between

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O.J. C192/8 (1989); and Calcium Metal From China and the USSR, O.J. C20/3 (1988).

[1101] See for example, Methenamine From Bulgaria, the CSSR, Hungary, Poland, Roumania and Yugoslavia, O.J. C322/8 (1988); Ferrosilicon From Poland, O.J. C122/4 (1991); Artificial Corrundum From Yugoslavia, O.J. C159/5 (1990); Portland Cement From Yugoslavia, O.J. C149/4 (1989); and NPK Fertilizers From Hungary, Poland, Romania and Yugoslavia, O.J. C55/3 (1989).

[1102] See P.A. Messerlin, "Anti-Dumping Regulations or Pro-Cartel Law?", (1990) 13 World Economy 465.

[1103] LdPE, Commission Decision IV/31.866, O.J. L74/21 (1989).

1980 and 1985. The companies involved controlled around 90% of EC production capacity which accounted for approximately 50% of the demand in the Union market. Substantial fines were imposed by the Commission and the companies were ordered to desist in their practices.

In order to limit the volume of imports during this period, and thereby increase control and market share, the members of the cartel lodged anti-dumping complaints against the main suppliers of the product to the Union.[1104] These investigations were terminated by price undertakings from the produced alleged to have been dumping.[1105]

Ten companies found to have participated in the cartel by the Commission were parties to this anti-dumping complaint. More importantly, these ten companies accounted for the major proportion of production in the Union. It seems reasonably clear therefore that the use of anti-dumping measures had been part of a deliberate strategy of restraining imports in order to increase market share in the European Union.

The second investigation concerned the production of polyvinyl chloride (PVC). In March 1988, the Commission opened an investigation into the activities of the major producers of this chemical many of whom - BASF, Atochem, Hoechst, ICI and Shell - were also being investigated for anti-competitive practices in regard to the production and sale of polyethylene.

The Commission found fourteen European producers of PVC

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[1104] Polyethylene From Czechoslovakia, the GDR, Poland and the USSR, O.J. C230/2 (1982).

[1105] Polyethylene From Czechoslovakia, the GDR, Poland and the USSR, Commission Decision 83/248/EEC, O.J. L138/65 (1983).

products guilty of conducting a price and quota fixing cartel and issued a cease and desist order as well as imposing fines of 23,500,000 ECUs.[1106] The companies involved had controlled approximately 95% of Union production of the chemical and held 80% of the market share in the Union. The Commission decision in this case was in fact annulled by the Court of First Instance but only on the basis of infringements of essential procedural requirements by the Commission.[1107]

Again it is reasonably clear that the producers had abused the anti-dumping procedure by lodging a complaint against their main foreign competitors in order to regulate the flow of the product into the Union. This had taken the form of an anti-dumping complaint lodged in 1981 against four Eastern European producers.[1108] Provisional anti-dumping duties were imposed in one case and price undertakings accepted in the other three cases.[1109]

The third illustration of the chemical industry abusing the anti-dumping laws for anti-competitive motives occurred in relation to the chemical, soda ash. Two chemical companies were responsible for the vast proportion of EU production of this chemical. Both were found to have engaged in anti-competitive practices over

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[1106] PVC, Commission Decision IV/31.865, O.J. L74/21 (1989).

[1107] Re The PVC Cartel: BASF AG and Others v EC Commission, Case 79/89 [1992] 4 CMLR 357.

[1108] Polyvinyl Chloride From Czechoslovakia, the GDR, Hungary and Romania, O.J. C332/2 (1981).

[1109] Polyvinyl Chloride From Czechoslovakia, the GDR, Hungary and Romania, O.J. L274/15 (1982).

a period between 1980 and 1990.[1110] Both companies received substantial fines and were order to desist from such practices.

During this period, both companies had jointly lodged, and secured, anti-dumping measures against their main United States competitors.[1111] The Commission's decision expressly found that the companies had used anti-dumping measures to shield their anti-competitive practices from international competition. Nevertheless, despite this finding, the European Commission subsequently granted further protection in the form of anti-dumping measures despite submissions on behalf of the United States companies that these producers had been the probable cause of the injury to the EU industry and to EU consumers.[1112]

### (4) The Limits of International Trade Regulation - The Reluctance of the European Court to Incorporate International Obligations into European Union law

As we have seen in the context of United States trade law[1113], refusal to allow judicial review of national laws (and in this case supranational laws) acts against the interests of foreign producers and exporters and favours those of national producers. Failure to incorporate, or to incorporate properly, also creates an

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[1110] Soda Ash-Solvay, ICI, Commission Decision IV/33.133-A, O.J. L152/1 (1991); Soda Ash-Solvay, CFK, Commission Decision IV/33.133-B, O.J. L152/16 (1991); Soda Ash-Solvay, Commission Decision IV/33.133C, O.J. L152/21 (1991); and Soda Ash-ICI, Commission Decision IV/33.133D, O.J. L152/40 (1991).

[1111] Disodium Carbonate from the USA, O.J. L206/15 (1984), terminated on review, O.J. C64/6 (1989).

[1112] Disodium Carbonate from the USA [preliminary measures], O.J. L83/8 (1995).

[1113] See text supra, pp.410-422.

asymmetry in legal rights between domestic and foreign interested parties. It is, of course, a fundamental principle of international law that states must ensure that national laws do not conflict with their international obligations.[1114] Conflicting national laws cannot be used as a defence for the evasion of international law.

But between the black and white of implementation and non-implementation of international obligations lies a twilight area where imprecise international obligations can be incorporated into national laws creating considerable discretion on the part of the national authorities. This discretion would be limited by allowing review of national laws against the relevant international standards at the request of private individuals.

Within the European Union, direct enforcement of international obligations would also produce effects other than rectifying any asymmetry caused by non-incorporation, or incomplete incorporation, of international obligations. For example, it is more likely that European Union institutions will pay more attention to international commitments when framing internal measures particularly those having an impact on the international market-place such as measures to implement the Common Agricultural Policy.[1115]

If international obligations prevail over measures of internal European Union law, Union institutions would be

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[1114] See, most recently, UN Headquarters Agreement Case, (1988) ICJ Rep 3.

[1115] See J.H.J. Bourgeois, "Trade Policy-Making Institutions and Procedures in the European Community", in M. Hilf & E-U Petersmann (eds), National Constitutions and International Economic Law (1993), 175.

forced to take account of such obligations because any internal measure could be declared null and void by the European Court in the event that it is found incompatible with international rules. This, of course, assumes that the European Court would be prepared to adopt such a policy towards the issue of supremacy between international and European Union laws. If, on the other hand, the Court of Justice declared that European Union legislation prevailed over international obligations entered into by the Union, this would seriously undermine the normative effect of these obligations within the internal Union legal order.

While the EC Treaty prescribes many of the rights and duties existing at the European Union level, it fails to address expressly the issue of the hierarchy among the different types and forms of law that interact with European Union law.[1116] It has been left to the Court of Justice to resolve the question of the effect of international obligations in the Union legal order.

This hierarchy among the different forms of law - particularly between European Union law and international law - is critical from a trade policy perspective because the effect given to international obligations in the internal Union law plays a significant part in influencing the shape of trade policy. Unfortunately, to date, the Court has not ruled decisively one way or another on this matter. This has been quite simply because the issue itself is not black and white, but rather involves a number of complex

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[1116] See generally, J.H.J. Bourgeois, "Effects of International Agreements in European Community Law", (1984) 82 Mich Law Review 1250-1273; T.C. Hartley, "International Agreements and the Community Legal System", (198 ) 8 EL Rev 383; and Volker, "The Direct Effect of International Agreements in the Community's Legal Order", (1983) 9/1 LIEI 131.

constitutional issues including deciding the hierarchy of sources of Union law.

It can, however, be said that the policy of the Court towards the application of international obligations varies according to the nature of the obligation itself. An analysis of the decisions of the Court can assist determine the course of action adopted by the Court in the event of an inconsistency between internal Union law, or a national law for that matter, and a Union international obligation. But, this task has been made particularly difficult in light of the inconsistent signals that the Court has been sending out particularly in its most recent decisions.

The approach of the Court towards the application of the General Agreement and the 1979 Anti-dumping Agreement has been markedly different and for that reason it is most prudent to examine the policy of the Court towards these agreements separately. As a related matter, in this discussion we shall also consider very briefly the status that will eventually be given to the new agreements which have recently been negotiated as part of the Uruguay Round discussions.

(A) The Status of the General Agreement in European Union law

The Court of Justice has considered whether the General Agreement confers directly enforceable rights on at least five separate occasions.[1117] On each occasion the Court has demonstrated a manifest reluctance to render any of the GATT provisions directly enforceable in European Union law despite the participation of all Member States, and the Union itself, in the

[1117] See J. Steenbergen, "The Status of GATT in Community Law", (1981) 5 JWTL 337.

organisation.[1118]

The first attempt to invoke the GATT involved a number of European Union regulations which were being challenged before a Dutch court on the ground that they infringed Article XI of the GATT which concerns the general elimination of quantitative restrictions.[1119] The case was referred to the European Court under Article 177 to allow the Court to decide whether the validity of the regulations was affected by reason of the fact that their terms were contrary to international law.[1120]

Two preconditions were declared by the Court to be necessary for European Union measures to be held invalid:

(a) the European Union must be legally bound by the treaty provision in question; and
(b) where the incompatibility of a provision of Union law is alleged in a national court, it is necessary that the provision of international law is capable of 'conferring rights on citizens of the Union which they can invoke' in such courts.

While the Court was prepared to accept that the General Agreement was binding on the European Union because the Union exercised the powers originally conferred on the

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[1118] See E-U. Petersmann, "Application of the GATT by the Court of Justice of the European Communities", (1983) CML Rev 397.

[1119] International Fruit Company v Produktschap voor Groenten en Fruit, Cases 21-24/72 [1972] ECR 1219; [1975] 2 CMLR 1.

[1120] On this case in general, see M. Maresceau, "The GATT in the Case Law of the ECJ", in M Hilf et al., The European Community and the GATT (1986) 107-126.

individual Member States, it did not accept that the GATT conferred rights on individual citizens.

In deciding whether the GATT was capable of clear, unqualified and unconditional application, the Court examined two factors; the spirit and general scheme of the GATT, together with the nature of the individual terms being relied on by the applicants. After an examination of these elements, the Court highlighted aspects of the General Agreement which implied that it was not capable of conferring individual rights. In particular, it focused on the preamble which cited the need to secure 'reciprocal and mutually advantageous arrangements', and continued to point to the 'flexibility' of a number of its provisions including those terms relating to derogation, consultations and dispute-settlement.

It concluded that these factors were sufficient to establish that Article XI was not capable of conferring rights on private individuals which could be relied on at the European Union level. Consequently, the validity of the European Union regulations could not be contested against this provision of the GATT.

The methodology employed by the Court in arriving at this decision has been criticised by a number of commentators.[1121] There seems no reason to dwell on these factors since the Court has clearly decided that this policy will not be reversed. This was made clear in the subsequent cases which followed this decision. For example, in Schluter v Hauptzollamt Lorrach[1122], the argument that compensatory taxes imposed by the Union on

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[1121] See M. Waelbroeck, "Effect of GATT Within the Legal Order of the EEC", (1974) 8 JWTL 614; Petersmann, supra note , 415-439.

[1122] Case 9/73, [1973] ECR 1135.

imports from third countries were incompatible with Article II of the GATT was rejected on broadly similar grounds.

In the early 1980s, efforts to have the GATT declared part of Union law were revived when three separate judgments were issued by the Court, each involving different factual circumstances. These cases merely reaffirmed the position adopted earlier by the Court.[1123] So, at this point, the legal authority of the provisions of the GATT in European Union law was confined to that of an aid to interpretation of Union measures.[1124]

Recently the European Court modified its position slightly in this connection. This change of policy occurred in EEC Seed Crushers' and Oil Processors' Federation v EC Commission (known as the Fediol III Case).[1125] In 1986, a trade association lodged a complaint with the Commission under the New Commercial Policy Instrument of the Union alleging the existence of certain illicit commercial practices by the government of Argentina concerning exports of soya cake to the European Union. Two practices were considered illicit by the association, namely a scheme of differential charges on exports of soya products which discriminated among certain products and a series of quantitative restrictions. The facts of the case have been considered

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[1123] These cases were Societa Italiana Per L'Oleodotto Transalpino v Ministero delle Finanze, Case 266/81 [1983] ECR 731; Amministrazione delle Finanze dello Stato v Societa Petrolifera Italiana, Case 267-269/81 [1983] ECR 801; and Compagnia Singer and Geigy v Amministrazione delle Finanze dello Stato, Cases 290-291/81 [1983] ECR 847.

[1124] Interfood GmbH v Hauptzollamt Hamburg, Case 92/71 [1972] ECR 231.

[1125] Case 70/87 [1991] 2 CMLR 489.

in more detail at an earlier point in this study.[1126]

The Commission rejected the complaint on two grounds: (a) the levying of differential duties was not contrary to any of the rules of international law relied on by the complainers; and (b) the complaint disclosed no evidence of the existence of the alleged quantitative restrictions. In response, the applicants challenged the decision on the ground, inter alia, that the charging of differential rates was contrary to international law and in particular Articles III, XI, XX and XXIII of the GATT.

In its judgment, the Court made a clear distinction between private individuals relying on the GATT to establish Union rights which can be invoked before courts, thereby sustaining its earlier decisions, and relying on the terms of the GATT to establish the existence of an illicit practice contrary to the rules of international law, of which the GATT forms part. In fact, the Court considered all three factors which were considered a bar to direct effect - insufficient precision in the rules, too much flexibility, and the existence of a special dispute settlement procedure - before concluding that these factors do not 'prevent the Court from interpreting and applying the rules of the GATT with reference to a given case (under the NCPI), in order to establish whether certain specific commercial practices should be considered incompatible with those rules.'[1127]

The Court then proceeded to interpret all four provisions of the GATT which were alleged to be incompatible with the Argentinean measures. While the

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[1126] See text supra, p.341-342.

[1127] Para 20, supra note 1125.

Court rejected all four submissions by the applicants, the important point is that it engaged in an interpretation exercise for all four rules before dismissing the application. It is interesting to observe that, although in earlier cases the Court held that Article XXIII of the GATT - dispute settlement - was a factor which militated against granting direct effect to all provisions of the GATT, in this decision the Court in fact interpreted the express terms of this provision in order to determine whether the compliant was justified.

In an even more recent case, the European Court again denied the general direct effect of GATT provisions but raised the possibility of two exceptions. In Germany v EC Council [Re: Imports of Bananas][1128], the Court considered, inter alia, whether an adverse panel ruling[1129] could be enforced against the European Union albeit at the request of a Member State. While again affirming the general principle of non-enforceability, the European Court did state GATT provisions may be enforced in cases where 'the Community intended to implement a particular obligation entered into within the framework of the GATT or if the Community expressly refers to specific provisions of the GATT.' Unfortunately, the Court elaborated no further on this point and gave no examples by way of illustration.

The final conclusion of this examination is simply that a considerable limitation applies on the impact of the GATT in the formulation of Union trade policy. While the Court has accepted that the GATT is binding on the Union

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[1128] Case C280/93, Judgment of October 5, 1994, not yet reported.

[1129] The report had not been adopted by the GATT Council; see EEC Import Regime for Bananas, GATT Doc. DS38/R (1993).

and Member States, it is not prepared to allow individual measures of European Union law to be challenged on the ground of incompatibility with the provisions of the GATT.

As a limitation on the right of the European Union to enact internal measures, the GATT has no effect and the European Union can act with impunity towards its obligations under the General Agreement. There is little doubt that this is an unsatisfactory situation.

(B) The Tokyo Round Codes

In its measure of December 10, 1979, the Council of Ministers 'approved' the Tokyo Round Codes which were included as an annex and authorised the President of the Council and other Council representatives 'to take such steps as are required to bind the European Economic Community'.[1130] According to Article 228 of the EC Treaty, as a result the agreements became binding on the institutions of the European Union and form an integral part of Union law without the need for transformation. This contrasts with the incorporation of the Codes in United States law which required the Trade Agreements Act of 1979. While the American legislation is specifically expressed to be the full measure of the rights which may be exercised by private individuals by virtue of the Codes, the position of these agreements in European Union law is considerably more vague.

True, the participation of the Union in the final act of the Round subsequently required a number of amendments and modifications to existing European Union measures. For example, the Union's anti-dumping and anti-subsidy legislation was amended in 1979 to take into account of

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[1130] Council Regulation (EEC) 3017/79, O.J. L339/1 (1979).

the changes brought into effect by the Subsidies Code and the Anti-dumping Code.

Nevertheless, there is nothing in this legislation to suggest that it is the absolute measure of individual's rights under the underlying treaties. In other words, it remains possible that, in the event of an inconsistency between a European Union measure and the obligations contained in one of the MTN texts, private individuals may be permitted to challenge the Union measure.[1131] Inconsistencies may arise either because the measure is incompatible with the terms of the underlying agreement, because it fails to truly reflect the relevant obligations or because administrative practices differ in some respects from the international rules.

It was the policy of the European Union that implementing legislation was only required where the provisions of an agreement were too imprecise to permit effective administration of obligations although any new rules drafted on the basis of such provisions were required to remain true to the original obligations. In addition to anti-dumping and anti-subsidy, Union legislation was also required to implement the Customs Valuation Code[1132] and the Technical Standards Code.[1133]

To successfully challenge the validity of any Union measure concerning trade policy, it remains necessary to satisfy the conditions elaborated by the Court for the direct effect of Union treaties. Accordingly, this will

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[1131] J.H.J. Bourgeois, "The Tokyo Round Agreements on Technical Barriers and on Government Procurement in International and EEC Perspective", (1982) 19 CML Rev., 5.

[1132] Council Regulation (EEC) 3000/79, O.J. L342/1 (1979).

[1133] Council Decision 80/45/EEC, O.J. L14/36 (1980).

depend on whether the nature and contents of the obligations entered into allow for such an interpretation, taking into account the spirit, general scheme and the terms of the particular agreement being relied on. In a number of instances, the officials of European Union institutions have implied that judicial review of Union legislation against the Anti-Dumping Code may be permitted.

Commission officials themselves consider that the anti-dumping legislation must be applied in a manner that is compatible with the Code.[1134] If the Code is precise on a particular point, the Commission will endeavour to respect its terms. While this is not the same as a legal challenge being made by an applicant who considers a particular investigation to have been handled in a manner incompatible with the terms of the Code it does indicate that the Commission officials are wary of taking any course of action inconsistent with the Code.

The policy of the Commission has been confirmed in at least one case. In an appeal against the imposition of anti-dumping duties, the reporting Advocate-General commented that:

> 'the Commission confirmed, in answer to a question put by myself, that it did in fact consider itself to be bound by the GATT anti-dumping rules'[1135]

The Court itself has in fact been asked to rule whether Commission anti-dumping practices are compatible with

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[1134] Discussions between the author and Alistair Stewart, Chef d'Unite, DG IC2, European Commission, November 20, 1992.

[1135] Opinion of Advocate-General VerLoren van Themaat in Gerlach & Co BV v Minister for Economic Affairs, Case 239/84 [1986] 3 CMLR 30, 33-34.

the Anti-dumping Code in at least four separate cases yet has managed successfully to evade the issue in each of its judgments.[1136]

The first concerns a case brought by Japanese producers alleging that the Commission was required to implement Article 2(3)(b)(ii) of Regulation 2423/88 in a manner consistent with Article 2(4) of the Anti-dumping Code.[1137] The Commission investigation concerned imports of compact disc players from Korea and the appeal was based on the contention that, in establishing normal value by the constructed value technique, profit added should be confined to the profits realised on sales of products of the same general category in the domestic market.

After analyzing the practice of the Commission during the investigation, the Court subsequently held that:

> 'Article 2(3)(b)(ii) of the basic regulation complies with Article 2(4) of the 1979 Anti-dumping Code inasmuch as it does not disregard the spirit of the latter provision but simply specifies, as regards the different situations which may arise in practice, the reasonable methods of calculating the constructed normal value.'[1138]

In other words, where there is ambiguity in the interpretation of a particular provision, as long as the Union regulation did not disregard the spirit of the Code, the measure will not be declared non-applicable.

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[1136] See generally, F.C. De La Torre, "The Status of the GATT in EEC Law: Some New Developments", (1992) 26:5 JWT 35.

[1137] Goldstar Company Limited v EC Council, Case 105/90 [1992] ECR 667, [1992] 1 CMLR 996.

[1138] Ibid, 1025.

Of course this implies that if the measure does infringe the spirit, the Court would be prepared to accept that the provisions of the Code should prevail. Or does it?

The second case is equally important from the point of view of enforcing the Tokyo Round Codes in Union law and relates to a complaint again by a Japanese producer this time alleging procedural violations by the Commission during its investigation.[1139] The complaint involved a challenge to a Council regulation imposing definitive anti-dumping duties on dot matrix printers from Japan.[1140]

Counsel for the applicants argued that the constructed value method prescribed in Article 2(3)(b)(ii) of the basic regulation violated Articles 2(4) and 2(6) of the Code to which the Council argued that the Code, like the GATT itself, had no direct effect and therefore could not be relied on by the applicants. The Court rejected the Council's argument that the applicants were claiming direct effect and found that the appeal was based on the legality of a provision of the basic regulation.

However, the Court held that the provision being challenged did not violate the terms of the Code because it amounted to a reasonable interpretation of the terms of the Code.

The most explicit confirmation that judicial review of an anti-dumping regulation against the 1979 Code was

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[1139] Nakajima All Precision Co v EC Council Case C69/89 [1991] ECR I 2069.

[1140] See E.A. Vermulst & J.J. Hooijer, "Case Comment: Nakajima All Precision Co v EC Council", (1992) 29:2 CML Rev 380.

given in NMB (Deutschland) GmbH v EC Commission.[1141] The applicants sought judicial review of an anti-dumping measure on the ground that it was incompatible with the 1979 Agreement. The Commission objected to the admissibility of the application arguing that review on such grounds was not possible.

This argument was rejected by the Court which declared that:

> 'As regards the alleged infringements of the GATT Anti-Dumping Code, it should be noted that...such an infringement may be pleaded for the purposes of review of the legality of the basic Union regulation'.

This is an explicit endorsement that anti-dumping measures, and even the basic regulation itself, may be attacked if it is incompatible with the terms of the Code.

There has only been one case in which the Court rejected the proposition that measures must be interpreted in accordance with the GATT Code which really serves to obscure the exact legal position. In response to an argument for applicants that the previous 1984 basic regulation must be construed in light of the GATT and the Code, the Court replied with the following observation:

> '[The applicant] maintains that Regulation 2176/84 must be interpreted in accordance with the General Agreement on Tariffs and Trade and the 1979 Anti-dumping Code, which require a fair comparison to be made in order to establish the existence of

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[1141] Case C188/88 [1992] ECR I 1689, [1992] 3 CMLR 80.

dumping. That argument cannot be accepted.'[1142]

This rather cursory statement is of little value to use in trying to unravel the mystery surrounding the legal status of the 1979 Code in Union law. That this statement is unsupported with rational argument severely weakens its credibility especially in light of the other recent statements made by the Court.

(C) The Uruguay Round Agreements

Implementation of the Final Act embodying the results of the Uruguay Round on multilateral trade negotiations required considerable amendments to be made to existing European Union legislation. The agreements relating to rules of origin, preshipment inspection, technical barriers to trade, import licensing procedures, customs valuation and government procurement, as well as those relating to anti-dumping and anti-subsidies, contain different rules from those in the existing European Union measures.

The Commission first published its proposal for the implementation of the Uruguay Round results.[1143] It was the Commission's view that the European Union has the 'requisite overall competence to undertake the international commitments' contained in the Final Act. This view was derived from the argument that, while some of the instruments contained in the Final Act have implications in other areas of concern, all the instruments have as their purpose the regulation of various aspects of international trade for which the EU

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[1142] Sharp Corporation v EC Council, Case 179/87 [1992] 2 CMLR 415.

[1143] European Commission, Proposal for a Council Decision Concerning the Conclusion of the Results of the Uruguay Round MTNs, COM (94) 143 Final (April 1994).

has exclusive competence under Article 113 of the EC Treaty (and Article 95 of the ECSC Treaty).

Although this is the position adopted by the European Commission, a number of Member States, including the United Kingdom and France, challenged this interpretation claiming that certain instruments regulate matters falling outside the scope of Article 113. To settle this dispute, the Commission requested an Opinion from the European Court on the competence of the EU to conclude the WTO Agreement and, in particular, the General Agreement in Trade in Services and the Agreement on Trade-Related Aspects of Intellectual Property Rights.[1144] Once the opinion had been issued, the Council adopted a decision approving the texts of the WTO Agreement with regard to that portion of the agreements which fell within the competence of the European Community.[1145] Each Member State was therefore left to approve the remaining portions of the agreements which fell within their competence.

This confusing situation leads to complications when deciding whether the WTO Agreement can be given direct effect at the request of private individuals. The actual text of the final Council decision states that:

> 'The Agreement establishing the WTO, including the Annexes thereto, is not susceptible to being directly invoked in Community or Member States' courts.'

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[1144] In Re: Competence of the Community to Conclude International Agreements Concerning Services and the Protection of Intellectual Property Rights, Opinion 1/94 [1995] 1 CMLR 205.

[1145] Council Decision 94/800/EC, December 22, 1994, O.J. L336/1 (1994).

This prohibition is less emphatic than the original Commission proposal[1146] but nevertheless the impact is clear; it is an attempt to forestall the possibility of private individuals relying on the terms of the Agreement to mount a challenge against Community and national measures. Whether the European Court will accept this principle depends on two factors. First, whether or not, as a general principle, the Eurpopean Union can act illegally under international law and, in particular, adopt measures inconsistent with its WTO obligations. Second, there is the issue of whether the Court would permit national governments to enact illegal measures under the WTO rules and be able to tiotally evade judicial review at the EU level because of the bar to proceedings created by this provision. The matter is therefore far from being resolved.[1147]

(D) Tentative observations

The United States and the European Union, as signatories to the various GATT Codes, have selected different methods for incorporating the obligations contained in these agreements into their domestic legal systems. More importantly, the United States has enacted legislation expressly prohibiting private individuals from relying on the terms of the Code to establish rights in United States law. There is no scope for judicial review of the implementing legislation against the precise terms of the Codes. To this extent, the United States has taken an extreme dualist posture with regard to the ratification of the texts.

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[1146] Recital 8 of the Preamble, ibid.

[1147] See generally, F. Castillo de la Torre, "The Status of GATT in EC Law Revisited: The Consequences of the Judgment on the Banana Import Regime for the Enforcement of the Uruguay Round Agreements", (1995) 29:1 JWT 5.

The European Union, on the other hand, incorporated the Codes through a decision. This was not a typical course of action for the Union to take as regards multilateral agreements and the decision must be seen sui generis, and not as a precedent. To a certain extent, this course has created a number of unique problems in ascertaining the exact status of the Codes in Union law. However, as a general statement, this procedure does not affect the legal validity of the Codes as an integral element of Union law. If the conditions for direct effect can be established, there is no logical impediment to prevent the direct enforcement of the terms of these agreements at the Union level.

True, the issue has never been satisfactorily resolved by a decision of the Court. But this does not necessarily imply that judicial review of Union legislation against the obligations contained in a Code is incompetent. It depends to a large extent on the exact nature of the provision itself. As a result, it is possible that the Codes may be used to challenge national legislation of Member States and certain Union measures.

The same will not be true for the agreements negotiated as part and parcel of the Uruguay Round. Further, the measures which may be challenged remain limited and, for example, it is unlikely that the European Court would find acceptable that a provision of the founding Union Treaties is void for being incompatible with an international obligation of the European Union.

**(5) Observations**

The institutional framework inside the European Union for the formulation of the Common Commercial Policy is the key to understanding the lack of normative influence

of international obligations on the final content of that policy. This framework is a mechanism which allows the various factors influencing the shape of the policy to be hammered into a final position. Its form is critical in identifying which factors will be given the greatest degree of priority and those which become diluted or side-lined in the competition of interests.

Article 113 of the EC Treaty, even as amended by the Treaty on European Union, contains only the loosest outline for the formulation of policy. The European Commission is empowered to submit proposals to the Council for implementation of the CCP, to negotiate international agreements and to administer the commercial defence measures. Inside the European Commission, each of these tasks is performed by separate departments and units within DG1 which habitually ignore the interests of other department. Hence, even at the basic level of policy formulation, there is incoherence which cannot be corrected even by the overall supervision of the cabinets of the two Commissioners responsible for external relations.

The decision-making process grants the Council of Ministers absolute control over the final adoption of proposed measures in almost all areas of policy (the notable exception being the adoption of provisional anti-dumping measures). Here the control exercised by the Council over the Commission does not extend only to the power of adoption but also through strict control of negotiating mandates and the various committees composed of Member States. Both these techniques allow the Council (through Member State representatives) to have two opportunities to influence the final content of measures. Hence, the fingerprints of the Member States normally cover proposed measures even before these are considered by the Council itself where again the Member

States can make their views know in a formal manner.

Once a proposed measure reaches the Council, the competing interests of Member States are again manifested. We have seen this competition in its most naked form in the reform of the Common Agricultural Policy and the compromise necessary for the acceptance of the Uruguay Round Final Act. Both occasions provide evidence of the potency of Member State national interests in the process.

At a more formal level, unquestionably the voting requirements for the adoption of particular measures play a significant role in the final content of the policy. Member State influence is weakest where there is voting by simple majority, for example, now in the case of the adoption of definitive anti-dumping measures. On the other hand, the negotiation and approval of international agreements pursuant to the objectives specified in Article 113 requires a qualified majority where the agreement is concluded by the European Union acting alone.[1148] Here, a consensus for adoption of a policy measure - albeit in the form of an international agreement - is more difficult to secure.

Other than the competition between Member States and the European Union agencies, most notably the Commission, there is the plethora of differing interests impacting on the decision-making process. Crudely, these can be grouped as follows: (a) national interests of Member States; (b) domestic pressures imposed on the governments of Member States; (c) European Union industries; (d) and interested private parties. In very broad terms, if these interests or pressures were to be ranked in terms of potency, this ranking would proceed

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[1148] Article 114, EC Treaty, as amended by The Treaty on European Union.

from (a) to (d). This spectrum of interests is both diverse and divisive. Nevertheless, channels are made available to all these interest groups in the decision-making process facilitating the formulation of the CCP.

The only normative influence of international obligations on this process originates from two sources: (a) the European Commission formulating proposals or agreeing international agreements in a manner consistent with international commitments; and (b) Member States voicing concerns over consistency vis-a-vis the European Commission on the one hand and other Member States on the other hand. In the latter case, the raising of such concerns is rarely for altruistic reasons and is, more commonly, for the purpose of promoting competing national interests over those of other Member States.

The institutional framework acts as a filter for these competing interests. The strongest of these (probably European Union and Member State interests) prevail over the others. Since the influence of international obligations is only actively promoted in an indirect manner, the institutional process fails adequately to protect their enforcement. The result is the formulation of a Common Commercial Policy which frequently conflicts with the international obligations of the European Union and produces the consequent adverse rulings of the GATT panels and provokes the ire of the United States.

Leaving aside the complications caused by the inadequate institutional structure, the influence of international obligations is also mitigated by the influence of other European Union policies on the formulation of the Common Commercial Policy. The European Community, and now the European Union, was established on the premise that Community-wide policies were essential to promote the objectives of the organisation. Hence, policies such as

the Common Agricultural Policy, competition policy, and latterly the single internal market programme, have become ensconced within this structure. Promoting the objectives of these policies, and others, is of paramount importance to the European Union agencies.

This competition of policy objectives necessarily implies a prioritisation of aims and goals. The purpose of each of these policies is distinct although occasionally there are instances of overlap or conflict. In this situation, mechanisms for co-operation and ensuring compatibility among policy objectives are critical. These mechanisms must also permit the taking into account of international obligations or these commitments will be subsumed and submerged beneath the pressures exerted by the other policies.

Inside the European Union, there is no effective co-ordination in the formulation of different policies. Separate Directorate-Generals have responsibility for the administration of external policy (DG I), competition policy (DG IV), the CAP (DG VI) and the single internal market programme (DG III). From the personal experience of the writer, there are no formal co-operation structure between these departments and the ad hoc consultation meetings which take place to facilitate harmonisation are virtually ineffective. While proposed measures are circulated to the cabinets of all the Commissioners, in conformity with the Commission's own internal procedures, it is normally too late for an interested Commissioner to influence the content of another Directorate-General's proposed measures. Further, the staff administering each cabinet is too small effectively to review all proposed measures or policies which impinge on the responsibilities of their Commissioners.

The result is that final policy measures are rarely co-ordinated. For example, anti-dumping measures are adopted after only cursory discussions with the departments responsible for competition policy, the internal market programme or, most importantly, industrial development policy. Similarly, decisions on competition matters are rarely made after consultations with other interested Directorate-generals. Hence, there is an almost complete break-down in attempts to introduce co-ordination among these different areas of European Union responsibility.

This lack of co-operation originates within the Commission but the Council of Ministers, which is the organ responsible for the adoption of most measures and policies, does not perform any over supervisory function to ensure compatibility. In fact, within this organ, it is the interests of national governments which prevail and hence the situation is exacerbated as the element of Member State interest comes into play.

If the decision-making apparatus of the European Union is unable to co-ordinate its own internal policies, it is not surprising that it is unable to ensure compliance with its international obligations. There is no formal procedure within the Commission or the Council of Ministers which ensures review of decisions and policies for compatibility with international commitments. Further, the administrative staff of these institutions are composed of many professions other than lawyers and even the staff with legal qualifications are not always instructed to apply international law when drafting measures or formulating policy.

The sole mechanism for ensuring compliance with the international rules is by application to the European Court and now the Court of First Instance. Even this

procedure has limitations. The standing requirements, as we shall see later[1149], often operate to prevent private interested parties from challenging measures in the European Court for consistency with EU international obligations. Similarly, the European Court has not been prepared unconditionally to review EU measures in light of the rules of international law. Conditions and special requirements must be fulfilled before an international obligation is given effect in European Union law. At the same time, the exact hierarchy of obligations within the European Union legal system is not crystal clear and it is doubtful whether the European Court would declare a measure of European Union constitutional law inapplicable due to a conflict with a rule of international law.

The refusal of the European Court to give absolute effect to rules of international law also have particular repercussions in the area of trade policy and the operation of the Common Commercial Policy. The most important repercussion is that this refusal eliminates any effective counterbalance to protect the position of foreign producers and exporters from abusive behaviour by European Union agencies. On the whole, by denying the complete application of international rules inside the European Union legal system these parties are placed at a disadvantage and in the unenviable position of being unable to defend their position against illegal European Union measures.

While the European Court has in the past indicated a partial willingness to give effect to some of the obligations contained in the Tokyo Round Code, this has had an illusionary effect. Foreign producers or exporters are rarely successful in challenging EU

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[1149] See text, infra, pp.951-960.

measures against international standards. Even if they are successful in establishing standing, the Court has been unwilling to accept their arguments. On the whole, the Court has supported the European Commission in most cases and granted the Commission substantial discretion to administer the CCP.

In any event, the prospect of challenging European Union measures against international standards has substantially deteriorated now that Council decision approving the WTO Agreement has been adopted. The measure clearly envisages a complete prohibition on private parties (mostly foreign producers or exporters) from relying on the terms of the agreements to challenge EU measures.

## PART D

# THE TRADE PROTECTION LAWS OF THE UNITED STATES AND THE EUROPEAN UNION IN LIGHT OF THE INTERNATIONAL RULES AND OBLIGATIONS

## 8 Abuse of Anti-Dumping and Countervailing Duty Measures by the United States

During the period being investigated in this thesis, the United States was manifestly guilty of abusing the international rules on dumping and countervailing measures by engaging in two separate practices. First, while the underlying framework of U.S. anti-dumping and countervailing duty laws appeared to equate to the general international principles, it enacted numerous rules, particularly since 1979, which were blatantly inconsistent with the international standards. This illegal behaviour was compounded by administrative practices which also fly in the face of the spirit, if not the letter, of international law.

The same country also took advantage of almost every loophole or deficiency in the international system of regulation to liberalise its anti-dumping and countervailing laws to make available relief to its own domestic industries even although, in numerous cases, there was no credible injury caused by foreign imports. It also frequently interpreted the international rules in such a manner as to nullify any normative impact that international rules might have had on its behaviour. The United States must therefore face three charges.

First, it actively promoted and encouraged the use of both anti-dumping and countervailing measures by domestic industries even when such relief was not justified under the international standards. In addition, it was directly responsible for deliberate laxity in the application and administration of these laws. Finally, it was guilty of complicity, along with its own domestic industries, by deliberately engineering its own laws to allow its industries to disrupt the flow of foreign goods onto its markets and interfering with

the effective distribution and supply of foreign goods.

Before preceding to examine the United States anti-dumping and countervailing duty measures in detail, it is worthwhile considering for a moment why these two separate measures have come to be perceived as tandem measures in U.S. law. While together they constitute the two main components in the policy of administered protectionism operated by the United States during this period, there are a number of notable conceptual differences between the two mechanisms which should be noted.

It must be pointed out that anti-dumping measures are intended to counter purely private practices which rarely involve foreign governments at any level. In contrast to subsidisation which involves government intervention, dumping is a private commercial act. In fact, dumping is one of the few private practices which is considered to be a non-tariff barrier to trade. Quantitative restrictions, technical standards, subsidisation and discrimination between domestic and foreign products, are all perpetrated by government agencies. Yet dumping is considered such a pernicious practice that mechanisms to neutralise its effects have been established at the international level.

As a related point, anti-dumping measures themselves cannot be considered to be a device that allows the international trading system to return to some form of imaginary 'level playing field'. The only element of government interference in the anti-dumping process is at the customs border when additional duties are imposed on products found to have been dumped. There is no government assistance in the manufacturing processes which result in cheaper imports. Therefore, it is reasonable to characterise the imposition of anti-

dumping duties as a proactive measure rather than a reactive one.

Throughout this chapter the main theme which will be developed is the comparison between the United States substantive laws and the international rules of the Tokyo Round Codes governing the application of anti-dumping and countervailing measures, as well as consideration of the methodology involved in the interpretation and administration of the statutory provisions. It is not intended to make a comparison of the US substantive laws and the new Uruguay Round rules as this would be premature and indeed is unnecessary since this work deals with the pre-1995 legal regime.

## (1) The Manipulation of the Substantive Anti-Dumping Laws of the United States for Protectionist Motives

The rise in the volume of anti-dumping proceedings initiated in the United States has not been as controversial as has been the case with countervailing duty actions simply because anti-dumping measures are the preferred choice of administered protectionism by so many other developed countries.[1] Nevertheless, the escalation in the number of complaints during the 1980s has fuelled speculation that anti-dumping duties are being used in conjunction with countervailing duty actions illegitimately and inconsistent with the international rules in order to provide relief or protection to domestic industries.[2]

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[1] See generally, J.H. Jackson & E. Vermulst, Anti-dumping Law and Practice (1989).

[2] See J. Devault, "The Administration of US Anti-Dumping Duties: Some Empirical Observations", (1990) 13 World Economy 75.

In many ways this is to be expected because the causes behind this phenomenon are broadly similar to those behind the increased use of countervailing duties, namely pressure from domestic industry for relief from foreign competition and the perceived economic problems of the United States periodically throughout the 1980s and now in the early 1990s.

(A) The Original U.S Anti-Dumping Laws - A Variation of Anti-Trust Law

The first anti-dumping statute enacted by the United States extended U.S. anti-trust laws to the activities of foreign producers and exporters. The statute in question was the Anti-dumping Act of 1916 which created civil liability for dumping in the event that private individuals were able to establish that a foreign producer or exporter was engaging in practices which had the effect of 'destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolising any part of trade and commerce in such articles in the United States'.[3]

This was a variation of the application of the prohibitions of Section 2 of the Sherman Act of 1890, relating to predatory pricing, to non-American companies. It created a mechanism whereby private individuals could claim damages against foreign companies engaging in dumping as defined in the statute, namely by reference to the intention of destroying a United States industry or of monopolising a particular commercial activity.

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[3] 39 Stat. 798 (1916).

In fact there have only ever been two reported cases where private individuals have attempted to enforce such rights. The first case, reported in 1935, was an attempt to enforce the 1916 Act against German exporters but failed on technical and procedural grounds.[4]

The second case which was infinitely more significant is Zenith Radio Corporation v Matsushita Electronics Industrial Co. This involved a claim by an American company and a union against Japanese producers of televisions sets. The Japanese producers were found to have been engaging in dumping by the United States Tariff Commission in 1971.[5] The plaintiff's claim was based on the 1916 Act and alleged that the Japanese producers had embarked on a policy of predatory pricing intended to eliminate domestic producers of television sets. This law suit led to fifteen years of litigation in which the plaintiffs claimed $360 million in treble damages plus costs from the defendants.[6]

The court of first instance awarded damages to the plaintiffs based on the allegations that the defendants had conspired to fix and maintain artificially high prices for their products when sold in Japan, while maintaining artificially low prices for the same products in the United States, thereby causing injury to the United States television manufacturing industry.[7]

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[4] H. Wagner & Adler Co v Mali, 74 F.2d 666 (2d Circuit, 1935).

[5] 402 F.Supp. 251 (1975).

[6] On the background to this case, see M. Gold, "Managing Dumping in a Global Economy", (1988) 21 George Washington Journal of Int'l Law & Econ., 503.

[7] Had this ruling stood, a considerable number of private anti-trust actions were anticipated; See J.H. Jackson & W.J. Davey, International Economic Relations (Second edition, 1986), 801.

This finding was reversed by the Federal Court of Appeals[8] and the judgment of the Federal Court was subsequently affirmed by the U.S. Supreme Court.[9] The Supreme Court in this case noted that predatory pricing is by its nature speculative and that, ultimately, its success depends on 'maintaining monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain'. Although the Court was sympathetic to the arguments of the domestic industry, there was no direct evidence of such anti-competitive behaviour.[10]

The explanation for the lack of use of the 1916 Act stems from the fact that it was intended to combat predatory pricing as opposed to mere dumping. These two practices are not mutually inclusive. In particular, a foreign producer may indulge in dumping without being guilty of predatory pricing. Yet, as we have seen, the alleged raison d'etre of the anti-dumping legislation is to counter predatory pricing. Nevertheless, the 1921 Act, which formed the basic framework of United States anti-dumping law for more than fifty years clearly envisaged the imposition of anti-dumping duties even when there was no element of predatory pricing.

Given that the conditions for raising an action under the 1916 Act were roughly as onerous as commencing a domestic anti-trust suit, and presuming that the purpose

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[8] In Re Japanese Electronic Products Antitrust Litigation, 723 F.2d 238, 319 (3rd Cir. 1983); reproduced in J.H. Barton & B.S. Fisher, International Trade and Investment (1986), 614.

[9] Matsushita Electric Industrial Co Ltd v Zenith Radio Corporation, 106 S.Ct. 1348 (1986).

[10] It should be noted that the Court was divided into a 5-4 majority decision in this case and that the main point of division was whether an anti-competitive practice in fact existed.

of anti-dumping measures was to protect domestic producers against predatory pricing, one question comes to mind. Why are anti-dumping proceedings almost invariably initiated by private parties under the successor legislation to the 1921 Act and not the 1915 Act especially in light of the attractiveness of the treble-damages provision?

The answer to this question is relatively straightforward. If the anti-dumping laws of the United States operated only to prevent predatory pricing, there would be no need for them. In other words, the United States anti-dumping legislation serves some other purpose and, in the opinion of the present writer, this is mainly as a vehicle for protectionism. Thus the justification for anti-dumping measures in United States law does not reside in a legitimate fear of foreign predators and this pretext should be discarded.

More recently, pressure has resurfaced within the U.S. Congress for dumping to be considered actionable in U.S. anti-trust law. In the ten year period until 1990, no less than eighteen bills were introduced in Congress to give private individuals a right of action against foreign manufacturers or exporters allegedly engaged in dumping.[11] At the time, it was considered extremely likely that such a right would be included in the bill that eventually became the Omnibus Trade and Competitiveness Act of 1988.[12]

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[11] Note, "Why a Private Right of Action Against Dumping Would Violate the GATT", (1991) 66:3 New York University Law Review 696, 712-715.

[12] The enactment of the act does not however appear to have reduced the desire in Congress to create a private right of damages for United States citizens injured by dumping by foreign parties. It is therefore a very real possibility that legislation may be enacted within the next few years to create such a right.

The main arguments of proponents of a private right is that the existing anti-dumping laws function ineffectively, although the majority of proposed measures are intended to work in conjunction with the existing measures and are not considered to be replacements. This perception of ineffectiveness stems from two considerations. First, the existing laws are alleged to have only prospective relief, at least from the perspective of injury to a domestic industry. Relief is only available after the anti-dumping order has been made, even if the actual levying of duties is done retrospectively.

Second, all proceeds of anti-dumping orders go to the Federal Treasury coffers and not to firms and companies that have been injured by a persistent course of dumping. A private right of damages would, the argument goes, correct this position by allowing injured industries to seek compensation.

It is likely that the creation of such a right would violate the general provisions of the GATT itself. Firstly, if such an amendment was made to the law, it would not have the benefit of the protection of the Protocol of Provisional Application. In other words, it would have to comply with the express terms of the GATT. At the same time, it is unlikely that such a provision would be consistent with Article VI which contains the sole remedy to counter dumping and makes no reference to a private right.

Further complications also arise when the consistency of such a proposal is considered in light of the other GATT provisions. In particular, it would be difficult to justify a particular right to challenge the activities of foreign importers accused of predatory pricing while not making a similar provision for domestic producers.

This conflicts with Article III which requires contracting parties to treat imported products no less favourably than like goods of national origin as regards all laws affecting their internal sale, purchase, distribution and sale. Nor could such a measure be justified under Article XX(d) as a general exception.

(B) The Statutory Basis for the Present Anti-Dumping Framework in United States Law

The Anti-Dumping Act of 1921 provided both the 'conceptual and institutional basis' upon which the anti-dumping law has developed.[13] This statute prohibited foreign manufacturers from selling goods in the United States market at prices below those charged for like products in the domestic markets and, in contrast to the countervailing duty legislation, it contained an injury test.[14]

The Trade Agreements Act of 1979 repealed the Anti-dumping Act of 1921, but amended Title VII of the Tariff Act of 1930. The relevant anti-dumping provisions are now contained in Title VII of the 1930 Act by virtue of the 1979 Act. This has the effect of codifying the countervailing and anti-dumping provisions into one statute. But of course, the United States Congress has not been able to resist the temptation to dabble with the 1979 Act and accordingly amendments were made to its provisions in the Trade and Tariff Act of 1984, and more radically, by the Omnibus Trade and Competitiveness Act of 1988 which completed the transformation of the United

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[13] 42 Stat. 11 (1921). See M. Knoll, "United States Anti-Dumping Law: The Case for Reconsideration", (1987) 22 Texas Int'l Law Journal 265, 269.

[14] See generally for background, J.P. Hendrick, "The United States Anti-dumping Act", (1964) 58 AJIL 914.

States anti-dumping law into its present shape.[15]

For a number of reasons, Congress has been keen to remain the driving force to regulate the content of anti-dumping law. In fact, even incorporation of the 1979 Anti-Dumping Code into United States law through the Trade Agreements Act of 1979 was significantly obstructed by Congress. The legislative history of the statute contains a number of statements conceding that some trading partners were concerned that provisions of the bill did not repeat the exact terminology of the Code provisions.[16] Nevertheless, the concerns of foreign nations that the provisions of the Code were not properly incorporated into American law were dismissed with reassurances that the statute was drafted 'with every intention of achieving consistency with the Code'.[17]

There is little doubt that the United States did not achieve all of its main negotiating objectives in the 1979 Code.[18] The major Congressional criticism was that the United States entered into significant procedural and substantive obligations which restricted the powers of the government to make decisions on the content and administration of these laws in return for the status

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[15] On the effect of this statute on the US anti-dumping and countervailing duty law, see G.N. Horlick & G.D. Oliver, "Anti-dumping and Countervailing Duty Law Provisions of the Omnibus Trade and Competitiveness Act of 1988", (1989) 23:3 JWT 5.

[16] Senate Report No. 249, 96th Congress, 1st Session 87 (1978).

[17] S.A. Lorenzen, "Technical Analysis of the Anti-Dumping Agreement and the Trade Agreement Act of 1979", (1979) 11 Law & Pol'y Int'l Bus., 1405.

[18] See generally, P.D. Ehrenhaft, "What the Anti-dumping and Countervailing Duty Provisions of the Trade Agreements Act [Can] [Will] [Should] Mean for U.S. Trade Policy", (1979) 11 Law & Pol'y Int'l Bus., 1361.

quo that already existed in many countries as regards the administration of such laws.[19] Of course, this view disregards the fact that the United States gained significant negotiating objectives in other areas of trade policy unrelated to anti-dumping.

If this is truly the case, then the United States has spent the better part of the next decade attempting to free itself of these bonds and has successfully done so through imaginative legislating and administrative interpretation

(C) The Definition of Dumping in United States Law

Dumping is defined in United States trade law as occurring when 'a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value'.[20] Leaving aside for the moment the need to establish injury and causation, if goods are sold, or are likely to be sold, in the United States market place at 'less than fair value' dumping is deemed to occur. The investigation into the existence of sales at less than fair value is conducted by the International Trade Administration (ITA) an agency of the Department of Commerce.

The statutory concept of dumping is confined to trade in

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[19] Ibid, 1398-1402.

[20] The anti-dumping legislation of the United States is set forth in Title VII of the Tariff Act of 1930, as added by Section 101 of the Trade Agreements Act of 1979. For a description of U.S. anti-dumping law in general, see E.A. Vermulst, Anti-dumping Law and Practice in the United States and the European Communities (1987).

goods and does not include the supply of services.[21] Neither Article VI nor the 1979 Anti-dumping Code specifically countenances the possibility of duties on services provided at less than fair value. Nevertheless, the practice of the United States authorities as regards the application of duties to services has been to include services, in certain cases, where they increase the margin of dumping. For example, in Rail Passenger Cars From Canada, the ITA held that, where services form an integral part of the merchandise being imported, the terms of the statute require the imposition of duties where the imported article consists of elements involving the technological expertise of the foreign manufacturer.[22] In other words, the supply of services relating to the manufacture or sale of a product can be brought into the dumping calculation if this has been done at less than the fair value of providing the service.

This principle has been clarified in a subsequent case. In Automated Fare Collection Equipment and Parts Thereof From France, the ITA excluded from the scope of its investigation testing, installation and interim maintenance services 'which were provided ancillary to the purchase of the subject merchandise'.[23] The guiding principle is therefore that services at less than fair value which are provided as an integral element in the sale of the product may be taken into the dumping calculation while services that are merely ancillary are not taken into account.

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[21] For a discussion of the possible future application of anti-dumping laws to services such as insurance and the construction industry, see H. Kubo, "Can Anti-Dumping Law Apply to Trade in Services", (1991) 12:4 Michigan J. Int'l Law 828.

[22] 47 Federal Register 36,042 (1982).

[23] 52 Federal Register 55,339 (1987).

This raises the very real prospect that goods, the price of which includes an amount for closely related services may be considered dumped if the service component has been provided at less than fair value even although the goods themselves have not. For example, frequently the cost of installing a computer system includes a substantial element for services required to devise and install the system and the required programme. The actual cost of the hardware is often only a minor part of the final cost of the contract. In such a case the service element may be taken into consideration to determine the existence of dumping.

Goods enter the United States at less than their fair value when the 'foreign market value' (FMV) of the goods is greater than the 'United States price' (USP). Both prices are defined by statute but, broadly speaking, the foreign market value is the price of the goods in the country of origin while the United States price is the price of similar goods once they have passed through U.S. customs. The determination of 'less than fair value' of goods is obviously the crux in the process of identifying dumping but this procedure is not as straight-forward. Indeed, it is a concept that has been the subject of considerable controversy over the last ten or so years.[24]

(1) The United States Price

The statute identifies two methods of valuing the USP: the 'purchase price' (PP) and the 'exporter's sales

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[24] See generally, D.N. Palmeter, "Dumping Margins and Material Injury: The USITC is Free To Choose", (1987) 21 JWTL 173.

price' (ESP).[25]

(a) Purchase price

The purchase price is defined as 'the price at which merchandise is purchased, or agreed to be purchased prior to the date of importation, from the manufacturers or producers of the merchandise' under investigation.[26] In other words, it is the value of the goods at the time the merchandise is sold to an unrelated purchaser in the United States.[27]

(b) Exporter's sales price

The exporter's sales price is 'the price at which the merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporter'.[28]

The difference in methods employed merely depends on the stage at which the first arm's length transaction is made.[29] Where the goods have already passed through Customs for sale to an unrelated party, the ITA values

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[25] Section 772(a) of the Tariff Act of 1930, as amended by Section 101 of the Trade Agreements Act of 1979.

[26] Section 772(b) Tariff Act of 1930, as amended.

[27] Sections 772(b) and (c), ibid.

[28] Section 772(c), ibid.

[29] Section 771(13) of the Tariff Act of 1930 holds the following to be related to a foreign exporter for the purposes of calculating USP: (a) a U.S. agent or principal of the foreign exporter; (b) an American company that owns or controls, directly or indirectly, an interest in the business of the foreign producer; (c) an American subsidiary of a foreign company.

the goods on the basis of the purchase price method.[30] In the event that the first sale across the border is made to a related entity, such as a subsidiary, the ITA uses the ESP. In such cases, the determination of the USP by the ESP method is delayed until the goods leave the possession of the related party and become the subject of a sale to a third party.

(2) The Foreign Market Value

Foreign market value refers to the price at which a manufacturer sells, or offers for sale, the merchandise in the country where the goods are produced. If the merchandise is not sold in the country of manufacture, alternative methods of valuation may be used such as sales in third countries or constructed value.

(a) Home market value

The home market value is the price at which similar merchandise is sold or, in the absence of sales, offered for sale in the country from which it was exported, in the usual wholesale quantities and in the ordinary course of trade for home consumption.[31] It is the usual basis for valuation and the ITA cannot use an alternative basis unless there are no sales for consumption in the market or the country of production or the existing sales are insufficient to provide an adequate basis for comparison.

The Department of Commerce generally determines the price of identical goods in the foreign market as manufactured by the foreign producers under

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[30] See Tubular Steel Framed Chairs From Taiwan, 50 Federal Register 21917 (1985).

[31] Section 773(a)(1)(A), Tariff Act of 1930, as amended.

investigation. However, the Department also has statutory authority not only to look to foreign market sales by other companies engaged in the production of similar goods, but even to select 'similar merchandise' as the basis for its analysis.

A weighted-average of the home market price is calculated for the period against which a comparison of the price of goods sold in the United States, after adjustments, is made.[32] Yet, this practice can inherently lead to an inequitable result.[33] Suppose a foreign producer sells a product for $100 in both the United States and the home market. After three months, the price of the product is raised to $200 in both markets. While the average home market price would be calculated taking into account both prices, i.e. $150, the authorities often take the United States price to be the price at the commencement of the investigation, in this case $100. An artificial margin of dumping is created simply by the time lag that exists during the investigation procedure.[34]

Another controversial practice is that of sampling. Particularly in investigations into allegations of dumping of agricultural products, large numbers of foreign producers are involved.[35] To conduct their

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[32] See, for example, Certain Tapered Roller Bearings and Parts Thereof, Finished and Unfinished From Japan, 52 Federal Register 30,700 (1987).

[33] N.D. Palmeter, "The Rhetoric and Reality of the United States Anti-dumping Law", (1991) 14 World Economy 19, 20-21.

[34] See Certain Iron Construction Castings From India, 51 Federal Register 9486 (1986).

[35] For example, in Certain Fresh Winter Vegetables From Mexico, over two thousand foreign producers exported the subject merchandise to the United States; 45 Federal Register 20,512 (1982).

investigation, the ITA sample the merchandise from a selected number of producers. The main problem is that the Department of Commerce selects the largest producer groups to collate the relevant statistics. Thus, in one case, the ten largest growers were selected from over two hundred producers.[36] These producers accounted for a considerable volume of imports but large scale producers are also the most likely to be engaged in dumping since they can take advantage of economies of scale. Even if such producers are engaging in dumping, it is not a logical conclusion that smaller producers have the resources to do the same. Nevertheless, all producers are grouped with the largest and tarred with the same brush.

Sampling was originally an administrative device employed by the ITA with no statutory authority but the practice was approved by Congress in the 1984 Act.[37] According to this provision, the ITA may use averaging or 'generally recognised sampling techniques' whenever a significant volume of sales is involved or a significant number of adjustments to prices is required. The only guiding principle in this procedure is that samples and averages must be representative of the transactions under investigation.

The final stage in the determination of the home market value is to convert the foreign currency into U.S. dollars to allow a comparison to be drawn with USP. In this process, as a general rule, the ITA applies the exchange rate in effect on the date of the corresponding United States sales forming the basis for the calculation of less than fair value, as certified by the

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[36] Fall-Harvested Potatoes From Canada, 45 Federal Register 20,513 (1982).

[37] Section 777A Tariff Act of 1930, as amended by Section 620 of the Trade and Tariff Act of 1984.

Federal Reserve Bank as published on that date. However, where multiple rates exist, the ITA has the discretion to select the most appropriate rate. For example, in one investigation, two exchange rates were published, one being the official Mexican government controlled rates and the other the free exchange rate.[38] The ITA opted to apply the government controlled rate which was significantly less favourable than the alternative rate.

The selection of appropriate exchange rates becomes difficult where there exists substantial exchange rate movements during the investigation. Thus, if goods are exported from the United Kingdom to the United States when the appropriate exchange rate is £1=$2, an exchange rate movement of £1=$3 in the intervening period would inflate the foreign market value of the goods compared to the United States price. It is ironic that, when the United States economy is weak, and its currency therefore relatively devalued, domestic industries will have an opportunity to establish dumping margins due to currency fluctuations.

The ITA regulations do provide, 'when the price of the merchandise is affected by temporary exchange rate fluctuations, the Secretary [of Commerce] will not take into account in fair value comparisons any differences between United States price and foreign market value resulting solely from exchange rate fluctuations'.[39]

However, the limited impact of this principle was demonstrated in the recent case of NTN Bearing

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[38] See Certain Fresh Cut Flowers From Mexico, 52 Federal Register 6,361 (1987).

[39] Rule 353.60, ITA Regulations for the Determination of Dumping, 54 Federal Register 12,742 (1989).

Corporation of America v United States.[40] The applicants claimed that the dumping margin found to exist was in fact generated by a substantial increase in the value of the Japanese yen against the US dollar during the period in which the investigation was conducted. Between September 1988 and August 1986, which included the period of investigation, it was alleged that the yen experienced a 40% increase in value relative to the dollar.

The Court refused to give the applicants the benefit of this exception. It held that the relevant fluctuations were limited to a period of three months and were followed by a subsequent decline in value to approximately the same as that which existed previously. This ruling was issued notwithstanding the fact that during these three months the foreign market value would have been substantially inflated relative to the dollar and that the artificially high prices during this period would have affected the weighted-average price.

(b) Third country value

If the merchandise is not sold or offered for sale in the home market, or if the home market sales are so small as not to permit an adequate basis for comparison, the price at which the merchandise is sold to third countries can provide a suitable alternative basis for this calculation.[41] The ITA Regulations provide that sales to a third country are to be preferred rather than constructed values, if adequate information is available

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[40] Reproduced at (1990) 2:5 WTM 190.

[41] Section 773(a)(1)(B), Tariff Act of 1930, as amended and Rule 353.48(a), ITA Regulations, supra note 39.

and can be verified.[42]

As a general rule, if the quantity of the merchandise sold in the home market is small in relation to the quantity sold for exportation to third countries, it will be considered an inadequate basis for the calculation of foreign market value.[43] While the ITA itself has established a five percent lower threshold rule[44], it has been prepared to abandon this rule when it considers such a policy to be expedient. For example, in Red Raspberries From Canada the ITA refused to allow a foreign market value based on home market sales even although the percentage of home sales relative to sales to third countries by one producer was as much as twenty nine percent.[45] When asked to defend this policy before a binational panel established under the Canada-United States FTA, the ITA representative simply stated that the agency 'knows inadequacy when it sees it'.[46] This is hardly a basis for an adequate policy. Hence, the binational panel held the ITA decision on this point to be defective.

The ITA also has virtually unfettered discretion to select an appropriate third country for making the third country valuation. In the discharge of this duty, the Department has established the following rules for the selection of the appropriate third country:

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[42] Section 353.49(b), ITA Regulations, supra note 39.

[43] This requirement is often referred to as the 'foreign market viability test'.

[44] See Silver Reed America Inc v United States, 581 F.Supp 1290 (CIT 1984).

[45] 50 Federal Register 26,019 (1985).

[46] Binational Panel Review No. 89-1904-01 (1989), reproduced at (1990) 2:2 WTM 137.

(a) the degree to which the product exported to a third country has similar characteristics to that exported to the United States, provided that an adequate volume of the merchandise has been exported to the third country;
(b) the volume of sales to the country is the largest to any country other than the home market or the United States; and
(c) the similarity of the market of the third country to that of the United States in terms of organisation and development.[47]

In fact, the ITA has expressed a preference for selecting the price of goods in developed states to the price of goods in developing countries. Thus, in one case, the ITA selected Australia as the appropriate surrogate for products exported from Taiwan because that country was the largest developed market on which to base a comparison with United States prices.[48] Naturally, in general, prices in developed or industrial countries tend to be higher than comparative prices in developing countries.

(c) Constructed value

Despite the ITA's statement for a preference for third country values, the use of constructed value calculations has grown considerably in recent years. One study into the use of constructed cost valuations concluded that in 1987 approximately two-thirds of all anti-dumping investigations conducted by the ITA

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[47] Rule 353.49(b), ITA Regulations, supra note 39.

[48] Tubular Steel Framed Chairs From Taiwan, 50 Federal Register 21,917 (1985).

involved cost of production analysis.[49]

This is the most controversial means of determining the foreign market value of goods simply because there are numerous techniques for valuing the costs of producing goods. It is to a certain extent an arbitrary process since the administering authority determine which principles and rules are to be applied. Certainly, of the three ways of determining foreign market value, this basis of valuation provides the ITA with the greatest degree of discretion and is susceptible to administrative abuse.

The following are the most controversial practices.

The addition of minimum percentages for general expenses and profit

General expenses are simply the costs of running a manufacturing process. It would be inequitable to omit to charge these against the unit cost of producing the goods, but at the same time over-allocation of such expenses increases the final constructed value and hence the likelihood of a margin of dumping being found. By statute, general expenses must be at least ten percent of the total cost of materials and labour.[50] A producer is therefore penalised for the difference between the actual expenses and the 10% minimum threshold.

The practice of imposing a mandatory minimum charge of ten percent of the direct labour and material costs has

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[49] G.B Kaplan et al., "Cost Analysis Under the Anti-dumping Law"; (1988) 21 Geo. Wash Journal Int'l Law & Econ. 357, 358.

[50] Section 773(e)(1)(B)(i), Tariff Act of 1930, as amended, and Rule 353.50 ITA Regulations, supra note 39.

drawn substantial criticism.[51] This figure bares no correlation to the efficiency or otherwise of the manufacturer. Further, in fact, it is a relatively frequent occurrence for the ITA to substitute the mandatory figure for general and administrative expenses in the calculation of constructed cost.[52]

The same statutory provision requires that a minimum level of eight percent of the sum of the general expenses be allocated to the costs of producing the merchandise as an estimate of profit. The rationale for linking the general expenses of running a business with profit levels is unclear. There appears to be only a tenuous relationship between these elements in actual practice. A more realistic indicator upon which to base an estimated profit figure would be an estimate of the levels of profit generally reflected in sales of similar merchandise in the country of origin.

The justification for these surrogate statutory amounts (general expenses and profit) is that the true values are difficult to evaluate.[53] However, it is a perplexing claim that such high levels of profit and costs are a reality of modern production and sale of goods given possibly high degree of competition in today's markets.

The inclusion of subsidies in constructed value calculations

The statutory definition of constructed value requires

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[51] Kaplan, supra note 49, 383.

[52] See, for example, Cellular Mobile Telephones and Sub-assemblies From Japan, 50 Federal Register 45,447 (1985).

[53] See N.D. Palmeter, "The Rhetoric and the Reality of the United States Anti-dumping Law", (1991) 14 World Economy 19, 23.

that the costs of materials include all those costs 'which would ordinarily permit the production of that particular merchandise in the ordinary course of business'. What treatment is proper for government subsidies which have been provided to assist defray these expenses?

This question arose in Al Tech Specialty Steel Cop v United States which concerned West German government subsidies to German producers of tool steel.[54] In an anti-dumping petition, a United State complainer alleged that these subsidies should be considered a component of the manufacturer's cost. If this policy was adopted, it would have the effect of increasing the foreign market value under constructed value determinations, thus increasing the likelihood of a margin of dumping.

The statute gives no guidance as to the treatment of subsidies in constructed value calculations nor is there any judicial precedents on the point. Thus, the resolution of this question was essentially a policy issue. Should subsidies be left for neutralisation through countervailing duty complaints or could the administering authorities allow the indirect offsetting of such effects through anti-dumping proceedings?[55]

Initially, the ITA was prepared to add government subsidies to the reported production costs in calculating constructed value.[56] However, this policy

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[54] 651 F.Supp 1421 (CIT 1986).

[55] On the policy issues, see generally, J.K. Stronski, "Anti-dumping, Constructed Value and Non-Countervailable Subsidies: A Proposed Inclusion of Subsidies in Constructed Value After Al Tech Specialty Steel Corp v United States", (1987) 11 Fordham Int'l Law Journal 208.

[56] Certain Steel Products From the Netherlands, 47 Federal Register 35,664 (1982).

was subsequently altered and the ITA refused to add subsidies to reported costs, the result being confusion in the administration of the policy.

The matter eventually fell to the Court of International Trade for resolution. The court upheld the distinction between the purposes of anti-dumping and countervailing duty procedures and found that the calculation of subsidies in constructed value computations is outside the scope of the anti-dumping law.

This ruling has been subject to some criticism from certain quarters. One writer has observed that, at the very least, non-countervailable subsidies should be included in the calculation of constructed values because such duties cannot be levied on such assistance.[57] However, the decision of the Court is correct. If subsidies cannot be countervailed because they do not fall within the definition of actionable subsidy under the countervailing law, it would be improper to indirectly attack non-actionable subsidies by means of the anti-dumping laws. Such an interpretation would have the effect of providing an indirect remedy to a matter that the legislators have decided should not be provided directly through the countervailing duty laws.

Ignoring sales at less than the costs of production

Where the ITA has reasonable grounds for believing or suspecting that sales in the home market of the country of exportation (or where appropriate third countries) have been made at less than the cost of producing the merchandise in question, such sales may be disregarded

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[57] See Stronski, J.K. 'Anti-Dumping, Constructed Value and Non-Countervailable Subsidies', (1987) 11 Fordham Int'l Law Journal 208.

for the purposes of determining FMV if two conditions are satisfied, namely:

> (a) the sales have been made over an extended period of time and in substantial quantities; and
> (b) the sales are not at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade.[58]

If, after such sales are deducted, the remaining sales above the costs of production are inadequate to calculate the foreign market value, the ITA is instructed to calculated the foreign market value based on constructed value.[59] This rule, originally enacted in the Trade Act of 1974, is intended to prevent the foreign market value calculation from being distorted by the inclusion of sale prices at below the cost of producing the merchandise.[60]

In practice, the effect of this rule is to allow the authorities to disregard home market values - the fairest method of establishing foreign market value - and to replace this with constructed value - the least fair method.

(3) Adjustments

The adjustments made to the United States Price and the Foreign Market Value are designed to work back in the

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[58] Section 773(b), Tariff Act of 1930, as amended.

[59] Rule 353.51(b), ITA Regulations, supra note 39, and see Porcelain-on-Steel Cooking Ware From Mexico, 55 Federal Register 21,060 (1990).

[60] Kaplan et al, supra note 49, 369.

distribution chain to the price of the goods at the factory gate, i.e. the ex-works price. The price of goods being sold in the home market normally includes profits for distributors, discounts for gross sales, commission, etc. The price of goods sold in the United States normally includes costs incurred for carriage, insurance, freight, etc. These expenses must be eliminated from the comparison process in order to avoid distortion.

At the same time, the adjustment process offers a great potential for distorting the margin of dumping. Refusal to allow certain adjustments, or exaggerating adjustments can easily create artificial dumping margins. Similarly, where adjustments are not symmetrical, a dumping margin can be created simply by the different treatments given to the prices.

The adjustments that are made in United States law to the USP and the FMV are complicated and are best considered independent of each other. However, it should be noted that, as a general rule, any deductions to the USP will increase the margin of dumping while additional expenses decrease it. In contrast, any deductions to the FMV will decrease the margin of dumping while the addition of expenses will increase the final duty.

(a) Specific adjustments to the United States price

As regards the adjustment for tax, the Court of International Trade has distinguished two separate components in this tax adjustment.[61] The USP is to be increased by the amount of foreign taxes imposed

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[61] See also Para. 353.41(d) of the ITA Regulations For the Determination of Dumping, 45 Federal Register 8,175 (1980).

directly upon the exported merchandise which has been forgiven (rebated or not collected) because the merchandise was exported to the United States. On the other hand, the adjustment is to be limited to the amount that such taxes are added or included in the price of comparison merchandise sold in the home market.[62]

Consequently, if the overheads of the subsidiary in the United States market are greater than in the home market all overheads will be allowed but, if the converse is true and home market overheads exceed US overheads, the home market expenses will be restricted.[63] This has the effect of increasing the FMV and increasing the likelihood of a dumping margin being found.

Also where sales in the United States are made through a subsidiary and the ESP price is the relevant USP, the so-called 'ESP cap' may apply.[64] A subsidiary will incur costs in selling the products to an arm's length purchaser which differ from those incurred by the manufacturer in the home market. An appropriate adjustment must be made to account for this difference. While this principle is logical enough, the practice of the authorities themselves place exporters at a disadvantage.

All of the overhead charges incurred in the United States are deducted from the ESP when the net USP is being calculated but the amount of the relevant

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[62] Zenith Electric Corporation v United States, 633 F.Supp 1382 (1986).

[63] This practice has been upheld by the courts as being a 'fair and reasonable exercise of administrative authority'; see Consumer Products Division SCM Corp v Silver Reed America, 753 F.2d 1033 (Fed Cir. 1985).

[64] See Palmeter, supra note 33, 23-24.

counterpart deduction in the home market is capped to an amount equal to the value of the US deduction. Consequently, if the overheads of the subsidiary in the United States are greater than in the home market all overheads in each country will be deducted, but if the converse is true, and home market overheads exceed United States overheads, the home market expenses will be restricted.[65] This practice has the effect of increasing the home market value in relation to the calculation of the USP.[66]

(b) Specific adjustments to the foreign market value

The ITA has statutory authority to make three principal adjustments to the calculation of FMV but only if it is established to the satisfaction of the ITA that the amount of any difference between the USP and the FMV is wholly or partly due to these circumstances.[67]

First, the fact that the wholesale quantities, in which the merchandise is sold in the United States are less or greater than the wholesale quantities in which the merchandise is sold in the market of the its country of origin is a ground for making an appropriate allowance.

The second ground is where there exists differences in

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[65] This practice has been upheld by the courts as being a 'fair and reasonable exercise of administrative authority'; see Consumer Products Division SCM Corp v Silver Reed America, 753 F.2d 1033 (Fed Cir. 1985).

[66] The adjustment process in the case of the ESP cap for the purposes of arriving at the USP was fully considered in Brother Industries v United States, 540 F.Supp 1341 (CIT) 1984). Reproduced in part in J.H. Barton & B.S. Fisher, International Trade and Investment (1986), 290.

[67] Section 773(a)(4), Tariff Act of 1930, as amended.

the circumstance of sale. Due to the contentious nature of this practice, it is considered in a later part of this section.

The final ground for adjustments is where similar merchandise is used for the purpose of making the comparison. In such circumstances, adjustments may be made for merchandise that is similar or like in purpose.

(4) The Margin of Dumping

The margin of dumping is the difference between the United States Price and the Foreign Market Value for the goods. In order to calculate the dumping duty, the margin of dumping is expressed as a percentage of the value of the merchandise once it is presented for clearance at the U.S. customs.[68] In other words, the anti-dumping duty is a percentage of the cif value of the merchandise expressed as an ad valorem figure.

It appears that the Commerce Department has no discretion in imposing a level of duty equal to that of the anti-dumping margin. The statute requires that, if the administering authority finds the existence of dumping 'then there shall be imposed upon such merchandise an anti-dumping duty...in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise'. The imposition of the duty equal to the margin of dumping is automatic once sales at less than fair value have been found.

The point here is that, if a lesser duty would be sufficient to eliminate the injury, the ITA cannot opt for the lesser amount but must stick to the margin of dumping. This is despite the fact that the Anti-dumping

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[68] Section 736(a), Tariff Act of 1930, as amended.

Code allows for the possibility of the imposition of a lesser dumping duty if this would be sufficient to prevent further injury.[69] Article 8(1) of the Code states that it is desirable for signatories to impose lesser duties 'if such lesser duties would be adequate to remove the injury to the domestic industry'.

While anti-dumping duties are levied against countries, in practice, the United States authorities impose variable levels of duty on a company-specific basis.[70] In other words, different levels of duty are imposed depending on the levels of dumping found against particular manufacturers, producers or exporters.

As a final point, the ITA is not required to consider the interests of producers or consumers within the United States before imposing duties. In some respects this is a disadvantage to United States consumers and producers. For example, if anti-dumping duties are imposed on semi-conductors imported from Japan and if these semiconductors are incorporated into computers in the United States, the higher the level of duty the greater the indirect level of injury caused to the domestic producers.

At the same time, the fact that anti-dumping duties are always imposed at the maximum possible level is hardly an advantage to foreign producers.

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[69] This contrasts unfavourable with the practice of the European Commission. See text infra, Chapter 10.

[70] See generally, Certain Small Business Telephone Systems and Subassemblies Thereof From Taiwan, 54 Federal Register 31987 (1989).

(D) Indirect Dumping

(1) Component Dumping

Before 1988 the ITA had no statutory authority to act against products considered to have been dumped as component. However, the Department of Commerce, clearly as a matter of policy, indicated that foreign companies would not be allowed to benefit from component dumping even if the companies involved were related.

As a matter of practice, prior to 1988, the ITA merely included component parts in the investigation into allegations of dumped finished merchandise. Thus, in Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From Japan, the ITA included roller bearing component parts in its investigation into finished roller bearings.[71] The petitioners alleged that the component parts had been sold at less than fair value to the company manufacturing the finished products. The respondents sought judicial review of the duties imposed on the ground that the component parts were transferred intra-company and therefore no actual sales of component parts occurred in the United States. In the absence of sales of imported merchandise, the company challenged the decision of the ITA to apply the anti-dumping laws to the parts.

In response the ITA asserted that the parts were included in the initiating petition and therefore were automatically subject to investigation. While this is correct from a procedural point of view, it is difficult to see how two unlike products can be brought within the scope of the same petition. Nevertheless, the CIT held that the Commerce Department had 'inherent authority to

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[71] 52 Federal Register 47,955 (1987).

define the scope of an anti-dumping investigation'.[72] On this basis alone the Court ruled in favour of ITA. But, commenting on the forthcoming legislation, in this case the 1988 Act, the Court made the following illuminating statement:

> 'All too often foreign manufacturers effectively emasculate our anti-dumping laws by employing inventive import strategies....Accordingly, Congress has attempted to thwart importers' circumvention strategies by enacting legislation intended to send a clear message to foreign producers and trading partners that we will actively seek to prevent circumvention of our trade laws and thereby decrease the incentive foreign producers might have to finesse their way around our trade laws, in order to engage in recognised unfair trade practices'.

Hardly the statement of an impartial judicial body. In other words, even before the enactment of the relevant provisions of the 1988 Act, the Court had already embarked on a declared policy of preventing any activities which might be construed, fairly or unfairly, as circumvention.

The provisions of the 1988 Act dealing with component dumping were not the first attempt to prevent such developments. In the House of Representative's version of the bill that finally became the Trade and Tariff Act of 1984 contained a proposal to regulate the issue of downstream dumping. Section 104 of this bill defined 'downstream dumping' as occurring when three conditions were satisfied:

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[72] NTN Bearing Corporation of America v United States, reproduced at (1990) 2:5 WTM 190.

(a) a product used in the manufacture of the merchandise subject to investigation is purchased at a price that is below its foreign market value;
(b) that purchase price is either:
(1) lower than the generally available price of the product in the country of manufacture; or
(2) lower than the price at which the product would be generally available in such country but for price depression if the price depression is caused by artificial depression of market prices by reason of any subsidy or other sales at below foreign market value; and
(c) the difference between the foreign market value and such purchase price has a significant effect on the cost of manufacturing the merchandise in question.[73]

In the event that downstream dumping was found by the administering authorities to exist, the proposal would have authorised the imposition of an anti-dumping duty equal to the difference between the foreign market value of such products and the generally available price as calculated above. It is likely that, had this measure been enacted, a number of contraventions of the GATT would have been committed. Most importantly, as observed in earlier parts of the work, the investigation would not have been into 'like products' to those that constitute the final range of finished products.[74] But also, Article VI of the GATT requires that the anti-dumping duty should be equal to the difference between the normal value and the export price.

The amendments to the law on component dumping

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[73] See Bierwagen & Hailbronner, supra note 49, 41.

[74] See text, supra pp.180-182.

introduced by the 1988 Act did not go as far as those proposed in the 1984 House of Representatives bill. The major alteration brought by the 1988 Act was addition of Section 780 to the Tariff Act of 1930 which introduced new procedures for downstream product monitoring.[75] This allows private parties to petition the ITA for a determination that a particular product incorporates component parts that have been subject to previous anti-dumping orders.

The application of the provision is partially restricted by the fact that it applies only in three circumstances:

> (a) the component part is already subject to monitoring as part of a bilateral monitoring arrangement;
> (b) the component part is the subject of a 'significant number of investigations' for the same country; or
> (c) there are two or more cases against the same company for related products.

In addition to the existence of one of these circumstances, there must also be a dumping margin of at least fifteen percent. At the same time, there must be 'a reasonable likelihood' that imports into the United States of the downstream product will increase.

In the event that these factors exist, any imported manufactured article which incorporates' the product formerly found to have been dumped can be subject to monitoring by the ITC.

The main concern of the international community with this provision is that investigations can be initiated

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[75] See text, supra pp.700-701.

not on the basis of allegations of dumping, but based on claims relating to dumping of component parts.[76] However, it is only the standards for the initiation of an investigation that have significantly altered and not the standards for reaching a dumping decision. For that reason, the issue of downstream product monitoring is treated as a matter of procedure as opposed to an issue of substance in this text.[77]

(2) Sub-Assembly Dumping

The United States authorities have tackled the problem of sub-assembly dumping in the same was as component dumping, namely simply by treating the pre-assembly package as being imported into the United States as like products to the finished products.[78] This is a highly controversial practice which has attracted considerable criticism.[79]

The landmark case in the application of this approach to the issue of sub-assembly dumping was Cellular Mobile Telephones and Subassemblies From Japan.[80] A petition was lodged by Motorola, a United States company

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[76] For a legal analysis claiming that this amendment is legitimate under the GATT, see S.J. Powell & J.D. McInerney, "International Energy Trade and the Unfair Trade Laws", (1989) 11:2 University of Penn. Journal Int'l Bus. Law, 399, 343-44.

[77] Ibid.

[78] Sub-assembly dumping differs from component dumping because, sub-assembly dumping occurs when all the component parts of the finished product are dumped in the United States whereas in component dumping only single elements of the product need be dumped.

[79] See generally, L.T. Yanowitch, "Foreign Assembly and Outsourcing: New Challenges to the Anti-dumping Law", (1986) 18 Law & Pol'y Int'l Bus., 815.

[80] 50 Federal Register 45447 (1985).

manufacturing cellular mobile telephones, allegedly on behalf on the United States cellular mobile telephone and telephone subassembly industry. The investigation covered a number of products including cellular mobile telephones (CMTs), CMT transceivers, CMT control units and subassemblies for all of these devices.

The respondents argued that the subassemblies were not like products to the finished products and therefore fell outside the scope of the investigation. There is undoubtedly merit in this argument. It is difficult to see how a circuit board, a number of computer chips and some electronic equipment could be construed as a cellular mobile phone in the absence of the input of skilled labour. Further, it appears that the petitioners in fact only manufactured the finished products, there being no consumer market for subassembly kits for cellular mobile telephones.

The ITA rejected the respondent's contentions holding that subassembled products could be considered like products to the final and completed product. In making such a determination, the ITA took into consideration a number of factors, including: (a) the general physical characteristics of the products; (b) the expectations of ultimate purchasers; (c) the channels of trade in which the product is sold; (d) the manner in which the products are advertised; and (e) the ultimate use of the merchandise in question. Taking these factors into account the ITA held that the finished cellular phones and the component parts unassembled constituted like products.

In any event, it cannot be said that the ITA would have given serious consideration to an argument that component parts of a product fall outside a petition if they are not like products because the ITA declared that

it 'has an inherent power to establish the parameters of the investigation so as to carry out its mandate to administer the law effectively and in accordance with its intent'. In other words, in future investigations, complete subassemblies of products will be considered part of the investigation into dumped finished products unless there are facts to establish otherwise.

It is interesting to note that the ITC did not reach the same conclusion in its investigation into material injury.[81] In its final determination on this matter, the Commission held that the finished products constituted like products but that the sub-assemblies for each of these components together constituted a separate like product. However, this was a majority decision and there was considerable debate among the Commissioners themselves as to the problem of like products.

There is little doubt that the question of anti-circumvention was behind the ITA's decision in this case. The possibility of large numbers of finished products entering the United States market through the back-door, as it were, caused genuine concern in the absence of anti-circumvention measures.[82] However, at the same time, there is little doubt that the United States would have a difficult time justifying this decision before the relevant international authorities simply because it was a policy decision and not one based on the letter of international law.

(E) Dumping From Non-Market Economies

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[81] Cellular Mobile Telephones and Subassemblies Thereof, Inv. No. 731-TA-207 (1986).

[82] On the earlier policy of the ITA, see A. Langer, "The Concepts of Like Product and Domestic Industry Under the U.S. TAA of 1979", (1983) 17 George Washington Journal Int'l Law & Econ., 495.

One commentator has observed that 'perhaps nowhere is the arbitrariness of the [United States] anti-dumping law as apparent as in its treatment of products from centrally-planned or non-market economies'.[83] The main problem arises from the nature of the economies of these countries. Where the economy of a country is regulated by state planners, and not the forces of supply and demand, it is virtually impossible to determine prices even on a constructed basis.[84] Instead, it has been necessary to rely upon third country prices for valuations of foreign market prices in non-market economy countries.[85]

The principles of liberal trade policy and comparative advantage are incompatible with the economic philosophy behind the GATT itself and for this reason no non-market economy state joined the GATT at the time of its original formation.[86] True, some non-market economy states, such as Hungary and Poland, have subsequently acceded to the General Agreement, but on the whole non-market economy states have remained outside the world trading system. Similarly, no non-market economy country is a signatory to the Anti-dumping Code of 1979.

The United States, and other GATT contracting parties,

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[83] N.D. Palmeter, "The Rhetoric and the Reality of the United States Anti-dumping Law", (1991) 14 World Economy 19, 29.

[84] See generally, J. Bhagwati, Protectionism (1988), 51.

[85] J.S. Neeley, "Non-market Economy Import Regulation: From Bad to Worse", (1989) 20 Law & Pol'y Int'l Bus., 529.

[86] Both Czechoslovakia and Cuba joined the GATT in 1948, but their subsequent conversion to non-market economies ruled out any active participation in the organisation.

have therefore been allowed to develop their own rules to deal with products that have allegedly been dumped in the United States market. In contrast to the position with subsidised goods, the United States has vigorously asserted its anti-dumping legislation against imports from non-market economies. Yet, the problems presented in the operation of countervailing and anti-dumping duty laws are largely similar and stem from the same fundamental issue, namely the method of valuing goods in such an economy.

The rule originally states in the 1979 Act was that, if from available information, the ITA believes that the economy of a country from which merchandise is exported is state-controlled and does not allow a determination of foreign market value for merchandise in accordance with the normal rules for this process, a substitute foreign market value is made on the basis of the normal costs, expenses and profits involved in the manufacturing of such merchandise.[87] Such valuations are to be made by reference to either:

> (a) the prices, determined in accordance with the normal principles by which such valuations are made, of similar merchandise in a relevant non-state-controlled-economy when sold:
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> (1) for consumption in the home market of that country; or
>
> (2) to other countries including the United States; or
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> (b) the constructed value of such merchandise in a non-state-controlled-economy country.[88]

The subsequent statutory and administrative history of

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[87] Section 773(c), Tariff Act of 1930, as amended.

[88] Rule 353.52, ITA Regulations, supra note 39.

the treatment of goods from non-market economy countries under United States anti-dumping law has been an attempt to impose increasingly restrictive rules to goods from these countries.

(1) Comparable Third Country Valuation

It would be inequitable if the price of goods in countries at different stages of economic development were used in this process. Therefore, the ITA claims to base its prices on costs in a non-state-controlled economy country at a similar stage of economic development to the country from which the goods originated.[89]

Nevertheless, in practice, the choice of comparable third countries appears absolutely arbitrary. Thus, in Unrefined Montan Wax From East Germany, the ITA rejected comparisons with the price of component goods in Canada and the United Kingdom, in favour of prices in West Germany, simply because West Germany was considered, from an industrialised point of view, to be 'more

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[89] More specifically, the ITA is instructed to select, in order of preference:

(a) a non-state controlled economy country other than the United States, at a stage of economic development comparable to that of the home market based on generally recognised criteria, including per capita gross national product and infrastructure development, particularly in the industry producing such or similar merchandise;
(b) a non-state controlled economy country other than the United States that is not at a stage of economic development comparable to that of the home market country, in which case adjustments will be made for known differences in the costs of materials and fabrication; or
(c) the United States; Rule 353.52, ITA Regulations, supra note 39.

comparable' than the other two countries.[90] No other explanation was given as to why the economy of one of the most wealthy and healthy states in the global economy of that time was selected as opposed to a less efficient country such as the United Kingdom unless of course this is simply one way that the ITA artificially inflates the foreign market value.

However, the scope for choice in this regard is restricted because quite simply many other countries do not produce goods that are interchangeable with the merchandise under investigation.

Similarly, in some investigations, the country that is the first choice as a surrogate foreign market value cannot be used for the comparison because national officials refuse to allow producers to co-operate with the United States authorities in the collection of such information. For example, in one investigation, the government of Pakistan refused to allow such information to be collected for fear that this information would be used in a subsequent investigation of Pakistani exports of similar merchandise.[91] Thus, the country which is expressly declared to be the most appropriate must be rejected in favour of other country which is clearly not the first choice of the investigating officials.

The 1988 Act introduced significant changes in the use of third country comparable prices.[92] The most dramatic of these was the reversal of the preference for third

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[90] See Unrefined Montan Wax From East Germany, 46 Federal Register 38,555 (1981).

[91] See Shop Towels of Cotton From China, 48 Federal Register 37,055 (1983).

[92] Section 773(c), Tariff Act of 1930, as amended by Section 1316, Omnibus Trade and Competitiveness Act of 1988.

country values in favour of constructed values. In general, the ITA is instructed to determine the foreign market value of the goods on the basis of the factors of production utilised in the production of the merchandise. Only, where the ITA finds that the information available for making a constructed value determination, should valuations be made on a third country basis.

It is generally accepted that this change will result in a greater number of affirmative dumping findings.[93] There are two principal reasons for this. Factors of production within non-market economy states, such as labour, materials, etc., are generally relatively lower than in market economy states. Pricing such inputs on a market economy level will undoubtedly increase foreign market values and hence margins of dumping.

Similarly, energy supplies in these countries are often heavily subsidised thereby reducing the final price of the goods to the consumer within the state. Valuation of goods at world energy market rates will result in increased foreign market values.

(2) Constructed Value Prices

In the past, in the absence of a comparable price in a market economy country, the ITA simply opted to construct a value for the goods. If similar merchandise was not produced in a market economy country which the ITA deemed at a comparable stage of economic development to the home market country, a value is to be constructed based on factors of production incurred in the home market country including, but not limited to, the costs

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[93] See G.N. Horlick & G.D. Oliver, "Anti-dumping and Countervailing Duty Law Provisions of the Omnibus Trade and Competitiveness Act of 1988", (1989) 23:3 JWT 5, 17.

of labour, the quantities of raw materials employed, and the amount of energy consumed. But these factors are not valued based on the cost of these resources within the home country but rather the cost of these factors of production in a comparable market economy country.

For example, in the Electric Golf Cars From Poland[94], the Treasury Department expressly acknowledged that there was no comparable product and no counterpart country for a relevant foreign market value determination. The valuation was made by means of a hypothetical cost calculation in which component parts were valued according to comparable prices in third countries and then a total value was computed by adding these together and then making an allowance for labour, profits and other overheads. This practice was confirmed in the 1988 Act.

Now by statute, the ITA must make its determination of foreign market value in non-market economy states on the basis of constructed values as opposed to third country values. The general rule is that the ITA will determine the foreign market value of the merchandise on the basis of the value of the factors of production utilised in producing the merchandise.[95]

In valuing these factors of production, the ITA is required to use, to the extent possible, the prices or costs of factors of production in market economy countries that are at a level of economic development comparable to that of the non-market economy country and relative to significant producers of comparable merchandise. This is merely codification of prior ITA practice and is unlikely to resolve the problems that

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[94] 40 Federal Register 25,497 (1975).

[95] Section 773(c)(1), ibid.

were inherent in that process.

As every accountant is aware, costs of production can be allocated in different manners for the purposes of valuing goods on a constructed cost basis. The ITA has considerable discretion as to which method will be employed for this purpose, there being no statutory guidelines in this respect. This leaves considerable scope for manipulation of valuations in order to increase relevant foreign market values.

To this value is added amounts for general expenses and profit as well as the cost of containers, coverings and other expenses. There is no statutory minimum to be added as profit, but since producers in non-market economies are not generally manufacturing goods for profit, the inclusion of such a figure reveals that the United States is not interested in obtaining a true value for goods, but rather a surrogate equivalent market economy valuation.

It is this reliance on comparable prices for parts in third countries that makes this method of valuation as difficult and as arbitrary as valuation on the basis of the value of merchandise in third states. Instead of valuing a finished product, the ITA will value its component parts which will tend to inflate the price of the finished merchandise.

In valuing the component parts of the final product in the prices that apply in the third country, no allowance or adjustment is permitted to reflect differences between the country of origin and the country of comparison in terms of per capita GNP, the cost of materials or labour in the particular sector.[96]

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[96] Unrefined Montan Wax From East Germany, supra note 90.

(3) Observations on the Development of Applicable Principles

The main criticisms of these principles stem from the fact that it is a wholly artificial process to value goods in one market by comparing them to another. There is no accurate method of valuing the cost of goods in a non-market economy without making a number of arbitrary assumptions.

Further, originally there was no definition of 'non-market economy country' or 'state-controlled-economy country' is specified. This has led to difficult problems in light of the progress of many of these states towards market economies. In 1981 the ITA considered a number of economic factors, including wage controls, sources of financing, exchange controls and currency convertibility, distribution and progress towards economic reform, before deciding that Hungary was still a non-market economy country.[97] However, in its decision, the ITA expressly declared:

> 'we cannot state categorically that certain factors we have relied on in this case will have the same relevance in any other investigation.'

The 1988 Act introduced rules for determining which countries are to be considered non-market economy countries.[98] Factors to be taken into consideration include currency convertibility, wage controls, ownership of production facilities, government control of resources, and the extent to which joint ventures are permitted. naturally, this still leaves considerable

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[97] Truck Trailer Axle and Brake Assemblies From Hungary, 46 Federal Register 46,152 (1981).

[98] Section 771(18), ibid.

scope for the exercise of discretion which is underscore by the fact that the ITA may take into consideration 'such other factors as [it] considers appropriate' in this process.

### (2) The Manipulation of the Substantive Countervailing Duty Laws of the United States for Protectionist Motives

The dramatic rise in countervailing duty actions has been a significant factor in drawing the attention of the world community to the growing penchant of the United States to rely on unilateral mechanisms to achieve solutions to multilateral difficulties. As one of the most eminent writers in the field of international trade law has observed:

> 'The United States has become far and away the largest user of countervailing duty proceedings. All other nations combined have probably not used countervailing duties explicitly to offset subsidies more than about two dozen times...[T]he United States is blazing a trail.'[99]

The United States has made no secret of its crusade against foreign subsidies through this medium which is seen as a surrogate for international rules to regulate governmental assistance. The failure to negotiate such rules is undoubtedly a contributing factor to the high levels of countervailing duty actions in the United States. But at the same time the authorities have shown little sympathy for the complications involved in the negotiation of effective international rules and this

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[99] J.H. Jackson, "Import Practices: Are They Really Unfair", (1986) 30 Law Quadrangle Notes 26, 30.

has been reflected in both the form and administration of present countervailing duty legislation.

At the same time, there is also a fear in governmental circles that other countries may follow the American example and use their countervailing laws to block imports into their markets.[100] This explains why the United States has not abandoned efforts at the multilateral level to negotiate a revised Subsidies Code in favour of a policy of resorting to unilateral neutralisation of subsidies through the application of countervailing duties.

The purpose of this analysis is to compare the existing United States system for imposing countervailing duties with the international rules to determine the degree of compatibility between these two sets of rules and, at the same time, to determine whether the existing international rules are sufficiently comprehensive to tackle the proliferation of such duties. This will also involve an examination of the methodology involved in the interpretation and administration of the statutory provisions.

In addition, it is necessary to evaluate the degree to which countervailing actions provide artificial relief to American industries by preventing adjustment to increased international competition and efficiency in production. In other words, is it proper that a legitimate form of relief, sanctioned in the GATT itself, has been fashioned into a tool for protectionist forces particularly when the United States has consented through its international obligations to act in a

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[100] J.H. Jackson, "Perspectives on Countervailing Duties", (1990) 21 Law & Pol'y Int'l Bus., 739.

particular manner?[101]

(A) The Statutory Basis for the Present Countervailing Duty Framework in United States Law

Prior to 1970, U.S. countervailing legislation was not of any significant importance due to the infrequent use of the mechanism.[102] In fact, in 1958 the apparent redundancy of the procedure inspired one writer to observe:

> "[T]he relative desuetude of [the anti-dumping and countervailing duty] provisions in recent years does not justify their retention as the potential hatchets of rearguard protectionism."[103]

The economic difficulties of the United States in the early 1970s have however saved the countervailing duty legislation from this fate. As the balance of trade figures progressively worsened, European export subsidies were widely seen as being a primary source of American economic woes. The natural response to subsidisation was countervailing duties and private industries needed no-one to point them in the right direction.

Not only did the number of countervailing complaints increase throughout the late 1960s and early 1970s, but

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[101] For an apologists view on the use of countervailing duties by the United States, see J.D. Greenwald, "United States Law and Practice", in J.H.J. Bourgeois (ed), Subsidies and International Trade (1991), 33.

[102] The most significant countervailing duty legislation was contained in Section 303 of the Tariff Act of 1930, as amended, Stat. (1930).

[103] Ehrenhaft, supra note 18, 76.

so did the number of affirmative definitions and likewise the amount of duties imposed.[104] Once the process had been revived, the volume of complaints went from strength to strength.[105] The most immediate concern of American trade partners was the arbitrary nature of the United States countervailing provisions. The passage of the comprehensive Trade and Tariff Act of 1974 did little to assuage the concerns of these nations particularly as regards the changes brought to the countervailing duty legislation.[106]

Section 331 of the 1974 Act authorised the imposition of countervailing duties on non-dutiable items.[107] Implicitly, the original purpose of the legislation was replaced and a new purpose substituted - a unilateral remedy to the growing problem of subsidisation of production by foreign governments.

A number of controversial practices were also officially sanctioned in the statute. The hitherto unofficial power of the Treasury Department to 'estimate' the amount of the subsidy deemed to exist was explicitly sanctioned and no guidelines specified as to the type of subsidy subject to countervailing duties or criteria for quantification.[108]

Reacting to international pressure, Congress did submit

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[104] See Butler, "Countervailing Duties and Export Subsidies: A Re-emerging Issue in International Trade", (1968) 9 Virginia Journal of Int'l Law 82.

[105] See text supra pp.378-380.

[106] 88 Stat. 1978 (1975).

[107] Section 303(a)(2), Tariff Act of 1930, as amended.

[108] Section 303(a)(5), Tariff Act of 1930, as amended.

to the introduction of an injury test for countervailing duties, but the standard introduced does not appear to accord fully with the requirements of Article VI.[109] There were perceived to be two primary limitations to this test:

(a) Non-comprehensive application of the test

The 1974 Act did not extend the injury test to imports of all merchandise, but only to non-dutiable goods. In other words, where goods remained dutiable, the authorities were not obliged to render a determination of injury.

Failure to introduce an injury test when the scope of the countervailing legislation was being extended from dutiable goods to all goods would have been a flagrant violation of Article VI. The United States could not have argued that the legislation was grandfathered under the Protocol of Provisional Application, because the new statute introduced a radical alteration of the pre-GATT system.

Indeed, it is also possible that the failure to introduce compliance provisions when the statute was amended was itself inconsistent with Article VI.[110]

In the context of its international obligations, the partial introduction of an injury test was about all the United States could get away with without provoking a series of international complaints and protests. At the

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[109] J.H. Jackson & W.J. Davey, International Economic Relations (Second edition, 1986), 752.

[110] In the United States - Manufacturing Clause Legislation, GATT BISD, 31st Supplement 74 (1985), a GATT panel held that consolidating legislation predating the GATT was required to be consistent with the GATT and could not benefit from the PPA.

end of the day, the concession itself was merely an empty gesture in view of the volume of trade affected.

(b) The test of injury

The standard of harm itself was specified as 'injury' as opposed to 'material injury'. This provoked speculation as to whether the test of injury was less onerous than that of material injury mandated in the GATT.[111]

In reality, the labelling of a particular standard is not as important as its practical implementation. In other words, if the test was identified merely as injury, but the standards applied amounted to those for material injury, it is irrelevant that the test was referred to as something else. However, the legislation did not specify standards for the Treasury Department to follow in their assessment of harm, which fuelled speculation that the United States was cheating by applying a lesser standard.

It is difficult to separate the rhetoric from the facts to decide whether the United States test was of a sufficiently high standard to comply with Article VI. And, for all practical purposes, the whole question was rendered moot by the introduction of the material injury test in the Trade Agreements Act of 1979, a mere five years later.

The Tariff Act of 1930, as amended by the Trade Act of 1974, was radically overhauled by the Trade Agreements

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[111] See generally, D. Evans, "Subsidies and Countervailing Duties in GATT: Present Law and Future Prospects", (1977) 3 Int'l Trade Law Journal 211.

Act of 1979[112], which started a new chapter in the history of the United States countervailing duty law.[113] Subsequent alterations were made to the 1979 system by both the Trade and Tariff Act of 1984[114] and the Omnibus Trade and Competitiveness Act of 1988.[115] Together, these three statutes embody the complete post-Tokyo Round countervailing legislation of the United States.[116]

### (B) The Economic Policy Assumptions Behind United States Countervailing Duty Laws

The administration of a countervailing duty policy is implicitly based on a number of economic assumptions. It is only with the benefit of a defined economic model that certain tasks may be performed in the implementation of the policy. For example, the calculation of the value of a subsidy depends on the application of certain economic principles. Whether a subsidy is quantified on the basis of the benefit to the recipient or the cost to the government depends on the economic policy assumptions that underpin the system itself. Similarly, certain economic presumptions are

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[112] On the negotiating objectives of the United States, see P.B. Feller, "Observations on the New Countervailing Law", (1979) 11:4 Law & Pol'y Int'l Bus., 1439.

[113] 93 Stat. 144 (1979). On the background to the 1979 Act, see generally, C.H. Cosgrove, "Technical Analysis of the Subsidies and Countervailing Measures Agreement", (1979) 11 Law & Pol'y Int'l Bus., 1497.

[114] 98 Stat. 2984 (1984).

[115] 102 Stat. 1107 (1988).

[116] On the effect of the 1988 Act, see D.B. Cameron & S.M. Crawford, "An Overview of the Anti-Dumping and Countervailing Duty Amendments: A New Protectionism?", (1989) 20:3 Law & pol'y Int'l Bus. 471.

required in order to allocate the benefits of subsidies over the relevant periods of time.

Unfortunately, none of the relevant statutes provides guidance as to the relevant economic model. As the ITA has pointed out, there is no statutory guidance or support in the background Senate Reports as to how the rules should be applied and consequently the ITA considers that it has 'wide latitude' in the development of the relevant economic model.[117]

The economic model selected by the ITA for the administration of countervailing measures is based on the conception that subsidies are to be considered distortions of the market process for allocating an economy's resources.[118] An obvious question that could be asked is why does the analysis of subsidy concentrate exclusively on the national market distorting effects of such programmes rather than the distorting effects of such programmes on the world economy. Nevertheless, the agency has observed:

> "In a market economy, scarce resources are channelled to their most profitable and efficient uses by the market forces of supply and demand. We believe a subsidy is definitionally (sic) any action that distorts or subverts the market process and results in a misallocation of resources, encouraging inefficient production, and lessening world wealth.'[119]

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[117] Cold-Rolled Carbon Steel Products From Argentina, 49 Federal Register 18,0006 (1984), reproduced in J.H. Jackson & W.J. Davey, International Economic Relations (Second edition, 1986), 764.

[118] See Greenwald, supra note 101, 35.

[119] Certain Wire Rod From Poland, 49 Federal Register 19,374 (1984).

The economic principles behind the application of countervailing duties can be ascertained from the Subsidies Appendices attached to many of the ITA decision in the early 1980s. The ITA developed the practice of explaining in detail by means of an annex to its decisions the explicit calculation, allocation and application of duties.[120] However, this approach was criticised by the Court of International Trade for the technical reason that the ITA had failed to engage in rule-making pursuant to an administrative procedure statute prior to adopting the policy.[121] In the court's view this was essential to make the applicable rules transparent.

In response, the ITA published the Notice on Rulemaking which contained a number of regulations prescribing the manner that the ITA would apply countervailing procedures in the future. These regulations are based upon the economic model articulated in the above case.[122] This is generally known as the 'distortion model' where the application of countervailing duties is measured according to the degree of economic distortion it causes in the economy of the country in which the benefit is received. However, the economic model applied by the ITA has been the subject of immense criticism from a number of writers.[123]

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[120] See, for example, Cold-Rolled Carbon Steel Products From Argentina, supra note 117.

[121] IPSCO Inc v United States, 687 F.Supp 614 (CIT 1988); and Saudi Iron and Steel Co (Hadeed) v United States, 686 F. Supp. 914 (CIT 1988).

[122] These principles were upheld by the Court of Appeals for the Federal Circuit in Georgetown Steel Corp. v United States, 801 F.2d 1308 (Fed. Cir. 1986).

[123] See generally, R. Diamond, "Economic Foundations of Countervailing Duty Law", (1989) 29 Virginia Journal Int'l Law 767; A.O. Sykes, "Countervailing Duty Law: An Economic Perspective", (1989) 89 Col Law Review 199; and

The primary criticism of the model expounded by the ITA is that it is incomplete and overly simplistic. The model assumes that, had market forces been allowed to operate unhindered, maximum efficiency would be achieved whereas in many cases externalities (non-economic benefits) can accrue to society, a government or even an individual producer.[124] On occasion, even market efficiency can be raised by subsidies if, for example, the actual cost of the final product manufactured with the assistance is below its value to society. Cheap power is the most obvious example of this phenomenon. The proposed rules makes no reference to either the measuring of externalities nor the deduction of any benefits derived therefrom from the presumed loss to the efficiency of the economy.

A related complication brought about by the ITA methodology concerns the calculation of net subsidy.[125] Since the quantification of subsidy is made on the basis of the distortion it causes, ie. the benefit to the recipient as opposed to the cost to the government, it is difficult to determine the amount that should be deducted from the gross subsidy to arrive at the net amount. If the model of calculation is the distortion model, it should include a figure to represent any benefits to society. This is not in fact done in the calculation of net subsidy.[126]

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M.J. Trebilcock, "Is the Game Worth the Candle? Comments on the Administration of U.S. Countervailing Duty Law", (1990) 21 Law & Pol'y Int'l Bus., 694.

[124] R. Diamond, "A Search for Economic and Financial Principles in the Administration of U.S. Countervailing Duty Law", (1990) 21 Law & Pol'y Int'l Bus., 507, 523.

[125] R.A. Casee, "Trade Subsidy Law: Can Foolish Inconsistency Be Good Enough for Government Work?", (1990) 21:4 Law & Pol'y Int'l Bus., 609, 340.

[126] See ASG Industries, Inc v United States (ASG Industries II), 610 F.2d 770 (1979).

(C) Definition of Countervailable Subsidy

The 1979 Act requires the ITA to determine both the existence of a subsidy and to calculate its value.[127] The 1979 Subsidies Code, it will be recalled, was deliberately vague on this point, and the identification of countervailable subsidies has largely been left to the judgment of individual signatories. Nevertheless, the background to the development of the concept of countervailable subsidy in American countervailing duty law perfectly illustrates how matters such as this develop in ways that bring into question the good faith involved in the operation of such agreements.[128]

The starting point for the identification of countervailable subsidies is, not surprisingly, the statutory definition.

According to the original provisions of Section 771(5), the term 'subsidy' simply has the same meaning as 'bounty or grant' insofar as that term is employed in Section 303 of the Tariff Act of 1930. Reference to Section 303 of the 1930 Act, as amended by the 1974 Act, is of little assistance in defining countervailable subsidies because the term 'bounty or grant' itself is not defined. However, it is probably sufficient to assume the pre-1979 decisions on the concept to remain valid since such decisions naturally rely upon the use

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[127] Sections 703(b) and 705(a)(1), Tariff Act of 1930, as amended.

[128] For a country-specific analysis of countervailing duties, see C.D. Stoltenberg, "Subsidies Under United States Counter-vailing Duty Law: The Case of Taiwan", (1988) 9 Northwestern Journal Int'l Law and Bus., 138.

of that term.[129]

The statute expressly provides two basic guidelines in identifying countervailable subsides. First, it incorporates the Illustrative List of Export Subsidies contained in Annex A of the 1979 Code into the legislation to provide illustrations of export subsidies. As mentioned earlier, all export subsidies are countervailable subsidies. Second, a number of rules are provided to isolate countervailable domestic subsidies.[130]

(1) Export Subsidies

All export subsidies are countervailable under American law and the incorporation of the Illustrative List from the Subsidies Code prima facie indicates that United States practice is consistent with the Code obligations. The list is expressly declared to be non-exhaustive and therefore the extension of the concept of countervailable subsidy to all forms of export subsidisation is legitimate. This interpretation is reinforced by the fact that the Code does not expressly limit the concept of countervailable subsidy in its text.

Some commentators have claimed that, in interpreting the concept of export subsidy, the ITA is bound by international obligations to refrain from countervailing subsidies that are permitted under agreements such as

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[129] Consideration of the pre-1979 law is provided in F. Berger, "Judicial Review of Countervailing Duty Determinations", (1978) 19 Harvard Int'l Law Journal 593.

[130] The rules for identifying countervailable domestic subsidies were considerably altered by Section 1312 of the Omnibus Trade and Competitiveness Act of 1988.

the GATT and the OECD Arrangements.[131] However, the fact that certain types of export subsidies are not prohibited by international agreements does not preclude the United States from applying its countervailing laws against permitted export subsidies. Article VI of the GATT allows states to countervail all subsidies and any limitation on the interpretation of that provision is unilateral, although as we shall see later these self-imposed limitations are becoming increasingly less restrictive.

This would accordingly appear to give the United States authorities unfettered authority to countervail all export subsidies. Naturally, the authorities have done just so. Among the most common forms of export subsidies that are regularly countervailed are rebates of customs duties on the export of specified products[132], export bounties[133], export restitution payments[134], low-interest working capital loans on exports[135], export credit insurance[136], and excessive rebates of indirect taxes on exports.[137]

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[131] See D. Simon, "Can GATT Export Subsidy Standards be Ignored by the United States in Imposing Countervailing Duties", (1983) 5 Northwestern Journal of Int'l Law & Bus., 183.

[132] Refrigerators, Freezers and Other Refrigerating Equipment From Italy, 46 Federal Register 23,512 (1981).

[133] Spirits From Ireland, 46 Federal Register 22,632 (1981).

[134] Dextrines and Solubles of Chemically Treated Starches From Corn Starch From the European Community, 45 Federal Register 18,414 (1980).

[135] Amoxicillin Trohydrate and Its Salts From Spain, 46 Federal Register 57,945 (1981).

[136] Steel Products From France, 47 Federal Register 26,315 (1982).

[137] Oil Country Tubular Goods From Spain, 49 Federal Register 47,060 (1984).

The ITA has developed a number of principles over the course of its jurisprudence on the subject to distinguish export subsidies from domestic subsidies. These have been codified in the Notice on Rulemaking.[138] The two main rules are as follows:

(a) Selective treatment, and a potential countervailable export subsidy, exists where the ITA determines that eligibility for, or the amount of, benefits under a programme is tied to actual or anticipated exportation or export earnings[139];

(b) Where exportation is only one of many eligibility criteria for benefits under a programme, the inclusion of exportation as a criterion shall not per se constitute selective treatment.

For a benefit to be an export subsidy, a government must provide special benefits to exporters, or exports, above and beyond what it may provide to non-exporters or non-exported products. Where the benefit is provided regardless of whether the recipient is a domestic producer or an exporter, it is a domestic subsidy, always subject of course to the doctrine of de facto export subsidy developed by the ITA and its predecessor.[140]

On the other hand, where a number of benefits are offered including programmes based on export performance, multiple eligibility criteria are applied.

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[138] Paragraph 355.43, ITA Regulations.

[139] See also Heavy Iron Construction Castings From Brazil, 51 Federal Register 9,491 (1986).

[140] See text supra, pp.575-579

In such situations, the ITA evaluate all the facts of the case in order to determine whether a programme operates in such as way as to render it an export programme. Each case must be considered on its individual merits and the overriding criterion is the effect of the programme with respect to the merchandise.[141]

(2) Domestic Subsidies

The treatment of domestic subsidies under United States countervailing law, both in the form of legislation and administrative practice, demonstrates how rules can be tightened to make the application of duties more likely. By constantly increasing the scope of the definition of countervailable domestic subsidies, the government and administering authorities have been able to reduce the number of domestic subsidisation programmes that cannot be countervailed.[142] The result is that a greater and greater range of programmes may be subject to duties.

Originally no domestic subsidy could be the subject of countervailing duties. As a matter of policy, until 1973, the Treasury Department restricted the concept of countervailable subsidy to export subsidies even although it no doubt possessed statutory authority to countervail domestic subsidies. Since export and domestic subsidies are considered to be mutually exclusive, as long as foreign governments ensured that any assistance rendered to producers fell within the scope of a domestic subsidy, as defined in United States legislation, the possibility of goods produced with such

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[141] See, for example, Carbon Steel Products From Austria, 50 Federal Register 33,369 (1985).

[142] See generally, C. Lehmann, "The Definition of 'Domestic Subsidy' Under United States Countervailing Duty Law", (1986) 22 Texas Int'l Law Journal 53.

benefits being countervailed was remote.

This policy was abandoned in the Michelin Tire Case in 1973 when the Treasury Department changed policy and decided that certain domestic subsidies could also be the subject of countervailing duties.[143] There is little doubt that the Treasury Department was reacting to criticism of its self-imposed limitation of the concept of countervailable subsidy.[144] In particular, the Williams Commission Report had cited the failure of the United States authorities to respond to European export subsidies as a direct cause of the perceived trade problems facing the United States at the time.[145]

In the Michelin Case, the Treasury Department had to decide whether a grant by the Canadian government to a tyre manufacturer, as an incentive to locate in a geographical and economically disadvantaged province of Canada, constituted a countervailable subsidy. The intention of the Canadian government in providing the assistance was clearly to alleviate disproportionately high unemployment in the region and the plant provided a considerable number of jobs in the area.

Quite clearly, on the basis of its earlier precedents, the Department should have construed the assistance as a domestic subsidy since the assistance was not intended to directly promote exports. In fact, the Department developed, for the first time, the concept of the de

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[143] X-Radial Steel Belted Tires From Canada, Inv. No. TD 73-10 (1975); reproduced in 12 ILM 208 (1973).

[144] See Guido, "The Michelin Decision: Possible New Directions for U.S. Countervailing Duty Law", (1974) 6 Law & Pol'y Int'l Bus., 237.

[145] S.D. Metzger, "Developments in the Law and Institutions of International Economic Relations", (1972) 66 AJIL 537, 557-58.

de facto export subsidy.[146] While the assistance was granted to assist domestic production, it was conferred on an individual enterprise and in fact:

> "...a substantial majority of the tires produced are being and are expected to continue to be exported into the United States."[147]

It is important to note that ostensibly the Treasury Department did not extend the scope of the countervailing laws to domestic subsidies at this point. Rather, the justification for the action was presented as being the fact that the assistance was a disguised export subsidy. Leaving aside the question of whether such a determination was possible on the facts of the case, the concept of de facto export subsidies opened the door to the Department to countervail domestic subsidies.

Whether or not a domestic subsidy could be considered a de facto export subsidy depended on whether the subsides were 'export-oriented'. In making this determination, the Department took into consideration the size of the subsidy, the volume of the merchandise imported into the United States and the effect of the subsidy on the volume of exports.[148]

The test for determining the degree of export-orientation of a particular subsidy was necessarily

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[146] See G. Horlick et al, "Government Actions Against Domestic Subsidies: An Analysis of the International Rules", (1986) 1 Legal Issues of European Integration 1, 29.

[147] This decision was upheld on appeal; see Michelin Tire v United States, 469 F.Supp. 270 (1979).

[148] Float Glass From Belgium, 41 Fed. Reg. 1299 (1976); and Float Glass From Germany, 41 Fed. Reg. 1300 (1976).

subjective and was not based on statutory guidelines. However, if a subsidy failed to satisfy the export-oriented test, the Department did not impose duties. For example, in the Float Glass From Belgium Case, the ITA declined to levy duties where 80% of assisted production remained in the home market and the value of the benefit conferred by the subsidy was two percent of the value of the goods.[149]

At this point, despite the change of policy towards domestic subsidies, the Treasury Department had exercised a degree of restraint in the application of the law since it possessed statutory authority to countervail all forms of subsidies, not only export subsidies. However, the judiciary was not prepared to entertain anything other than the rigorous application of the statute and in ASG Industries Inc v United States, the Court of Customs and Patent Appeals rejected the doctrine of the export-oriented subsidy, instead exhorting the Treasury Department to countervail all subsidies.

The court held that the statute did not expressly authorise the adoption of such a test and it was therefore a creation of administrative imagination. A subsidy, whether export or domestic, was a countervailable subsidy and the only rule that could be justified under the terms of the statute was a de minimus test.[150] The impact of this decision has subsequently been rendered redundant by the changes brought in the 1979 statute.

In the Trade Agreements Act of 1979, Congress had an

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[149] Ibid.

[150] ASG Industries Inc. v United States, 467 F.Supp. 1200, 1214 (1979).

opportunity to rewrite the law relating to the countervailability of subsidies. As we have already noted, the rules in the 1979 Subsidies Code were insufficient to constrain the intensions of Congress to extend, by statutory amendment, the definition of countervailable subsidy. This was essentially because there was no definition of countervailable subsidy contained in the 1979 Code. Congress therefore had considerable discretion in formulating an appropriate rule.

The rule for the application of countervailing duties to domestic subsidies finally enacted identified the following domestic subsidies as actionable:

> '[d]omestic subsidies, if provided or required by government action to a specific enterprise or industry, or group of enterprises or industries, whether publicly or privately owned, and whether paid or bestowed directly or indirectly on the manufacture, production, or export of any class or kind of merchandise:
>
> (1) the provision of capital, loans, or loan guarantees on terms inconsistent with commercial considerations;
> (2) the provision of goods or services at preferential rates;
> (3) the grant of funds or forgiveness of debt to cover operating losses sustained by a specific industry;
> (4) the assumption of any costs or expenses of manufacture, production or distribution.'[151]

According to this definition, for a domestic subsidy to

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[151] Section 771(5), Tariff Act of 1930, as amended.

be countervailable, it must be provided to a specific industry and must take one of the above forms.

(i) Forms of Countervailable Domestic Subsidies

Prima facie, the definition of actionable domestic subsidy appears to preclude the possibility of private financial assistance being the subject of countervailing action because the assistance must be 'provided or required by government action' in order to qualify.[152] Accordingly, private benefits should be extraneous to determinations of countervailing duties.

In practice, this is not the case. The Court of International Trade has affirmed that the term 'domestic subsidy' encompasses private as well as public benefits primarily because the term 'subsidy' is defined by reference to the definition of 'bounty or grant' in Section 303 of the Tariff Act of 1930, as amended. The notion of private subsidies was deemed to be implicit in the latter definition.[153]

Some commentators have maintained that 'the American authorities have made prudent use of authorization'.[154] Since this practice is contrary to the GATT[155], this can be considered condonation of an illegitimate practice. The Department of Commerce has in fact been rather

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[152] For an example of assistance required by government action, see Certain Steel Products From Spain, 47 Federal Register 51,438 (1982).

[153] See Bethelehem Steel Corporation v United States, 590 F.Supp 1237 (CIT 1984).

[154] G. Horlick, et al., "Government Actions Against Domestic Subsidies, An Analysis of the International Rules and An Introduction to United States Practice", (1986) 1 Legal Issues of European Integration 1, 31.

[155] French Assistance to Exports of Wheat and Wheat Flour, BISD, 7th Supplement 46 (1959).

surreptitious in its use of countervailing measures against private subsidies and tends not to drawn too much attention to the fact that such assistance has been countervailed. Thus, for example, in Steel Wire Rope From South Africa, the ITA countervailed rebates given by the South African Iron and Steel Industry Corporation, a private organisation set up by steel producers. But these rebates were included in an overall support figure instead of being singled out for identification as is the usual practice.

The different forms of subsidies, as identified in the illustrative list provided in Section 771(5), amount to a comprehensive category of countervailable domestic subsidies. Grants, loans and guarantees are included as are tax concessions and forgiveness of debt. The subsidised supply of goods and services is also caught by its provisions.

The source of these various types of domestic subsidies is Article 11(3) of the 1979 Subsidies Code. However, this provision is in fact part of Track II of the Code, which deals with the international regulation of subsidies and not the control of countervailing duties.[156] This illustrates how countervailing duty laws can be employed against subsidies that are not per se illegal under international law. It also highlights the lack of symmetry in the 1979 Agreement.

The physical forms of countervailable subsidies can be divided into the following broad categories: grants, loans, guarantees, equity participation, tax concessions and the supply of goods and services.

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[156] See J.J. Barcelo, "The Two Track Subsidies Code - Countervailing Duties and Trade Retaliation", in P. Slayton & J. Quinn, Non-Tariff Barriers After the Tokyo Round (1982), 121.

(a) Grants

The direct provision of financial assistance to an enterprise is the most common form of subsidy and has the advantage of being the most transparent. The principal element in different manifestations of grants is the fact that there is a direct transfer of cash funds from the government to the enterprise involved in the scheme. However, even direct grants take a number of guises.

Direct cash payments to producers are domestic subsidies and, in the past, production payments to manufacturers[157], cash payments to agricultural producers[158], direct cash grants[159], assistance for compensating for plant operating expenses,[160] and restitution payments from European Community guidance and guarantee funds[161] have all been countervailed.

Government participation in the financing of a company or enterprise, not through investment in production, but by involvement in the capital financing of its commercial activities may also constitute a domestic subsidy. Preferential financing in the form of equity

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[157] Dextrines and Solubles of Chemically Treated Starches Derived From Corn Starch From the United States, 45 Federal Register 18,414 (1981).

[158] Tomato Products From Greece, 46 Federal Register 51,425 (1981).

[159] Steel Products From Spain, 47 Federal Register 51, 438 (1982).

[160] Hercules Inc v United States (1987) 3 USITR (New Series), 200, 203.

[161] Molasses From France, 46 Federal Register 46,819 (1981).

infusions[162], the assumption of financing costs by the central government[163], government dividend capital[164], public dividend capital and new capital.[165]government equity participation[166], and the recapitalisation and conversion of debt to equity[167], all qualify as domestic subsidies.

Similarly the ITA has considered regional assistance such as capital investment grants for locating in economically disadvantaged areas[168], regional economic development grants[169], and regional development incentives[170], to be domestic subsidies.

One of the most important forms of stimulating economic efficient and progress - research and development aid - has also been targeted by the ITA as relevant domestic subsidies. Thus federal research and development

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[162] Comeau Seafoods v United States (1989 CIT); reproduced at (1990) 2:1 WTM 141.

[163] Steel Products From Belgium, 47 Federal Register 26,300 (1982).

[164] Steel Products From the United Kingdom, 47 Federal Register 26,343 (1982).

[165] Stainless Steel Sheet From United Kingdom, 48 Federal Register 19,048 (1983).

[166] Carbon Steel Structural Shapes From Luxembourg, 47 Federal Register 26,331 (1982).

[167] Steel Products From Italy, 47 Federal Register 39,356 (1981).

[168] Float Glass From Italy, 46 Federal Register 22,776 (1981).

[169] Welded Carbon Steel Pipes and Tubes From Spain, 49 Federal Register 47,060 (1984).

[170] Steel Products From France, 47 Federal Register 26,315 (1982).

assistance[171], financial assistance provided for the purpose of encouraging the introduction of new technology[172], and research and development aid for the establishment of institutes for research[173] can all be subject to countervailing duties.

Research and development costs have been deemed part of the ultimate costs of products and if government assistance is provided for these activities, the benefit conferred may be countervailable.[174] Governmental assistance will be a subsidy in so far as such assistance confers a competitive advantage that has been acquired without the required expenditure of resources.

But, assistance by a government to a firm to finance research and development will not confer a countervailable benefit where the results of the research have been, or will be, made available to the public, including competitors of the company in the United States.[175] Naturally this is rarely the case in practice.

This extra-statutory concession granted at the instance of the ITA has also been attacked by the CIT. In one case involving research and development expenditure, the Court held that "it is immaterial whether the information is disseminated to all groups, but whether the research and development is targeted to assist a

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[171] Steel Products From the Federal Republic of Germany, 47 Federal Register 26,321.

[172] Steel Products From the Netherlands, 47 Federal Register 26,335 (1982).

[173] Ibid

[174] Optic Liquid level Sensing Systems From Canada, 44 Federal Register 1,728 (1979).

[175] ITA Regulations, supra note 39, 23,382.

particular rather than a general industry".[176] A confusing situation has therefore developed and it is not clear from the decision of the Court whether the general public dissemination of findings in research and development programmes suffices to prevent a ruling against the existence of countervailable subsidies.

No distinction is made between government activities in the economic sector and government support for commerce and industry. Thus, natural gas energy supplies provided at preferential rates have been considered domestic subsidies despite being an integral part of a government's economic strategy for the country.[177]

Governmental activities in social affairs can also constitute a domestic subsidies where this impinges on the commercial affairs of enterprises. For example, European Community labour assistance payments[178] have been countervailed as well as other social security payments.[179]

The range of government agencies from which subsidies can be considered to emanate is also considerable. Not only are central, regional, local and district government assistance programmes domestic subsidies but also, in certain circumstances, government department assistance such as grants from ministries of defence[180] and payments at other than commercial rates from public

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[176] Agrexco v United States, 604 F.Supp 1238 (1985).

[177] Fresh Cut Flowers From the Netherlands, 51 Federal Register 37,944 (1986).

[178] Ibid.

[179] Comeau Seafoods Ltd v United States, (1989 CIT); reproduced at (1990) 2:1 WTM 141..

[180] Industrial Cellulose From France, 48 Federal Register 11,971 (1983).

corporations. Even cross-subsidisation through sales to military services at artificially high prices have been held to be domestic subsidies.[181]

(b) Loans

Government loans at other than commercially available rates of interest are considered domestic subsidies. No distinction is made among long term, medium term and short term loans other than for the purposes of quantification.[182]

The purpose of the loan is irrelevant for establishing whether or not it is a domestic subsidy. So long as the assistance is provided from a government to a commercial enterprise, it qualifies as a domestic subsidy. For example, preferential interest rate programmes for firms locating in economically disadvantaged areas are still subsidies regardless of their function.[183]

Again the form of loan assistance can vary. On the one hand, it may be in the form of operating capital loans[184] or loans to uncreditworthy firms[185] and on the other hand, such assistance may take the form of interest rate rebates[186].

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[181] Ibid.

[182] Float Glass From Italy, 47 Federal Register 56,160 (1982); and Stainless Steel Products From Spain, 47 Federal Register 51,453 (1982).

[183] Float Glass From Italy, 46 Federal Register 22,776 (1981).

[184] Chains and Parts Thereof From Spain, 47 Federal Register 6,908 (1982).

[185] Steel Products From Belgium, 47 Federal Register 26,300 (1982).

[186] Float Glass From Belgium, 46 Federal Register 30,160 (1981).

In common with grants, the range of government bodies capable of providing domestic subsidies in the form of grants is substantial. In the past, loans from central and local government sources have been considered domestic subsidies as have loans from state companies[187], from the European Investment Bank[188], from the European Community[189] and even loans under a European recovery programme for steel producers.[190]

(c) Guarantees

Government guarantees to third parties in support of the commercial operations of domestic producers may constitute subsidies. For example, loan guarantees and even loans to establish housing facilities for workers have been held to be domestic subsidies.[191]

(d) Tax Concessions

Tax concessions constitute domestic subsidies if they provide an advantage to a producer because they allow a producer to decrease its final tax bill. Generally this is done either in the form of tax rebates or tax credits. Thus, tax credits to reduce corporation tax liability[192], deductions for tax liability[193] and

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[187] Steel Products From the United Kingdom, 47 Federal Register 26,343 (1982).

[188] Ibid.

[189] Certain Carbon Steel Structured Shapes From the United Kingdom, 47 Federal Register 39,384 (1982).

[190] Float Glass From the FRG, 47 Federal Register 57,549 (1982).

[191] Steel Products From FRG, 47 Federal Register 26,321 (1982).

[192] Float Glass From FRG, 47 Federal Register 57,549 (1982).

corporate tax and income tax rebates[194] are all domestic subsidies.

There is no requirement that the tax must be a central government tax. Exemptions from local government taxes constitute subsidies.[195] Similarly, the type of tax is not relevant in this computation. Thus, social security payments exemptions[196] and exemptions from property taxes[197] constitute subsidies.

In Armco Inc v United States, the treatment of tax concessions was thoroughly considered by the Court of International Trade.[198] The concessions in question were abatements of tax under a Malaysian statute allowing five percent tax rebate on the fob value of a company's export revenues in a taxable year and tax depreciation allowances for plant facilities allowing deductions exceeding the useful lives of the assets depreciated. The ITA had held both of these to be non-actionable.[199]

The CIT reversed the ruling of the ITA finding instead that both allowances were actionable subsidies. The abatement of tax was considered a countervailable subsidy because although its benefits accrued to a

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[193] Float Glass From Italy, 46 Federal Register 10,971 (1981).

[194] Ibid.

[195] Float Glass From Belgium, 46 Federal Register 30,160 (1981).

[196] Steel Products From Italy, 47 Federal Register 26,327 (1982).

[197] Carbon Steel Wire Rod From Belgium, 47 Federal Register 30,541 (1982).

[198] Slip No. 88-05; reproduced at (1990) 2:3 WTM 176.

[199] Carbon Steel Wire Rod From Malaysia, 53 Federal Register 13,303 (1988).

subsidiary company, it was nevertheless indirect export subsidy. Similarly, the depreciation allowances were held to be actionable because they constituted specific domestic subsidies.

(e) Supply or services and goods

The provision of goods and services at rates less than those paid by other producers constitutes a domestic subsidy. For example, preferential rail transportation rates.[200]

A less obvious form of supply of goods and service is the issue of natural resource subsidies for the production of energy and raw materials. While this subject cannot be divorced from the issue of so-called upstream subsidies, which will be considered later[201], it should be noted that where a government subsidises raw materials which constitute inputs, it is difficult to see how this will not constitute actionable subsidies.

(ii) The Specificity Test

In theory, the major limitation on the application of countervailing duties to domestic subsidies is the so-called specificity test. The statute expressly provides that, in order to be actionable, a domestic subsidies must be provided to 'a specific enterprise or industry or group of enterprises or industries'. This distinction allows the separation of domestic subsidies into two categories: general domestic subsidies and specific domestic subsidies. In theory, only the latter are

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[200] Carbon Steel Structured Shapes From the United Kingdom, 47 Federal Register 39,384 (1984).

[201] See text, infra, pp.605-607.

countervailable under the terms of the statute.

The logic behind this apparently self-imposed limitation is not clear. Neither Article VI or the 1979 Subsidies Code require contracting parties to limit the definition of countervailable subsidies to a particular class of subsidies, although the European Community and Canada also apply a similar test in ascertaining countervailable domestic subsidies.[202] The motive for maintaining the principle is to allow a workable distinction to be drawn between general domestic subsidies such as infrastructure expenditure which could only be quantified with great difficult and more specific assistance. It is the result of pragmatism rather than altruism.

Ironically, ever since, both Congress and the ITA have attempted to restrict the category of non-specific domestic subsidies. The point here is that, while the 1979 definition of countervailable domestic subsidy was consistent with the United States obligations, the long-term trend has been to reduce this concession and the incentive for this policy has been mainly political, although the judiciary has provided general support for this policy.

The formulation of the principles behind the specificity test has largely been left to the ITA and there has been criticism that the ITA has failed to establish clear guidelines on this issue. One writer has suggested that the effort by the Commerce Department to deal with the issue of specificity has led to 'the creation of

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[202] See E. Vermulst, "Comment on U.S. Law and Practice on Subsidies", in J.H.J. Bourgeois, Subsidies in International Trade (1991), 49, 52.

arbitrary rules'.[203] Similarly, the members of a Canada-United States binational review panel have complained that 'despite continuing efforts of Commerce and the courts to explain and clarify this issue the standards for finding specificity remain underdeveloped, opaque, contradictory, elusive and unsatisfying'.[204] Yet, it has been this uncertainty that has allowed the Department of Commerce to manipulate the scope of actionable domestic subsidies.

In its proposed rules the ITA suggested the following rule as the guideline for determining specificity:

> 'Commerce will not act against a foreign subsidy program unless the program 'provides selective treatment to a product or firm.' Selective treatment is defined in 355.43 as either:
> (a) a programme under which benefits are tied to exports or export performance; or
> (b) a domestic subsidy under which the benefits are limited in law or in fact to a specific enterprise or industry within the jurisdiction.'[205]

The first point to note is that selective treatment applies to both products and firms. This distinction is important in the calculation of the amount of subsidy. Countervailable benefits must be tied to the actual merchandise under investigation. Thus, if the benefit is provided to a firm, it must be distributed over the

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[203] D. Tarullo, "Beyond Normalacy in the Regulation of International Trade", (1987) 100 Harvard Law Review 546, 561.

[204] Investigation into Fresh, Chilled and Frozen Pork, Inv. No. 89-1904-06 (1990) 30 ILM 181 (1991).

[205] Rule 355.43, ITA Regulations, 54 Federal Register 23,366 (1989).

whole of the relevant merchandise over a specific period of time. A number of other economic factors must be taken into account in this calculation.[206] If the selective treatment has been applied directly to products, the calculation simply required the direct attribution of the benefit to the products in question.

Secondly, the selectivity criterion applies to both exports and export performance. This allows the ITA to countervail benefits that are paid in proportion to export performance as well as benefits given simply to stimulate exports, whether or not this in fact occurs.

The remainder of the formula deals with the application of the de facto and de jure specificity tests prescribed by statute. The principles behind this concept have been developed over the course of nearly a decade of administration and have had a controversial evolution.

Actionable domestic subsidies must meet two conditions before countervailing duties can be applied:

(a) The programme must benefit a specific set of recipients; and
(b) The programme must be preferential insofar as a specific recipient acquires goods or services on more favourable terms than other companies in the country.[207]

In the investigations immediately following the introduction of the 1979 Act, the ITA interpreted the statutory language to mean that a domestic subsidy could be countervailed only if provided to a specific

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[206] See Horlick, supra note 154, 35.

[207] See S.J. Powell & J.D. McInernay, "International Energy Trade and the Unfair Trade Laws", (1989) University of Penn Journal Int'l Bus Law 339, 346.

enterprise or group of enterprises.[208] However, this interpretation of the law was not fully endorsed in all quarters, particularly in Congress and among American businesses.[209] The matter came to a head in a series of cases lasting almost ten years in which American industries repeatedly brought actions against ITA decisions on specificity.[210]

The first challenge to the ITA's interpretation of the specificity requirement came against its finding that two foreign accelerated depreciation programmes could not be countervailed because they were generally available to all eligible recipients. The question of specificity was referred to the Court of International Trade which rejected the applicants argument that benefits from governmental programmes could be considered countervailable even if they are generally available on a non-preferential basis in favour of the ITA's interpretation of the principle.[211] Any other interpretation of the law, according to the court, would have resulted in an 'absurdly broad definition' of subsidies that could have been applied only with extreme difficulty.

Examining the decision of the Court more closely, the

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[208] In particular, see Steel Products From South Africa, 48 Federal Register 29,564 (1983); and Softwood Products From Canada, 48 Federal Register 24,159 (1983).

[209] See generally, L.A. Cameron & G.C. Berg, "The U.S. Countervailing Duty Law and the Principle of General Availability", (1985) 19 JWTL 497.

[210] See Anhydrous and Aqua Ammonia From Mexico, 48 Federal Register 28,522 (1983); Carbon Black From Mexico, 48 Federal Register, 29,564 (1983); and Portland Hydraulic Cement and Cement Clinker From Mexico, 48 Federal Register 43,063 (1983).

[211] Carlise Tire & Rubber Co. v United States, 564 F.Supp. 834 (CIT 1983).

presiding judge, Judge Maletz, observed that the law required that 'at a minimum either a regional or industry preference must be present in order for a bounty or grant to exist'.[212] The court deferred to the interpretation of the concept applied by the ITA observing that some special or comparative advantage had to be conferred upon an industry or group of industries and, if such an advantage were available to all manufacturers and producers within a given country, there would be no element of specificity.

Within a year, a further case had been brought to challenge the ITA's interpretation of the principle. The basis for the second action was an ITA determination that a South African tax allowance permitting two hundred percent deductions in respect of certain tax liabilities for employment training programmes was not countervailable because it was generally available to all South African producers who satisfied the conditions for receiving the benefit.[213]

While the Court of International Trade was prepared to uphold the Commerce decision, this was on the basis of a different rationale than in the earlier case.[214] The ITA decision had depended on the principle that the deductions were available to all South African industries, but the Court rendered its decision on the ground that 'the practice in question was a tax law and tax laws are not subsidies to the taxpayer if their terms are generally available.'

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[212] Ibid, 837.

[213] Steel Products From South Africa, 47 Federal Register 39,379 (1982).

[214] Bethlehem Steel Corporation v United States, 590 F.Supp. 1237 (CIT 1984).

Nevertheless, by way of obiter, the Court of International Trade hinted that it would be prepared to reverse its earlier decision that as a rule generally available benefits are not subsidies. The court stated that 'there is no reason why a particular benefit cannot be extended without limitation and still be countervailable.'[215] This was the first indication that the CIT was not completely satisfied with its earlier decision.

A confrontation between the ITA and the Court of International Trade appeared imminent and occurred after an investigation into a complaint against Mexican government programmes which supplied carbon black feedstock to Mexican carbon black producers at prices below world market prices. The ITA declined to hold countervailable programmes which provided a limited number of carbon black producers access to the low cost feedstock from the petroleum industry which is operated as a government monopoly in the country.[216]

This decision was made on the ground that, at least in law, any industry in Mexico was entitled to the supply of the byproducts at preferential rates, not only the two companies that in fact used the product. Commerce argued that by definition, 'programs or benefits that are generally available within the exporting country are not countervailable'.

The Court disagreed and upheld the submissions of the petitioner that when a government programme which is nominally available to all industries confers a de facto benefit only on specific enterprises, the programmes

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[215] Ibid, 1242.

[216] Carbon Black From Mexico, 48 Federal Register 29,564 (1983).

fall within the specificity standard set by statute for countervailable subsidies. While in terms of the relevant foreign law the programmes were generally available, in fact it was only the two companies under investigation that benefitted from the programmes.[217] The subsidies were therefore conferred on identifiable producers because the commodities were actually used only by a limited number of producers.

The Court therefore created the principle that, if there was a 'bestowal upon a specific class' of a benefit which amounted to a 'competitive advantage' even although it was not a de jure generally available domestic subsidy, the programme could be countervailed. General availability was to be established on a case-by-case analysis focusing on the benefits provided to recipients rather than on the nominal availability of the benefit.[218]

The court gave no satisfactory explanation for the reversal of its earlier decisions, even although the cases involved differed only slightly on the facts in question. In fairness to the Department of Commerce, the ITA did not immediately endorse the view of the Court and continued to apply its own interpretation of the specificity test. However, when this decision was reaffirmed in a second case brought by the same petitioners against a different benefit the ITA reluctantly conceded that de facto specific subsidies

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[217] Cabot Corporation v United States (Cabot I), 620 F.Supp. 722 (CIT 1986), appeal dismissed, 788 F.2d 1539 (Fed Cir. 1986).

[218] See also, J.A. Restani, "An Introduction to Statutory Responses to Import Penetration", (1986) 18 New York University Journal Int'l Law & Politics 1087.

could be countervailed.[219]

The immediate consequence of this decision was that United states producers reactivated their earlier complaints where these had earlier led to negative determinations of countervailable subsidies.[220]

The next case in this series was PPG Industries v United States which originated from a determination that certain products from Mexico could not be the subject of a countervailing duty order because the benefits derived by the Mexican producers of the product were generally available.[221] The case involved imports of float glass from Mexican manufacturers who had acquired natural gas energy at below world prices.[222] These supplies were available to all industries throughout Mexico, not only float glass producers.

The CIT upheld the findings of the ITA.[223] In its arguments before the court, the plaintiffs contended that any programme reducing the costs of producing or exporting a product should be countervailed irrespective of whether other companies received similar benefits.[224]

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[219] Cabot Corporation v United States (Cabot II), 694 F.Supp. 949 (CIT 1988).

[220] Compare, Softwood Lumber Products From Canada, 48 Federal Register 10,395 (1983) and Softwood Lumber Products From Canada, 51 Federal Register 51,453 (1986).

[221] Unprocessed Float Glass From Mexico, 48 Federal Register 56,095 (Dec. 1983).

[222] Unprocessed Float Glass From Mexico, 49 Federal Register 7,264 (1984).

[223] PPG Industries Inc v United States, 662 F.Supp. 258 (CIT 1987.

[224] On the implications of this argument, see J.H. Bello & A.F. Holmer, "The Specificity Dialogue Continues", (1988) 22:2 International Lawyer 563.

In effect, this was an attempt on the part of the plaintiffs to remove the express words of the statute referring to specificity in the countervailing of domestic subsidies. In response, the respondent argued that the literal language of the statute precluded such an interpretation.

The Court ruling in the PPG Case provides an interesting insight into the conflicting interests involved in the application of the test. On the one hand, Judge Carman noted that it would be absurd to countervail generally available public benefits such as defence and educational spending but, at the same time, there was also a certain degree of unfairness in rendering a benefit non-countervailable merely because it was generally available. Some sort of guidelines were required to reach a middle ground.

In the final event, the main principle elaborated in this decision was whether, on a case-by-case basis, a competitive advantage had actually been conferred in fact on a specific industry or group of industries, rather than concentrating on the nominal availability of such an advantage. Applying this standard to the facts of the case before him, Judge Carman held that the application of certain eligibility requirements for participation in a programme does not per se make the benefits conferred under the programme countervailable.

Within one month, the court was required to consider the whole issue again in Can-Am Corporation v United States which concerned the provision by the Mexican government of fuel oil at below world prices only to industrial purchaser who were willing to use the fuel in Mexico to produce goods.[225] The court ruled that the

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[225] 664 F.Supp. 1444 (CIT 1987).

interpretation given to the specificity principle in Cabot I was erroneous and that the PPG Case should be followed. This required that the ITA conduct a de facto, case-by-case analysis to determine whether or not a programme provided a subsidy to a specific industry or group of industries. In effect, this decision reversed all other court decisions prior to the hearing of this case

The CIT decision in PPG Industries Inc v United States was appealed to the Court of Appeals for the Federal Circuit which provided the final ruling on the point.[226] In a split opinion, the majority of the court held that the ITA decision was correct and that the test should be two-fold. First, if a domestic subsidy is provided by its terms to a particular enterprise or industry, it is countervailable without further inquiry. Second, if the benefit appears by its terms to be generally available to all industries, the benefits may nevertheless be countervailable if, 'in its application, the programme results in a subsidy only to a specific enterprise or industry or specific group of enterprises or industries.[227]

The findings of the appeal court in the PPG Case, however, only apply to those cases initiated before the 1988 Act came into force because the 1988 statute significantly amends the pre-existing rule.

The Omnibus Trade and Competitiveness Act of 1988, adopted the amended de facto use test endorsed by the

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[226] PPG Industries v United States, 928 F.2d 1568 (Fed. Cir. 1991). Reproduced, with commentary by G.N. Horlick, at 30 ILM 1179 (1991).

[227] On this point, the Court specifically referred to the ITA Regulations, 54 Federal Register 23,366 (May 1989).

Court of International Trade in the Cabot I Case. While the original definition of actionable domestic subsidy is not altered by the act, a new subsection was added which reads:

> 'In applying [the specificity test], the administering authority, in each investigation, shall determine whether the bounty, grant, or subsidy in law or in fact is provided to a specific enterprise or industry, or group of enterprises or industries.'[228]

The same amendment expressly instructs the ITA to refrain from finding that nominal general availability, under the terms of any law, regulation, programme or rule establishing a bounty, grant or subsidy is a basis for a finding that a bounty, grant or subsidy has not, in fact, been provided to a specific enterprise or industry.[229]

The statutory history behind this amendment reveals why the original de facto test endorsed for the first time in Cabot I prevailed over the later decisions of the Court of International Trade. The House Report accompanying the bill that finally became the 1988 statute stressed that the 'competitive advantage' language used by the Court in Cabot I will provide a basis for a substantially broader definition of countervailable domestic subsidy.[230] Further, the statute indicates that proof that a programme is nominally generally available is not in itself a

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[228] Section 771(5)(B) Tariff Act of 1930, as amended by Section 1312 Omnibus Trade and Competitiveness Act of 1988.

[229] Ibid.

[230] See Bello & Holmer, supra note 224, 567.

complete defence to the application of a countervailing order.[231]

From the foregoing, a number of conclusions may be drawn on the issue of specificity.

First, the legal basis for the rule is unsatisfactory despite the 1988 amendment. The rule is a creature of administrative practice and is inherently vague. The practices originally identified in Section 771(5) as domestic subsidies were intended to be illustrative and not designed to restrict the reach of the countervailing statute.[232] However, it is possible that the 1988 amendment to the provision may bring about a degree of stability in this matter although it does not add any clarity to the rule.

The test also requires the ITA to examine the internal policies of other countries and to comment on the propriety of these policies in so far as the distribution of resources within that country is concerned. In one sense, a finding that a subsidy is countervailable is tantamount to an accusation that a country has adopted an improper policy. In fact, all that the ITA is deciding is that the country's policy is not based, to the same degree, on the market-oriented principles as the United States.

A much less confrontational strategy would be to focus on the international trade-distorting effect of a programme. However, this might not be an effective substitute for United States purposes because it is

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[231] J.A. Ragosta & H.M. Shanker, "Specificity of Subsidy Benefits in U.S. Department of Commerce Countervailing Determinations", (1994) 25:2 Law & Pol'y Int'l Bus. 639.

[232] Greenwald, supra note 101, 37.

widely accepted that export subsidies have the greatest trade-distorting impact and that domestic subsidies have a much more limited comparative effect. Consequently, the average levels of countervailing duties applied against products benefitting from a subsidy would decline.

Second, the problem of the specificity principle is that, almost invariably some industries will benefit more than others from general programmes. For example, where energy is subsidised, energy-intensive industries will benefit more that industries that use less energy in the production of goods. But, nevertheless, most industries will derive some form of assistance in reducing their overheads. In such cases, the energy-intensive industries will benefit in relative terms more that the remaining industries, but almost all industries will be able to take advantage of the situation. The principle of specificity is of little use in drawing the line between those industries that in fact benefit more than others and in determining where that line is to be drawn.

An alternative approach would be not to focus on the form or availability of the subsidy, but to concentrate on its purposes and effects.[233]

Third, from a practical perspective, there are few guidelines on the application of the test. The proposed notice specifies that, in determining specificity, the ITA will consider:

(a) the extent to which a government acts to limit the availability of a programme;
(b) the number of enterprises, industries, or

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[233] See Cameron & Berg, supra note 209, 505.

groups that actually use the programme;

(c) wether there are dominant users of a programme, or whether certain industries or groups derive proportionally larger benefits; and

(d) the extent to which a government exercises discretion in conferring benefits under a programme.[234]

At the same time, a programme will be specific if the ITA determines that benefits under the programme are limited to enterprises or industries located in a specific region or regions of a country.[235]

However, these guidelines do not cover all situations. For example, as regards the concept of a particular group of industries, in the past the ITA has determined that a particular agricultural sector of a country's economy 'could not constitute a separate groups of industries'.[236] Yet, two years later, the ITA was prepared to concede that producers of separate stage agricultural products may in fact constitute such a group.[237]

Fourth, there are also unresolved questions as to whether particular programmes can be broken up into smaller funding programmes and thus made actionable. If such practices are permitted, it is likely that the

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[234] Rule 355.43, ITA Regulations, supra note 39.

[235] Ibid.

[236] Fresh Asparagus From Mexico, 48 Federal Register 21,618 (1983).

[237] Live Swine and Fresh, Chilled and Frozen Pork Products From Canada, 50 Federal Register 25,097 (1985).

smaller the programme, the more specific the subsidy.[238] Thus, agencies set up to provide grants to specific business may find that their assistance is countervailable insofar as it has been tailored to meet the individual needs of companies.

This issue has in fact arisen in the past. In one complaint, the ITA was required to consider whether a Mexican agricultural support programme was sufficiently specific.[239] The programme in question provided a broad range of benefits to a wide number of agricultural producers. The ITA rendered a negative preliminary determination which was appealed to the CIT which formed the opinion that the programme should have been broken down into different sections to determine specificity.[240]

However, the ITA subsequently adopted the policy of examining separately each specific development programme without waiting for the decision in its earlier case to be reversed.[241] Nevertheless, the CIT determined that the ITA has failed to perform this task adequately and declared the applicable principle to be that all regional programmes should be broken down in order to determine 'the actual results or effects of assistance

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[238] This is despite the fact that Rule 355.43, specifically declares that the agency will not regard a programme as being specific merely because the programme is limited to small or medium-size firms.

[239] Fresh Cut Flowers From Mexico, 49 Federal Register 4,023 (1984).

[240] Roses Inc v United States, 743 F.Supp. 870 (CIT 1990).

[241] Fresh Atlantic Groundfish From Canada, 51 Federal Register 10,041 (1986).

provided...and not [its] purposes or intentions'.[242] The court also reiterated that the specificity test involves a case-by-case analysis of the benefits conferred and is not dependent on the nominal general availability of the programme. As a result, four economic and regional assistance programmes were held countervailable.

The final point is that the issue of whether a subsidy is actionable or not is not resolved by reference to the definition of subsidy contained in Section 771(5) as amended. The section refers to their economic effect and form rather than their purpose. The new Draft Subsidies Code, in contrast, while partially adopting the principle of specificity, defines actionable subsidies by reference to their purpose. It will be remembered that the new Code establishes three categories of subsidies: (a) prohibited subsidies; (b) actionable subsidies; and (c) permissible subsidies.[243] Actionable subsidies include domestic subsidies that cause injury.

The primary advantage of adopting this three fold classification system would be that it facilitates the partial elimination of the specificity test.[244] Naturally, detailed rules would be required to identify which forms of assistance fall into which categories. However, this system has the benefit of clearly delineating which forms of assistance will be countervailed instead of leaving the resolution of this issue to the inconsistent attentions of the administering agency.

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[242] Comeau Seafoods Ltd v United States, Slip Op. 89-155 (CIT 1989); reproduced at (1990) 2:1 WTM 141.

[243] See text supra, pp.131-141.

[244] See W. Lay, "Redefining Actionable Subsidies Under United States Countervailing Duty Law", (1991) 91 Col Law Review 1495, 1516.

(iii) Proposed Forms of Statutory Countervailable Domestic Subsidies

The United States Congress has frequently adopted proposals that would render certain forms of government assistance actionable regardless of the forms, purpose or specificity. Their attention has mainly been drawn to practices deemed particularly pernicious. The common element in these proposed statutorily countervailable subsidies is that they are deemed to have inequitable purposes.

Thus, in 1984, the Subcommittee on Trade of the House of Representatives Committee on Ways and Means considered an amendment to the Trade Reform Bill passing through Congress at that time. The object of this amendment was to render countervailable certain forms of domestic subsidies regardless of specificity or otherwise.

The Committee proposed that the following subsidies be deemed countervailable:

(a) Export targeting subsidies
(b) Natural resource subsidies
(c) Upstream subsidies.[245]

Both the export targeting and natural resource subsidy amendments were removed from the final Trade and Tariff Act of 1984. This was due to the opposition of the full Ways and Means Committee and the Reagan Administration. Nevertheless, upstream subsidies did become countervailable under the 1984 Act.

Under the terms of the proposed amendment for natural resources subsidies, such assistance would have been

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[245] See H. Destler, American Trade Politics: System Under Stress (1986), 138.

rendered statutorily countervailable if, by government regulation, a natural resource was provided to a domestic user at below the export or fair market value, access to the resource at the low domestic price was denied to United States purchasers, and the cost of the resource at its fair market value constituted a significant portion of the production costs of the product in question.[246]

This would have had the effect of eliminating the broad exclusion for natural resource products generally available as decided by the ITA in earlier cases.[247] The natural resource subsidy proposal was a flagrant attempt by the Committee to interfere with the existing processes administering the law and would have been tantamount to a direct attack on the policy of the ITA in this matter.[248] It also provides an indication of the willingness of members of the Congress to meddle in the statutory processes without regard to the international rules.

Although the 1988 Act contains no provisions authorising the imposition of duties against statutory countervailable subsidies, this should not be seen as a source of comfort. The imagination of Congressional figures should not be underestimated although it is difficult to predict exactly which measures will be introduced in the future. However, two trends have been identified.

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[246] See Cameron & Berg, supra note 209, 502.

[247] See Carbon Black From Mexico, 48 Federal Register 29,564 (June 1983).

[248] See J.H. Bello & A.F. Holmer, "Subsidies and Natural Resources: Congress Rejects a Lateral Attack on the Specificity Test", (1984) 18:2 George Washington Journal Int'l Law and Economics 297.

First, there have been proposals mooted that, where benefits accrue to a broad range of industries, rules should be developed to identify those producers who benefit disproportionately from others, and to treat these benefits as subsidies.[249]

Second, there has also been proposals to create a special category for goods that have been produced with the benefit of below-world-market priced products. These inputs would be treated as carrying a countervailable subsidy.[250]

(D) Quantification of Subsidies

In addition to deciding whether a subsidy is countervailable, the ITA is also responsible for quantifying the amount of the subsidy conferred. Naturally the value of the subsidy will determine the level of countervailing duty imposed.

The value of a subsidy is calculated by the ITA on the basis of the 'benefit to the recipient' and not the 'cost to the government' principle as has been adopted by other states including the European Community.[251] The difference in these approaches can be demonstrated by means of an example.

Suppose that a government borrows finance from an institutional lender and makes this finance available to a firm that can only obtain credit at much higher rates

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[249] See Can-Am Corporation v United States, 664 F.Supp. 1444, 1447-49 (CIT 1987).

[250] See Cabot Corporation v United States (Cabot I), 620 F.Supp 722, 733 (CIT 1985).

[251] See Fediol v EC Commission, Case 177/85, Judgment of July 14, 1988.

of interest. Presume that the government pays 8% per annum for the funds and provided the funds to the enterprise at a rate of 0%. In the commercial market-place, the firm can only obtain funds at a rate of 15% interest. On a cost to the government basis, the subsidy granted would be calculated as 8% of the loan each year, but on a benefit to the recipient basis, the subsidy is 15% (ie. the difference between the commercial rate and the actual rate) of the loan each year.

On the whole, the benefit to the recipient methods tends to exceed the value of the cost to the government calculation in most cases. The benefit to the recipient sum is also a one-sided calculation. This is evident if regional grants are considered. If a country provides assistance to a company to locate in a particular geographically or economically disadvantaged area, the ITA is required to counter the full amount of any subsidy given and does not offset the advantages with an amount to compensate for the disadvantages that the support is designed to overcome.

The calculation of the amount of a subsidy is the most obvious method of manipulating the countervailing duty laws to provide protection. If countervailing duty levels are set higher than the actual levels of subsidisation, foreign producers would be placed at a competitive disadvantage compared to domestic producers. The GATT and the 1979 Subsidies Code expressly prohibit such practices, but there are no international rules for the quantification of subsidy levels. The matter is therefore one of great administrative discretion.

The conceptual basis for the valuation of a subsidy has been the source of much friction between the United States and its trading partners, particularly the European Community. While the Community tends to value

subsidies on the basis of the cost to the government, the United States authorities take the view that the level of subsidisation is relative to the benefit conferred on an enterprise by the assistance.[252] In a number of cases this causes substantial differences in the calculation of the subsidy.

## (E) Calculation of Net Subsidy and Allocation of Benefits

### (1) Calculation of Net Subsidy

Once a subsidy has been quantified, the Commerce Department is required to deduct from the gross subsidy any factors which reduce the real value of the subsidy.[253]

According to the 1979 Act, the ITA is entitled to make the following deductions in calculating net subsidies:

(a) any application fee, deposit, or similar payment paid in order to qualify for, or to receive, the benefit of the subsidy;
(b) any loss in the value of the subsidy resulting from its deferred receipt, if the deferral is mandated by government order; and
(c) export taxes, duties, or other charges levied on the export of merchandise to the United States specifically intended to offset the

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[252] See Carbon Steel Wire Rod From Czechoslovakia, 49 Federal Register 19,370 (1984); and Carbon Steel Wire From Poland, 50 Federal Register 30,125 (1985).

[253] See generally, G. MacDonnell, "Offset Policy Under the New Countervailing Duty Law", (1982) 15 Cornell Int'l Law Journal 429.

subsidy received.[254]

Prior to 1979, the Department of Treasury has adopted a less rigorous approach by attempting 'to maintain flexibility and discretion, and to emphasize trade distortion effects rather than the mere conferral of a benefit.'[255] This discretion has been severely curtailed by the 1979 Act, but, on the other hand, at least objective criteria have been introduced for this purpose.

These deductions are narrowly drawn and are intended to be exhaustive.[256] Also, these deductions are allowed at the discretion of the Department of Commerce which 'may subtract' these amounts in the calculation of net subsidy.[257] Deductions are not permitted unless supported by verifiable evidence.[258]

As a consequence numerous deductions have been refused by the ITA. Thus, in Certain Softwood Products From Canada, the ITA refused to allow dislocation costs (ie., the costs of moving production facilities from one region to another) and unrebated taxes to be deduction from the gross amount.[259]

A more controversial practice has been to ignore the

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[254] Section 771(6) Trade Agreements Act of 1979.

[255] J.J. Barcelo, "Subsidies, Countervailing Duties and Anti-Dumping After the Tokyo Round", (1980) 13 Cornell Int'l Law Journal 257, 266.

[256] Horlick et al, supra note 154, 42.

[257] See Rule 355.46, ITA Regulations which merely reiterates the provisions of Section 771(6).

[258] Rail Passenger Cars From Canada, 48 Federal Register 6,569 (1983).

[259] 48 Federal Register 24,159 (1983).

secondary tax consequences of a countervailable benefit. Thus, for example, some governments treat direct cash grants from governmental sources as revenue for income tax purposes and therefore liable to tax. The Department of Commerce effectively ignores the fact that such grants may be subject to tax and will not allow this liability as a deduction from the amount of the gross subsidy.[260] This treatment is wholly artificial and does not reflect the fact that the actual amount received by the firm is reduced by the amount of tax liability.

Deductions of allowances from gross subsidies are critical in quantifying net subsidies. If legitimate deductions are not permitted, the effect is to inflate the net subsidy figure and ultimately the level of countervailing duties applicable. The maintenance of a strict control over deductions indicates that Congress is not interested in legitimate deduction, but merely those immediately connected with receiving the assistance.

(B) Allocation of Benefits

There are two aspects to the allocation of benefits. First, the benefits must be allocated to particular units of production. Second, the benefit must be allocated over time.

(i) Allocation of benefits to units of production

Countervailable benefits must be attributed to the various firms that have benefitted from the assistance. Therefore, for example, regional development grants must be isolated to individual firms or companies. Complications arise where assistance is given to groups

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[260] See, for example, Welded Carbon Steel Pipe and Tubes From Argentina, 53 Federal Register 37,619.

of companies and consortia.

In the case of international consortia, a special rule was introduced in the 1988 Act. If the members of an international consortium that is engaged in the production of a class or kind of merchandise subject to a countervailing duty investigation receive subsidies from their respective home countries to assist, permit, or otherwise enable their participation in that consortium, then the ITA is entitled to cumulate all such subsidies, as well as subsidies provided directly to the international consortium itself, for the purposes of valuing the subsidy.[261]

It would be grossly inequitable if all merchandise produced by a particular firm, or group of firms, was subject to countervailing duties solely because assistance had been received for the production of specific goods. Government assistance should not be allowed to taint all production by an enterprise in the absence of legitimate reasons.

Should the ITA conclude that the benefit accrued to products other than those being investigated, no duty can be imposed. Similarly, if it is determined that a countervailable benefit has accrued on products that have been exported to a country other than the United States, no countervailing duty may be imposed.[262] However, both these scenarios represent two extremes and it is more often than not that products under investigation fall between these extremes.

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[261] Section 701(d) Tariff Act of 1930, as amended by Section 1315 of the Omnibus Trade and Competitiveness Act of 1988.

[262] See Nitrocellulose From France, 52 Federal Register 833 (1987).

If the subsidy has been bestowed on merchandise which is the subject of the investigation, but also on other merchandise, the ITA is required to calculate an ad valorem subsidy rate. This situation can arise where either the benefits accrue to merchandise other than that which is the subject of the investigation or not all the subsidised merchandise is imported into the United States.

Where the ITA determines that a countervailable benefit is tied exclusively to the production or sale of a particular product or products, it will allocate the benefit solely to those products. However, if the product or products to which the benefit accrue include products other than the merchandise that is the subject of the investigation, an ad valorem rate is calculated as follows:

(a) in the case of a domestic programme, the benefit is divided by the firm's total sales of the products which have received the subsidy; or
(b) in the case of an export programme, the benefit is divided by a firm's total exports of the product on which the subsidy has accrued.[263]

Alternatively, where products that have benefitted from the countervailable benefit have been exported to countries other than the United States, the ad valorem benefit is calculated by dividing the countervailable benefit by:

(a) the firm's total exports to the United States; or

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[263] Rule 355.47, ITA Regulations.

(b) if the benefit is tied to exports of a particular product, by the firm's total exports to the United States of the products to which the benefit is tied.

On the other hand, on occasion, the countervailable benefit cannot be tied to a particular product. Where the ITA determines that a countervailable benefit is not tied to the production or sale of a particular product, or to the sale of a product in a particular market, the ITA will allocate the benefit to all products produced by the firm, in the case of a domestic programme or to all products exported in the case of an export programme. This latter process rule will, of course, artificially inflate the final levels of duty found to exist.

(ii) Allocation of benefits over time

The allocation of benefits over time requires two separate stages. First, it is necessary determine the moment that a countervailable benefit accrues to a company. Second, the benefit must be amortised over the length of the production process that has gained from the benefit.

It is important to determine the exact time of the receipt of the benefit since this dictates the year in which the benefit will be attributed or, where the benefit lasts more than one year, the allocation of the benefit over time.

The general rule is that a countervailable benefit will accrue at the time there is a cash flow effect on the firm receiving the benefit.[264] Both the cash flow and

[264] Rule 355.48, ITA Regulations.

the economic effect of a benefit normally occur when a firm experiences a difference in cash flows, either in payments it receives or the outlays that are made as a result of receiving the benefit.

Special rules have been established to accommodate particular subsidies. For example, grants or equity infusions are deemed to accrue at the time the firm receives the grant or equity infusion. Where a firm receives goods or services, the benefit is deemed to accrue at the time the firm pays, or would have paid, for the goods or services. In the case of a loan, the benefit accrues at the time the recipient is due to make payment on the loan.

However, the ITA has express authority to depart from these special rules where the circumstances so warrant so long as reasons are provided for such departure. The typical example is complex construction projects where production and delivery may extend over a number of years.[265]

The benefits of a non-recurring countervailable subsidy must also be allocated over time. The general rule is that, depending on the nature of the benefit in question, the ITA will either: (a) expense the entire amount of the benefit in a single year: (b) allocate the benefit over two or more years; or (c) calculate the annual benefit for two or more years.[266]

Where the benefit can be allocated to a single year's production, this procedure presents little problems. In the typical case, the review period in an investigation

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[265] See, for example, Offshore Platform Jackets and Piles From Korea, 51 Federal Register 11,779 (1986).

[266] Rule 355.49, ITA Regulations.

is a single calender or fiscal year. Problems do arise where the lifetime of the benefit extends over two or more years. In this situation, the ITA attempts to calculate the amount of the countervailable benefit attributable to a particular year generally by transforming benefits bestowed in absolute amounts into ad valorem equivalents.

Originally, the ITA disbursed the benefit equally over each year.[267] This was changed to reflect the fact that a lump sum grant was much more valuable than a fraction of the whole sum over the course of a number of years. Hence, the discount rate was introduced to reflect the time value of money over a period when allocating benefits.[268] However, arguably the effect of the discount rate is to exaggerate the effect of a subsidy since the rate itself is decided by the ITA on the assumption that the money will be efficiently employed.

(F) The Issue of Indirect Subsidies

The production of manufactured goods requires the assembly of various components into the finished product. Occasionally, in the production of goods, the component parts may have benefitted from subsidies which, although granted to another manufacturer, will confer a competitive advantage on the final producer by reducing the final production costs of the item in question. The treatment of articles that have benefitted from such indirect subsidies is an extremely contentious topic in contemporary international trade law.

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[267] See, Steel Products From Belgium, Appendix B, 47 Federal Register 39,304 (1982).

[268] Ibid.

The issue of indirect subsidies did not suddenly emerge as a novel concern prior to 1984. In fact, the authorities had investigated a number of cases in which petitioners has alleged the existence of assistance which would now be characterised as indirect subsidisation. For example, in 1978, the Treasury Department had investigated a complaint alleging that payments to firms engaged in the tanning of leather benefitted exports of finished leather handbags.[269]

This case, which was heard on the basis of Section 303, which at that time had not been amended by the Trade Agreements Act of 1979, resulted in an ambiguous determination. While no countervailing duties were imposed because the subsidy was found to merely to equalise domestic prices with world prices for tanned leather, clearly the possibility of imposing duties on the finished products, namely the handbags, had been contemplated because the Treasury Department expressly found the amount of the subsidy on the handbags to be zero. Further, less than a year later the Treasury Department opened a second investigation, based on new evidence, and concluded that the assistance provided to the tanners exceeded the amount required to equate domestic prices with world prices. Duties were subsequently levied on the importation of the handbags.[270]

There then followed a stream of cases in which the ITA, which succeeded the Treasury Department in the investigation of countervailing complaints, found subsidies on goods that had not benefited directly from

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[269] Leather Handbags From Uruguay, 43 Federal Register 3,904 (1978).

[270] Non-Rubber Footwear, Handbags and Leather Wearing Apparel From Uruguay, 43 Federal Register 52,485 (1978).

government assistance.[271] But it was in the United States - European Community steel dispute of 1981-1982 that the issue became politicised.

As we have seen, in 1981, numerous countervailing (and anti-dumping) complaints were brought against European steel producers.[272] Allegations were made by private petitioners that European manufacturers had benefitted from subsidised coal. The ITA refused to include the subsidies in its final calculations of countervailable benefits for two reasons. First, the subsidies were not considered to be sufficiently significant to warrant inclusion in the final order. Second, this source of fuel was generally available and therefore did not satisfy the specificity test on which countervailable subsidies were based at the time.[273]

The CIT refused a accept that this assistance did not confer a countervailable benefit and in one case the ITA was compelled to concede to a remand from the court ordering the recalculation of benefits conferred on a German manufacturer using cheap coking coal during production.[274]

A number of other complaints were brought to the attention of the ITA at the same time[275], but it appears

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[271] See Sodium Gluconate From the European Economic Community, 46 Federal Register 45,975 (1981).

[272] See text, supra pp.390-397.

[273] See Certain Steel Products From Belgium, 47 Federal Register 26,300 (1982); and Certain Steel Products From France, 47 Federal Register 26,315 (1982).

[274] See Republic Steel Corporation v United States, 591 F.Supp 640 (CIT 1983).

[275] See Forged Undercarriage Components From Italy, 48 Federal Register 39,273 (1983); and Oil Country Tubular Goods From Argentina, 49 Federal Register 28,289

that it was not until the Mexican ammonia decision that Congressional patience with the ITA expired.

In October 1982, four American producers of ammonia filed a complaint with the ITA seeking relief from imports of ammonia from Mexico.[276] The complaint alleged that these producers had benefitted from sales of natural gas at below world prices and that a competitive advantage had been conferred on a number of specific producers. It was not alleged that the ammonia producers had directly received subsidies. Rather, the subsidies alleged to confer an unfair advantage resulted from the subsidisation of input products in the form of cheap fuel.

By way of a preliminary determination, the ITA held that the Mexican producer had received a countervailable benefit.[277] The rationale for this determination was that Section 771(5) did not differentiate between direct and indirect subsidies. The principal distinction in the statute was between general and specific subsidies, the assistance in question being considered a domestic subsidy. Since the price of the natural gas to the ammonia manufacturer was less than the price established by the Mexican government for other industrial natural gas users, an ad valorem duty of 2.95 percent was assessed.

This decision was, however, reversed in the final

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(1984).

[276] On the background to this case, see generally, J.Z. Barsy, "Upstream Subsidies and U.S. Countervailing Duty Law: The Mexican Ammonia Decision and the Trade Remedied Reform Act of 1984", (1984) 16 Law & Pol'y Int'l Bus., 263.

[277] Anhydrous and Aqua Ammonia From Mexico, 48 Federal Register 14,729 (1983).

determination, not on the basis of the applicable rules but because of a change in the facts considered by the ITA.[278] After consideration of the submissions of the respondents, the ITA held that there was no evidence that the Mexican ammonia manufacturer benefitted from any preferential rate at all. In the circumstances, the preliminary ruling could not be sustained.

The subsequent Congressional reaction could not be considered by any means to be rational, objective or fair. The ire of Congress was directed against the ITA which, by properly applying the letter of the law, had found the existence of no countervailable benefit. It was not as if the ITA had objected to the application of the statute to indirect subsidies, which was in itself a questionable contention. Rather the ITA had merely held that, on the facts of the case, no duties were warranted.

The result was the introduction of the Trade Remedies Reform Bill in the House of Representatives, backed principally by the Trade Reform Action Coalition, a group of industries that perceived trade benefits from countervailing products that had benefited from indirect subsidies.[279] This bill eventually became part of the Trade and Tariff Act of 1984.

The 1984 Act added a new Section 771A to the Tariff Act of 1930, as amended. According to the amendment, indirect subsidies could be countervailed if they could be considered upstream subsidies. An 'upstream subsidy' was defined as any subsidy, within the meaning of

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[278] Anhydrous and Aqua Ammonia From Mexico, 48 Federal Register 28,522 (1983).

[279] See D. Holmer & J.H. Bello, "The Trade and Tariff Act of 1984: The Road to Enactment", (1985) 19 International Lawyer 287.

Section 771(5) of the Tariff Act of 1930 that:

> (a) is paid or bestowed by a government with respect to a product that is used in the manufacture or production in that country of merchandise which is the subject of as countervailing duty proceeding;
> (b) in the judgment of the ITA bestows a competitive benefit on the merchandise; and
> (c) has a significant effect on the cost of manufacturing or producing the merchandise.[280]

Each of these conditions must be satisfied before a benefit can be considered an upstream subsidy. These are not alternative criteria. Nevertheless, at the same time, the cumulative nature of these conditions is not an impediment to the effective use of this provision.[281]

On the contrary, the effect of this amendment is to dramatically extend the scope of the countervailing legislation to allow action to be taken against products that are not 'like products' in terms of the 1979 Subsidies Code and the validity of the amendment must be seen in that light.

(a) Subsidy paid or bestowed on an input product

Section 771A expressly limits the subsidies that can be considered countervailable input subsidies by referring to the definition of subsidy in Section 771(5). This has the effect of incorporating into the provision the

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[280] See also Rule 355.45, ITA Regulations.

[281] In contrast, two authors have considered that the provision is 'narrowly and carefully drafted'; see J.H. Bello & D. Holmer, "The Trade and Tariff Act of 1984: Principal Anti-dumping and Countervailing Duty Provisions", (1985) 19 International Lawyer 639, 645.

specificity requirement.[282]

While the provision refers to Section 771(5), which includes export subsidies, in practice its terms are applicable only to domestic subsidies quite simply because it is difficult to envisage a product that benefits from an input export subsidy. An export subsidy is payable on, or in proportion to, the physical exportation of goods which would preclude such goods from being component parts of processed goods certainly within the same country.

Therefore, the first stage in the application of this test is for the ITA to determine that a countervailable domestic subsidy has been provided with respect to an input product. It appears that it is only the subsidy conferred on the input product that must be specific. In other words, it is irrelevant that the manufacturer of the input products sells its goods to a number of other producers other than the producers whose goods is subject to the investigation.

However, in its Proposed Rules, the ITA has attempted to mitigate the harshness of this effect by requiring that one of three situations exist before the benefit conferred on the input subsidy can be said to accrue to a finished product.[283]

First, the supplier of the input product and the producer of the final product are related parties. In other words, the supplier controls the producer, the producer controls the supplier, or the supplier and the

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[282] On these rules, see H.M. Giesen, "Upstream Subsidies: Policy and Enforcement Questions After the Trade and Tariff Act of 1984", (1985) 17 Law & Pol'y Int'l Bus., 241, 299.

[283] Rule 355.45(b)(2), ITA Regulations.

producer are both controlled by a third party.

Second, the price for the input product is lower than the price that the producer otherwise would have to pay for the input product in order to obtain it from an unsubsidised seller in an arm's length transaction.

Third, the government sets the price of the input product so as to guarantee that the benefit provided with respect to the input product is passed through to the producer of the merchandise.

In the event of any of these three situations being established, the input subsidy will be deemed to accrue to the final merchandise.

The ITA has also developed a de minimus threshold. Where the ad valorem subsidy rate on the input product multiplied by the proportion of the total production costs of the merchandise accounted for by the input product is less than one percent, duties cannot be imposed under this section.

(b) Competitive benefit

The general rule for establishing competitive benefit is that the price of the input must be lower than the price that a manufacturer at arm's length would have paid in an identical transaction under identical terms and conditions.[284] The price in an arm's length transaction is known as the 'benchmark price' and is the first choice method of establishing a basis from which to

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[284] Section 771A(b)(1) Tariff Act of 1930, as amended. See also Fabricated Automotive Glass From Mexico, 50 Federal Register 1,906 (1985).

determine the existence of a competitive benefit.[285]

In the absence of sales to an arm's length, where a subsidy has been previously found to exist on the input component after an earlier separate and independent investigation, the valuation of the subsidy reached in the earlier case will be applicable.

Finally, the ITA will be able to hold that a competitive advantage exists where the price for the input product is lower that the world market price for the input product.[286] However, the ITA has held that, even where production of inputs has been subsidised, no competitive advantage exists if the domestic producers paid prices higher than those charged to foreign producers.[287] Nevertheless, this criterion confers the most discretion on the ITA to find the existence of a competitive advantage.

If, after an investigation, the ITA decides that an upstream subsidy has been paid on the merchandise that is the subject of the action, the amount of any countervailing duty finally reached will include the amount of the competitive advantage conferred by the input subsidy.[288]

(c) Significant effect

In order to assess whether the upstream subsidy has a significant effect, the ad valorem subsidy rate

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[285] See Agricultural Tillage Tools From Brazil, 50 Federal Register 24,270 (1985).

[286] See Rule 355.45(d), ITA Regulations.

[287] Cold-Rolled Carbon Steel Flat-Rolled Products From Korea, 49 Federal Register 47,284 (1984).

[288] Section 771A(c) Tariff Act of 1930.

determined to exist on the input is multiplied by the proportion of the total production costs of the merchandise accounted for by the input product. If the input subsidy calculated in this way exceeds five percent, a significant effect is presumed. If the input subsidy so allocated to the merchandise is less than one percent, there is presumed to be no significant effect. Where the subsidies lies between one and five percent, there is no presumption and the matter will be decided on the facts of the case.[289]

Both presumptions may be rebutted by evidence supporting the proposition that, on the facts of the particular case, the upstream subsidy has no significant effect on the competitiveness of the merchandise. Factors deemed relevant in this calculation include quality differences in competing merchandise as well as demand.

The procedural aspects of investigations into allegations of input subsidies have been modified from those for normal ordinary investigations which gives rise to speculation whether the procedural aspects of this form of investigation comply with the 1979 Subsidies Code. Whenever the ITA concludes prior to a preliminary determination that there are reasonable grounds for believing that an upstream subsidy has been conferred, the time period within which a preliminary determination must be made is extended to 250 days after the filing of the petition.[290]

On occasion, problems have arisen in the application of this provision where the ITA decides that the input product and the finished product are in fact the same product. In one case involving subsidies given by the

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[289] Rule 355.45(e), ITA Regulations.

[290] Section 703(h) Tariff Act of 1930.

Canadian government for the production of pigmeat, the petitioners argued that subsidies on pig production constituted countervailable upstream subsidies in relation to certain types of pork products.[291] The ITA refused to distinguish between pigs and pork products, claiming that in fact these constituted the same products rather than pigs being an input into pork products.[292] The ITA therefore allocated the entire amount of the Canadian subsidy on pig production to pork products being imported into the United States.

This decision was, however, appealed to the Court of International Trade which held that the Commerce Department had erred in ignoring the rule introduced by the 1984 amendment.[293]

This case necessitated legislation clarifying the distinction between processed and unprocessed agricultural products for the purpose of the upstream subsidies provision. Section 1313 of the Omnibus Trade and Competitiveness Act of 1988 introduced Section 771B which provides that, in the case of an agricultural product processed from a raw agricultural product, subsidies provided to either producers or processors will be attributed to the finished product if (a) the demand for the prior stage product is substantially dependent on the demand for the latter stage product and (b) the processing operation adds only limited value to the raw commodity.

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[291] Live Swine and Fresh, Chilled and Frozen Pork From Canada, 50 Federal Register 25,097 (1985).

[292] See N.D. Palmeter, "Agriculture and Trade Regulation: Selected Issues in the Application of United States Anti-Dumping and Countervailing Duty Laws", (1989) 23:3 JWT 47, 64-65.

[293] Canadian Meat Council v United States, 661 F.Supp 622 (CIT 1987).

As we have seen, this provision was the cause of considerable international dispute.[294] However, it is yet another example of Congress legislating to improve the position of domestic producers against that of foreign producers of competing products.

(G) Countervailing Duties on Goods From State-Controlled Economy Countries

The refusal of the ITA to apply countervailing duties to imports from countries with non-market economies, together with the specificity requirement, has been cited in one recent work as an example of the way that the Department of Commerce has 'limited the reach of the law'.[295] While this may have been true in the early 1980s, as in the case of the specificity test, this concession has undergone a process of gradual erosion and its continued relevance in the 1990s is questionable.

The 1979 Act makes no specific distinction between goods from market economy countries and goods from non-market economies for the purposes of applying countervailing duties. The source of the distinction is the definition of subsidy which is defined according to distortions in the internal market processes within a state. Since non-market economies operate on the basis of state management of the industrial sector, there is no misallocation of resources because the forces of supply and demand are not present. Since there are no distortions, there are no state subsidies and, in the absence of subsidies, there can be no countervailable

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[294] See text supra, pp.207-210.

[295] J.D. Greenwald, "United States Law and Practice", in J.H.J. Bourgeois (ed), Subsidies and International Trade (1991), 33, 34.

benefits.[296]

The first opportunity to consider the issue arose before the ITA after a complaint by United States producers alleging that producers of steel wire rod in Czechoslovakia and Poland had received countervailable benefits.[297] In its final determination on this matter, the Department of Commerce held that bounties or grants cannot be identified in non-market economies.[298] A non-market economy was describes as a system in which the allocation of resources is achieved by central planning, as opposed to the forces of supply and demand, and there is therefore no market processes to distort or subvert. Furthermore, there were no criteria for defining specific subsidies in a non-market economy and, from a practical point of view, the measurement of such subsidies would present virtually insurmountable difficulties.

This determination was reversed on appeal to the Court of International Trade. In Continental Steel Corporation v United States, the presiding judge, Judge Watson, held that 'the Commerce Department [had] made a basic error in its interpretation and administration of the law'.[299] This fundamental mistake was the belief that subsidies could only exist in a market economy. The court maintained that the economic theory behind the

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[296] See D. Holmer & J.H. Bello, "The Countervailing Duty Law's Applicability to Non-Market Economies", (1986) 20 International lawyer 319.

[297] On the background to this case, see generally, K.A. O'Brien, "The Applicability of the United States Countervailing Duty Law to Imports From Non-Market Countries", (1986) 9 Fordham Int'l Law Journal 596.

[298] Carbon Steel Wire Rod From Poland, 49 Federal Register 19,374.

[299] 614 F.Supp. 548 (1985).

application of the statute took second place to the wording of the statute. The language of the statute made no distinction between the different forms of economy and no requirement was expressed that the economy of a state had to be a market one before countervailing duties could be imposed on exported merchandise.

The question was eventually decided by the Court of Appeals for the Federal Circuit which found in favour of the decision of the ITA not to apply duties to imports from non-market countries.[300] The Federal Court reaffirmed that the purpose of the statute was to protect domestic industries against unfair foreign competition caused by subsidies that have the effect of distorting market forces within the economy of a particular state. Where these such distortions result in misallocated resources which confer a competitive advantage on domestic producers, they constitute countervailable subsidies if the conditions of the statute are satisfied. In non-market economies, central planners determine the allocation of resources as well as the price and conditions of sale. These decisions effectively replace the forces of supply and demand and therefore the required element of distortion is not present in planned economies.

The possibility of the exclusion of products manufactured in countries operating non-market economies from the scope of the countervailing duty law caused widespread consternation in both Congressional circles and among producers.[301] There is little doubt that

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[300] Georgetown Steel Corporation v United States, 801 F.2d 1308 (Fed. Cir. 1986).

[301] O'Brien, K.A. 'The Applicability of the United States Countervailing Duty Law to Imports from Non-Market Countries', (1986) 9 Fordham Int'l Law Journal 596, 628.

legitimate reasons exist for such concern. Firstly, while it is true that centrally planned economies are not susceptible to distortions in the forces of supply and demand, certain industries are favoured over others. Generally, these are the industries in which hard currency can be earned from exports that can compete with western products.

Secondly, export subsidies can still be applied. Multiple exchange rate systems, currency retention programmes, adjustment and conversion coefficients that stimulate effective exchange rates and tax exemptions from foreign trade earnings are often used to promote exports from state-controlled economies. Yet, if these devices were used by states with market economies they would be countervailable without hesitation. For example, it is difficult to see why a multiple exchange rate lowering the cost of exports should not be the subject of countervailing duties on goods from China or North Korea, but would allow the ITA to impose countervailing duties if it was the United Kingdom that was employing the same technique.

Despite the affirmation of the ITA position by the Court of Appeals for the Federal Circuit, the events of 1990 and 1991 have probably rendered the concession redundant. There has been a dramatic attempt to move from non-market economies to market economies in Eastern European and the new states of the former Soviet Union. As this movement gathers momentum, unwittingly less and less goods will be able to benefit from the concession derived from being goods from a non-market economy.

In fact, this development has even wider ramifications. Both the United States and the European Community have committed themselves to supporting the fragile economies of these state. Credit has flowed from both countries,

as well as the IMF, the World Bank and the European Bank for Reconstruction and Development, into Eastern Europe and the newly independent states of the Soviet Union. But the value of this credit will be severely undermined if these countries are unable to sell goods in the industrialised countries of the west due to non-tariff barriers such as countervailing duties.

In the absence of legislation specifically requiring the ITA to refrain from imposing countervailing duties in goods from Eastern Europe, the benefit of this concession will expire as far as these countries are concerned and they will be exposed to the full vigour of the countervailing legislation like any other market economy state.[302] This will leave only China, North Korea, Cuba and the other diehard communist states entitled to exemption under this rule.

### (3) The Application of the Material Injury Test in Anti-Dumping and Countervailing Duty Investigations by the U.S. Authorities

In both countervailing duty and anti-dumping investigations conducted under the Trade Agreements Act of 1979, as amended, the International Trade Commission (ITC) is instructed to arrive at a determination of whether a domestic industry in the United States has suffered, or will suffer, material injury as a result of

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[302] See generally, M.G. Egge, "The Threat of United States Countervailing Duty Liability to the Newly Emerging Market Economies in Eastern Europe: A Snake in the Garden?", (1990) 30 Virginia Journal of Int'l Law 941.

subsidised or dumped imports.[303] The application of the material injury standard is, for the most part, virtually identical in both types of investigation. The main point of divergence is that the application of the test in countervailing duty investigations is restricted to exports from countries that are signatories to the 1979 Subsidies Code, or which have assumed 'substantially equivalent obligations' to those contained in the Code, or have been conferred with MFN privilege by the U.S. President.[304]

The ITC must address a number of substantive issues in the course of its investigation to determine the existence of material injury. For either countervailing or anti-dumping duties to be levied against foreign imports, it must be established that a domestic industry is suffering, or will suffer, material injury as a consequence of the imports. The three component elements of the injury test are therefore 'material injury itself, the identification of the relevant domestic industry and the matter of causation.

(A) Reasonable Indication of Material Injury in Preliminary Determinations

The injury standards applied by the United States authorities differ significantly in preliminary and final determinations into the existence of material injury. In preliminary investigations, the Commission is instructed to decide whether, on the basis of the facts available to it, there is a 'reasonable indication' that an industry in the United States is materially injured,

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[303] Sections 701(a)(2) and 731(2), Trade Agreements Act of 1979, 93 Stat. 144 (1979).

[304] Section 701(b), ibid.

threatened with material injury or the establishment of an industry in the United States is materially retarded.[305] While the Commission is instructed to apply the three separate tests established to determine injury, the requirement that there is merely a 'reasonable indication' of injury substantially undermines the thoroughness of the test.

As a general proposition, this standard is generally viewed as favouring the petitioner over the respondent.[306] This is simply because the standard for evaluating material injury in a preliminary determination is considered to be considerably lower than for a final determination. This has the effect of making a preliminary determination of injury more likely.

In fact the Court of International Trade rebuked the ITC for applying too lax a standard for assessing preliminary injury in Republic Steel Corporation v United States.[307] Nevertheless, in the same case the Court ruled that the ITC was not at liberty to weigh conflicting evidence from sources other than the petitioner. Statements made in the petitioners complaint, after verification, therefore form the primary source from which the determination is made. This is seen as providing the petitioner with an almost automatic right to have an affirmative initial determination in its favour.

Tension has also arisen between the Commission and the

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[305] Sections 703(a) and 773(a), ibid.

[306] See W.E. Perry, "Administration of Import Trade Laws by the United States ITC", (1985) 3 Boston Univ. Int'l Law Journal 345, 387.

[307] 591 F.Supp 640 (CIT 1984).

Court of International Trade in relation to the 'best information available' standard specified in the statute for preliminary determinations.[308] In Budd Company Railway Division v United States, the Court declared that this requirement imposed a separate standard for the judicial review of Commission decisions.[309] Judicial review on this basis was held competent to assess whether the Commission had conducted a thorough investigation and actually obtained the best information available at that time.

The Commission refused to accept this ruling, and in a number of cases appealed the issue to the Federal Court of Appeal which upheld the Commission's view on the subject. The Federal Court held that nothing in the best information rule defines a standard of investigative thoroughness.[310] This ruling mitigates against the interests of the foreign producer or importer because it leaves the issue of the best information available in the hands of the Commission and, since the best information rule is generally used to the disadvantage of foreign interest groups, the removal of the means to ensure fair and correct review of such decisions is unfortunate. In fact, the Federal Court emphasised that the best information rule was designed as a tool which the ITC could wield to coerce recalcitrant parties to cooperate in the investigation.

(B) Material Injury in Final Investigations

Although material injury is the key to the injury test

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[308] Section 703(b) Tariff Act of 1930, as amended.

[309] 507 F.Supp 997 (CIT 1980).

[310] Atlantic Sugar v United States, 744 F.2d 1556 (Fed. Cir. 1984).

applied by the ITC, actual injury is not required for the imposition of anti-dumping or countervailing duties.[311] In addition to actual injury, the threat of material injury or the material retardation of the establishment of an industry, will suffice for the purposes of the injury test.[312]

(1) Actual Material Injury

Material injury is defined in the statute as 'harm which is not inconsequential, immaterial or unimportant'. Clearly, material injury is a standard less than the 'serious injury' test set in safeguard actions and therefore a greater probability exists that, all things being equal, petitioners will be more successful in establishing injury in anti-dumping and countervailing duty actions.[313] While in safeguard actions the ITC is instructed to examine whether 'significant economic retardation' has been caused by imports[314], in anti-dumping and countervailing investigations these same factors need only point towards an 'actual or potential' decline in economic performance within a domestic industry.

The statute directs the ITC to consider a number of factors in making an injury determination including:

(1) The volume of imports of the merchandise which

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[311] See generally, D.N. Palmeter, "Injury Determinations in Anti-dumping and Countervailing Duty Investigations", (1987) 21 JWTL 123; and M.S. Knoll, "Legal and Economic Framework for the Analysis of Injury by the USITC", (1989) 23 JWT 95.

[312] Section 701(a) Tariff Act of 1930, as amended.

[313] See J.H. Jackson & W.J. Davey, International Economic Relations (Second edition, 1986), 564-565.

[314] Section 201(b)(2) Trade Act of 1974.

is the subject of the investigation and, in particular, whether there has been any significant increase in volume, either in absolute terms or relative to production of consumption.[315]

(2) The effect of imports of that merchandise on prices in the United States for like products, such as significant price undercutting by the imported merchandise vis-a-vis domestic like products, depressed domestic prices and the retardation of price increases that would have other wise occurred.

(3) The impact of imports of such merchandise on domestic producers of like products, including consideration of 'all relevant economic factors' which have a bearing on the industry, such as, inter alia: actual and potential decline in output, sales, market shares, profits, productivity, return on investments and utilisation of capacity; factors affecting domestic prices; and actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment.[316]

Despite express statutory instructions requiring that the Commission 'shall consider' each of these factors, in practice the Commission does not always do so. For example, in one case the Commission appears only to have referred to the volume of imports and the impact of the

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[315] Ibid.

[316] Sections 771(7)(B) and 771(7)(C) Tariff Act of 1930.

imports in assessing injury.[317] Here the ITC considered, among other factors, capacity, capacity utilisation, production, inventories, employment and profitability, but not the effect of imports on price. There was also limited consideration of consumption statistics. The result was an affirmative determination.

But, if the Commission does not need to fully consider all of these factors, and is allowed to pick and choose which it considers most relevant, injury can be found in virtually any investigation. The analysis of injury should involve a balancing, or weighing up, of the relevant effects against each other. If injury caused by increased volumes of imports is offset by a positive effect of the imports on prices, there is no injury. It would be in the interests of all third countries if the Commission was compelled to consider all these variables and to justify its decision within this context.

Further, it is unnecessary for the Commission to conclude that all of these factors are negative. For example, in one case, the ITC examined domestic consumption, domestic production, capacity, inventories, and financial performance before concluding that the financial position of the domestic industry could be characterised as 'very poor' throughout the period of investigation.[318] The Commission held that four factors indicated injury. The appellants argued that the ITC should be required to consider all economic variables. However, the CIT held that the Commission 'need not find all economic indicators to be negative to make a finding

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[317] See Color Picture Tubes From Canada, Japan, the Republic of Korea and Singapore, Inv No. 731-TA-367 (1987); reproduced at (1988) 22:3 JWT 95.

[318] Telephone Systems and Sub-Assemblies Thereof From Japan, Korea and Taiwan, Inv No. 731-TA-428 (February 1989).

of material injury'. The Court examined the legislative history of the 1979 Act and concluded that:

> 'the significance of the various factors affecting an industry will depend upon the facts of each particular case. Neither the presence or absence of any factor listed can give decisive guidance with respect to whether an industry is materially injured, and the significance to be assigned to a particular factor is for the ITC to decide.'[319]

Nor is the Commission's consideration of the factors contributing to material injury confined to these three indicators. Confirming the ITC's existing practice, the 1988 Act provides that the Commission may consider such other economic factors as are considered relevant to the determination of whether or not there is material injury by reason of imports.[320]

It is important to note that the Commission has been conferred with considerable latitude in the interpretation and application of the three main indicators, as well as their interaction.[321] But, in practice, each of these variables merge into each other in the typical analysis carried out by the Commission during its investigations and it is difficult to identify those specific factors which are deemed most likely to cause material injury. However, these elements

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[319] Iwatsu Electric Co Ltd & Ors v United States, reproduced at (1991) 2: WTM 1.

[320] Section 771(7)(B)(ii), Tariff Act of 1930, as amended by section 1328 of the Omnibus Trade and Competitiveness Act of 1988.

[321] On this point, see P.W. Jameson, "Recent International Trade Commission Practice Regarding the material Injury Standard: A Critique", (1986) Law & Pol'y Int'l Bus., 517, 523-524.

provide us with a convenient and logical catalogue for attempting to analyze the issue of material injury.

(a) Volume of Imports of the Relevant Merchandise

Increases in the volume of imports

The Commission is instructed to consider increases in the volume of imports, in either absolute or relative terms. In the past, emphasis has been placed on increases in volume relative to domestic consumption.[322] Less importance has been placed on increased imports where the total market for the product is expanding relative to both domestic and foreign production.[323] Similarly, an increase in imports is less significant if the imports remain a relatively small portion of the domestic market for the product.[324] Conversely, where the market share of the imported product has increased significantly, the Commission has tended to impute a high degree of injury. Naturally, an increased share of a domestic market by foreign goods means lost sales for domestic producers, even although it may be the result of legitimate increased competition.

Cumulation of the volume of imports

In measuring the volume of imports, the Commission recognises that products injuring a domestic industry need not originate from the same source or country. The

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[322] See, for example, Welded Carbon Steel Pipes and Tubes From India, Taiwan and Turkey, Inv. No. 731-TA-2271-3 (1986).

[323] See, for example, Heavy-Walled Rectangular Welded Carbon Steel Pipes and Tubes From Canada, Inv. No. 731-TA-254 (1986).

[324] See, Live Swine and Pork From Canada, 50 Federal Register 25,097 (1985).

Commission analyses the volume of imports from all sources which are alleged to have benefited from subsidisation. The imports are then cumulated for the purposes of making an injury determination.[325]

After a period of confusing and inconsistent practice, the ITC elaborated a number of guidelines to assist determine whether cumulation is appropriate in the circumstances of an investigation.[326] For cumulation to be applied it is necessary for the petitioner to demonstrate that 'the factors and conditions of trade in the particular case show its relevance to the determination of injury'. The factors and conditions which are relevant in determining collective effect on a domestic industry include: volume of imports; trend of import volume; fungibility of imports; competition in the market; common channels of distribution; price similarity; simultaneous impact; and co-ordinated actions by importers.

However, the elements of volume of imports and the trend of import volume were expressly rejected by the Court of International Trade for cumulation calculations and, in one particular case, the Court attempted to substitute its own doctrine of cumulation.[327] The test for cumulation of imports was deemed by the Court to be:

> "whether subsidised or allegedly subsidised imported products are competing with the product of

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[325] Cumulative assessment has a practice inherited by the ITC from its predecessor, the Tariff Commission; see City Lumber Co. v United States, 457 F.2d 991 (1972).

[326] Steel Products From Belgium, Brazil, France, Italy, Luxembourg, the Netherlands, Romania, the United Kingdom and West Germany, Inv. No. 731-TA-53-86 (1982).

[327] Republic Steel Corporation v United States, 591 F.Supp 640 (CIT 1983).

> a domestic industry during a period when the effect of these importations is being felt by the domestic industry".

This appears to be a less rigorous standard than that applied by the ITC and would also involve a less extensive examination of the facts of the case in question. Nevertheless, the ITC continued to apply its own version of the rule, ignoring the decision of the Court.

The difference of opinion between the ITC and the Court of International Trade was only resolved by legislative intervention. The 1984 Act added a new subsection to the Tariff Act of 1930 dealing with cumulation.[328] The new legislation favoured the test devised by the Court of International Trade and required the ITC to:

> "cumulatively assess the volume and effect of imports from two or more countries of like products subject to investigation if such imports compete with each other and with like products of the domestic industry in the United States market".

The application of this test requires the application of two separate requirements: (a) the imports from two or more countries must compete with each other as well as the domestic like product; and (b) the products in question must be subject to investigation.

The views of the ITC were, however, taken into consideration in the statutory wording of the methodology for evaluating the need for cumulation. The Commission is to consider in ascertaining whether

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[328] Section 771(7)(C) of the Tariff Act of 1930 as amended by Section 612 of the Trade and Tariff Act of 1984.

imported products compete among each other and with American products the following:

(1) the degree of fungibility between the various imports and the like domestic products;
(2) sales in the same geographical markets of the foreign imports and the like domestic products;
(3) common channels of distribution for the imports and the like domestic products;
(4) the price-range of the imports and domestic goods; and
(5) simultaneous marketing of foreign and domestic goods.[329]

These factors are virtually identical to those used in the pre-amendment practice of the ITC minus the factors of volume of imports and the trend of imports.

The second condition - that the imports must be subject to investigation - presents no problem if complaints against the products in question originating from different countries have been filed simultaneously. But, if imports have been the subject of a terminated investigation, it is inequitable that they should be considered the subjects of a subsequent investigation.[330] The ITC has, however, treated recently concluded cases as being liable to cumulation. In one case the ITC cumulated the imports under investigation with others from Thailand despite the fact that an order

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[329] Carbon Steel Products From Austria, Czechoslovakia, East Germany, Hungary, Norway, Poland, Romania, Sweden and Venezuela, Inv. No. 731-TA-271/273 (1987).

[330] See N.D. Palmeter, "Injury Determinations in Anti-Dumping and Countervailing Duty Cases - A Commentary on United States Practice", (1987) 18 JWTL 123, 152.

had already been issued for increasing duties.[331]

Cross-cumulation

Where imports from one country have been dumped and imports of the identical product, either from the same country or a different country, have been subsidised, both may contribute to the material injury of the industry. Prior to the 1984 amendment, the ITC had declined to engage in cross-cumulation between anti-dumping and countervailing duty actions and a similar reluctance has characterised the post-amendment practice of the Commission.

A number of reasons have been advanced by individual Commissioners to support the argument that the 1984 amendment does not require cross-cumulation.[332] Certainly the statutory authorization for cross-cumulation is ambiguous. While the 1979 Act introduced radical changes into both the United States countervailing and anti-dumping laws, the 1930 statute treats injury under both regimes in separate sections, although in the same title. Further, the dissimilarity between dumping and countervailing duty determinations is a factor against cross-cumulation.

In contrast to the reluctance of the Commission to enforce cross-cumulation, the Court of International Trade has explicitly held that the section added by the 1984 amendment, without exception, requires the cumulation of imports from two or more countries of like

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[331] Welded Carbon Steel Pipes and Tubes From India, Taiwan and Turkey, Inv. No. 731-TA-271/2 (1986).

[332] See Carbon Steel Products From Austria, Czechoslovakia, East Germany, Hungary, Norway, Poland, Romania, Sweden and Venezuela, 50 Federal Register 186 (1985).

products subject to investigation if they compete with each other and also with like domestic products, without distinction between dumping and subsidisation.[333] This decision was based on the theory that injury caused to an American industry remained injury regardless of whether it was caused by dumping or subsidisation. The Court was critical of the earlier refusals of the ITC to apply cross-cumulation and even suggested that the non-application of the test constituted a 'loop-hole' in the law for which there was no obvious justification.

The initial reaction of the ITC to this decision was interesting. At first, a number of Commissioners refused to cross-cumulate pending an appeal of the case to the higher court.[334] Even after the appeal court refused to accept the arguments against the application of the cross-cumulation test, a minority in the Commission continued to voice dissatisfaction in the application of this test which was manifested in a reluctance to apply cross-cumulation in injury tests.[335]

The Omnibus Trade and Competitiveness Act of 1988 removed all doubts as to the application of cross-cumulation.[336] In Section 1330 of the statute, Congress voted for the judiciary and against the Commission in

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[333] Bingham & Taylor v United States, 627 F.Supp. 793 (CIT 1986), affirmed 815 F.2d 1482 (Fed. Cir. 1987).

[334] See Brass Sheet and Strips From Brazil, Canada, France, Italy, Korea, Sweden and West Germany, Inv. Nos 701-TA-269/270 and 731-TA-311/317; and Oil Country Tubular Goods From Canada and Taiwan, Inv. No. 701-TA-255 and 701-TA-276/277.

[335] See Certain Fresh Cut Flowers, Inv. No. 701-TA-275/278 (1987). Appealed in Floral Trade Council of Davis, California v United States, --- F.2d (Fed. Cir. 1988).

[336] 102 Stat. 1107 (1988); reproduced in 28 ILM 16 (1989).

this matter. This section requires the ITC to cross-cumulate, subject only to a minor exception for de minimus cases.[337] This provision gives statutory authority to the ruling of the Court of International Trade in the Bingham Case and is in effect a rebuke of the Commission for its attempts to prevent the introduction of the rule.

As observed above, the cross-cumulation rule is subject to a de minimus exception in cases involving a small volume of imports. This provision has been described as 'the only anti-dumping/countervailing provision in the [1988] Act furthering free trade".[338] However, the de minimus provision itself cannot be considered pro-free trade if the history of its enactment is considered and, in particular, the non-application of the general rule of cross-cumulation prior to the amendment.

The de minimus rule applies to 'negligible imports'.[339] In order to ascertain whether imports from a particular country are negligible, the ITC is required to examine:

(a) whether or not the volume and market share of the imports are negligible;
(b) whether sales transactions involving these imports are isolated and sporadic; and
(c) whether the United States market for the like product is price sensitive to such a degree that small quantities of the imports might

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[337] 28 ILM 16, 80-81 (1989).

[338] G.N. Horlick & G.D. Oliver, "Anti-Dumping and Countervailing Duty Law Provisions of the Omnibus Trade and Competitiveness Act of 1988", (1989) 23:3 JWT 5, 36.

[339] Section 1330(b), 1988 Act.

result in price suppression.[340]

No reference is made to minimum volumes of imports, such as a 5% rule as a maximum share of the relevant product. Indeed, the criteria set are relatively subjective and the ITC has considerable discretion in the application of these conditions.

(b) The Effect of Imports on Domestic Prices

The second factor taken into consideration in the assessment of material injury under the 1979 Act is the impact of import prices.[341] The Commission is instructed to determine whether:

(1) the prices of imports undercut United States prices for the same goods; or
(2) the price of the imports causes United States prices to decline.

As a matter of economic reality, it is likely that the second of these effects would follow if the first exists. Where foreign manufacturers are able to undercut domestic suppliers, this will inevitably result in the creation of a price equilibrium between the foreign and domestic producers. Since the domestic producer's prices are high to start with, this will entail the domestic producers lowering their prices.

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[340] On the application of this test, see D.B. Cameron & S.M. Crawford, "An Overview of the Anti-Dumping and Countervailing Duty Amendments: A New Protectionism?", (1989) 20:3 Law & Pol'y Int'l Bus., 471, 486.

[341] Section 771(7)(B)(ii) Tariff Act of 1930, as amended by Section 101 of the Trade Agreements Act of 1979.

The Commission determines the price of the products of a domestic industry at the beginning of the three year period habitually used for deciding injury investigations. Thereafter, it calculates the price of the domestic products after the foreign goods have been introduced to the market. Where such competition has had the effect of reducing prices, or preventing sales at prices sufficient to maintain profitability, material injury may be suspected.[342]

However, undercutting the prices of domestic competitors is not ipso facto injurious. The relevant injury results from the diversion of production from the domestic manufacturer to the foreign supplier. While reduced prices constitute evidence in favour of material injury, by itself it is insufficient in the absence of reduced sales affecting the economic viability of a manufacturing operation.

Although the Commission generally follows the policy that price undercutting is insufficient in itself to justify a finding of injury, this willingness has not been extended to complaints alleging predatory pricing.[343] In such instances, the Commission has taken the view that such practices necessarily result in price levels that are damaging for domestic producers since this is part of the strategy for market dominance. In the absence of such injury, attempts to engage in predatory pricing would be bound to fail.

While such a presumption itself is not repugnant, the methodology of the Commission in applying this test has

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[342] See, for example, High Capacity Pagers From Japan, 47 Federal Register 40,679 (1982) and 48 Federal Register 2,682 (1983).

[343] See Welded Carbon Steel Pipes and Tubes From India, Taiwan and Turkey, Inv. No. 731-TA-271/3 (1986).

been such that many cases of non-predatory pricing have been deemed to be so. There are five pre-conditions for a finding of predatory behaviour:

(a) a large and increasing market share;
(b) high levels of subsidisation or dumping;
(c) homogeneous product ranges;
(d) declining prices; and
(e) barriers to entry for other foreign products.[344]

The stronger the evidence of these elements, the more likely the finding of predatory activities.[345] Although predatory behaviour might feasibly arise from subsidisation, it is more likely that its application to the test of material injury is more relevant in dumping cases.

(c) Impact of Imports on Domestic Production

The third and final statutory criterion for the determination of material injury is the impact of the imported goods on the economic health and productivity of the relevant domestic industry.[346]

In a somewhat cryptic amendment to the original legislation, the 1988 Act specifically restricted consideration of this indicator to the impact of imports on domestic producers, but only in the context of

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[344] Certain Red Raspberries From Canada, Inv. No. 731-TA-196 (1985).

[345] For a criticism of this approach in general, see P.W. Jameson, "Recent ITC Practice Regarding the Material Injury Standard: A Critique", (1986) 18 Law & Pol'y Int'l Bus., 517, 547-75.

[346] Section 771(7)(C)(iii) Tariff Act of 1930, as amended by the Trade Agreements Act of 1979.

production operations within the United States.[347] This effectively prevents the investigating authorities from taking into account production operations by United States firms in third countries. One possible explanation for the amendment is to focus on the degree of injury caused directly to industries located inside the United States.

This particular statutory indicator is defined with a considerable degree of specification in the statute. Section 771(7)(C)(iii), as amended, instructs the ITC, to evaluate all relevant economic factors that have a bearing on the state of the industry including, but not limited to:

(a) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilisation of capacity;
(b) factors affecting domestic prices; and
(c) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment.

These elements are to be taken in combination and not individually.

The 1988 Act added a fourth criterion.[348] The Commission is now also instructed to take into consideration the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the product under

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[347] Section 771(7)(B)(i)(III), ibid, as amended by Section 1328 of the Omnibus Trade and Competitiveness Act of 1988.

[348] Section 1328, Omnibus Trade and Competitiveness Act of 1988.

investigation. This provision is merely intended to prevent producers from being penalised for research and development expenditure and to encourage production drives.

(d) Other Factors

The three main indicators are not intended to be the only factors to be considered in the determination of injury and to a certain extent this also works against the interests of foreign exporters. This is quite simply because the Commission prefers to consider other factors only where these point to a conclusion of adverse injury. In other words, the Commission is less likely to consider other factors as an element mitigating any injurious effects of imports but, rather, refers to these mainly when they are a source of exacerbated injury.

For example, in the Certain Fresh Atlantic Groundfish From Canada Case, three other factors were considered in the Commission's analysis of injury to the domestic injury.[349] The first was the relative status of the United States and Canadian industries in terms of concentration and ownership. The second was the existence of an active dispute over fishing grounds in the George Bank sector. The final factor was an examination of the differences in the exchange rates between the Canadian and United States dollars.[350]

None of these other factors can be seen, at least objectively, as supporting the position of the Canadian exporters. Further, the relevance of at least the first

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[349] 51 Federal Register 10041 (1986).

[350] See also, S.M. Hoffer, "May Exchange Rate Volatility Cause Dumping Injury?", (1992) 26 JWT 61.

factor is open to question.

It is also interesting to consider some of the factors that the Commission does not consider in its injury determination.

Most significantly, it does not consider any benefits to the consumers of the imported products that have resulted from cheap prices due to the fact that a product has been dumped or subsidised. No compensatory effect can be derived from benefits bestowed on the consumers because the statute does not authorise the ITC to consider the issue of injury in any other context other than to the domestic industry concerned.

Nor does the Commission consider the possible benefits of dumped or subsidised merchandise for producers engaged in further stage product manufacture. For example, in Dynamic Random Access Memory Semiconductors of 256 Kilobits and Above From Japan, the Commission did not consider the efficiency-promoting effect of cheap semi-conductors in the United States computer manufacturing industry.[351] Obviously the cheaper the component products, the more efficient such industries will become.

Both of these failures to consider are merely illustrate that an investigation by the ITC into dumped or subsidised products is confined to the particular industry claiming injury and is not considered in the context of the whole economy of the country.[352]

(2) Threat of Material Injury

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[351] 51 Federal Register 28,396 (1986).

[352] In contrast, see the practice of the European Commission, infra Chapter 10.

The relationship between material injury and the threat of material injury is simply that the former relates to activity in the present, while the latter relates to activity in the future.[353] As a result, the factors which would establish material injury require to be modified to take into account the element of time.

The ITC have been provided with a total of eight economic indicators to aid in the identification of such a threat. These are as follows:

(a) If a subsidy is involved, whether the subsidy is an export or a domestic subsidy.
(b) Any increase in production capacity or existing unused capacity in the exporting country likely to result in a significant increase in imports into the United States.
(c) Any rapid increase in market penetration in the United States and the likelihood that the penetration will increase to an injurious level.
(d) The probability that imports of the merchandise will enter the United States at prices that will have a depressing effect on domestic prices of like products.
(e) Any substantial increases in the inventory of the merchandise held in the United States.
(f) The presence of under-utilised capacity for producing the merchandise in the exporting country.
(g) Any other demonstrable adverse trends that indicate the probability that the importation of the merchandise will be the cause of actual injury.
(h) The potential for product-shifting if

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[353] Rhone Poulenc SA v United States, 592 F.Supp 1319 (CIT 1984).

> production facilities owned or controlled by the foreign manufacturers, which can be used to produce the products subject to the investigation, are also used to produce the merchandise under investigation.[354]

The application of many of these tests requires the ITC to speculate as to future trends and events. However, the ITC is expressly required to refrain from making findings other than on the 'basis of evidence that the threat of material injury is real'.[355] But there is little doubt that the investigation of allegations into threats of material injury to domestic industries is an unenviable task which is subject to considerable criticism.[356]

Before the amendments made by the 1984 Act, the Commission tended to address only briefly the issue of the threat of material injury. Where a negative determination was made, the Commissioners would point out the negative injury factors and tended to ignore those elements favouring an affirmative determination.[357] In particular, the Commissioners tended to ignore information relating to production capacity from foreign producers.

The 1984 amendments were introduced to tighten up the

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[354] Section 771(7)(F)(i) Tariff Act of 1930, as amended by Section 612(a)(2) of the Trade and Tariff Act of 1984.

[355] Section 771(7)(F)(ii) ibid.

[356] See generally, Madden, "Threat of Material Injury Standard in Countervailing Duty Enforcement", (1984) 16 Law & Pol'y Int'l Bus., 373.

[357] W.E. Perry, "Administration of Import Trade Laws by the USITC", (1985) 3 Boston Univ. Int'l Law Journal 345, 406.

requirements for finding a threat of material injury by providing specific criteria for rendering a decision. These criteria are extremely broad and tend to favour an affirmative finding. In particular, the 1984 Act specifically identifies the unused capacity of a foreign producer as an element for consideration in evaluating a threat of injury and the ITC must ask and receive this data from foreign producers. If information on future production capacity is not forthcoming, the Commission is allowed to draw adverse conclusions.

The general effect of codifying the requirements for finding a threat of material injury is to provide a checklist against which the factual circumstances surrounding a case may be assessed. If a foreign producer or exporter fails to meet one or more of these conditions, a threat of injury may exist. Undoubtedly the existence of this checklists cuts down the ITC discretion for making a negative determination and the large number of grounds for making a finding on this point suggests affirmative decisions will be more likely.

Not content with liberalising the requirements for finding a threat of injury, in 1988, Congress changed the law once again in order to encourage the ITC to encourage more affirmative determinations on the grounds of threat of material injury.

One of the most significant changes relates to the addition of two new criteria to be taken into consideration in assessing the threat of material injury. The ITC is instructed to consider:

(a) the actual or potential negative effects on the product development and production efforts of a domestic industry in anti-dumping cases;

and

(b) the extent to which foreign merchandise has been sold at less than fair value in other markets.[358]

An additional special rule has been introduced for agricultural products. In investigating the threat of material injury in the agricultural sector, the ITC must also take into account the likelihood of increased imports by reason of product shifting in relation to raw and processed agricultural products.[359]

The extension of the injury criteria to cover development and production efforts appears to be an attempt to promote and protect research and development. This includes efforts to develop derivative or more advanced models or variations of existing products. Since this provision extends to 'efforts' on the part of domestic producers, it is unlikely that mere plans are protected. This extension detracts from the real and imminent overarching precondition in the test.

The condition that the ITC should consider dumping by the same party of the same class or kind of merchandise in other GATT contracting parties seems designed to take account of previous patterns of behaviour. Previous dumping behaviour might provide a reasonable indication of future conduct.

(3) Material Retardation of an Infant Industry

The third injury standard is the material retardation of the establishment of a domestic industry and is the most

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[358] Section 1329 Omnibus Trade and Competitiveness Act of 1988.

[359] Section 1326, ibid.

vague, and potentially threatening, criterion upon which an injury determination might be made.

To its credit, the ITC has acknowledged this fact and, in practice, findings that material injury has occurred on this ground are infrequently made. Similarly, the legislature has more or less left this area alone when attempting to tighten up the anti-dumping and countervailing duty law.

The ITC has established a number of principles through its own jurisprudence to supplement the dearth of guiding statutory rules. For example, the ITC decision in Dried Salted Codfish From Canada, provides an illustration of its approach to the issues.[360] In order to ascertain the existence of injury through material retardation, the ITC applied the following rules:

(a) Application of the material retardation standard is not limited to industries that have not yet commenced production but extends to new facilities that have initiated production but which have not yet stabilised their operations.
(b) Evaluation of material retardation is made on a case by case basis since each new industry is inherently unique.
(c) If industries have not yet engaged in production, there must be a reasonable indication that the industry has made a 'substantial commitment' to commence production.

Where these conditions are satisfied, the ITC will proceed to its determination of material retardation

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[360] Inv. No. 731-TA-199 (1985).

resulting in injury.

This is assessed according to whether the levels of economic activity of the industry reflect the normal start up conditions of an enterprise entering a difficult market or whether these costs are worse than what might have reasonably been anticipated as a result of foreign competition. In the latter case, the establishment of an industry is deemed to have been materially retarded.

The lack of cases on this issue indicate on the one hand that material injury on this ground is infrequently claimed and on the other hand that the law on this matter is essentially unsettled. It also reflects the fact that, in many industries, the United States has traditionally maintained a competitive advantage as regards research and development of new products. There are therefore only rare instances when another country has a technological advantage over the United States of such a degree that would be sufficient to prevent the establishment of a counterpart industry in the United States.

At the same time, the lead in such areas once held by the United States has been progressively eroded by a number of states. As this lead contracts, it is likely that more injury determinations will be made on this basis. Combined with the greater pressure that will be placed on the ITC to render affirmative decisions for protectionist reasons, it is likely that this reason will result in the greater imposition of countervailing duties on this ground.

(C) Domestic Industry

Material injury must, of course, affect a particular group of producers within the United States economy and for the purposes of both countervailing duty actions and anti-dumping actions, the relevant group of producers, or 'domestic industry', is defined as:

> 'the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product'.[361]

The relevant domestic industry is therefore comprised of all domestic producers engaged in the production of like products and this is consistent with both 1979 Codes.

(1) Establishing the Category of Like Product

The identification of the relevant industry within the United States rests on the issue of 'like products'. Only those producers manufacturing like products to the imported merchandise subject to investigation fall within the scope of the relevant domestic industry. A like product is defined as:

> 'a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to investigation.'[362]

The equivalent definition of like product in the two Codes is a product that is 'identical, i.e. alike in all respects to the product under consideration' and, in the absence of such a product, any other product which,

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[361] Section 771(4)(A) Tariff Act of 1930, as amended by Section 101 of the Trade Agreements Act of 1979.

[362] Section 771(10), ibid.

'although not alike in all respects, has characteristics closely resembling those of the product under investigation'.[363] While the American law definition is compatible with the Code definition, it is in the application of the test that inconsistencies arise.

The first stage of the process of identifying the relevant domestic industry is to define the imported products on the basis of their characteristics and purposes. The second stage is to examine the characteristics and used of domestically produced goods in order to ascertain whether or not they are like the imported products. The third stage is to ascertain which of those domestic manufacturers are part of the domestic industry for the purposes of the investigation. The critical parameters for the identification of the relevant domestic industry are the ITC determination of the characteristics and uses of the merchandise being imported into the country.

In the first stage, the ITC examines the imported products which are the subject of the complaint and then identifies both the characteristics and uses which would define like products. In making this evaluation, the ITC focuses on the uses of the goods from a consumer point of view rather than upon the nature of the machines on the production line required to manufacture the goods. The demand side of the equation is therefore more important than the supply side. Manufacturing processes and machinery, i.e. the supply side, are only relevant insofar as they assist indicate characteristics and uses which the imported products may have in common with

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[363] Note 18 to Article 6(1), Subsidies Code 1979; Article 2(2), Anti-dumping Code 1979.

domestic ones.[364]

Ascertaining the specifications and features of the imported product involves an intense factual analysis which, by its very nature, must be undertaken on a case-by-case basis. It involves distinguishing between the significant and the insignificant features in the characteristics and uses of products.

In most complaints, it is in the interests of a domestic industry to argue for the existence of a number of separate industries so long as it can equate its own economic problems to that of the imported goods. This has the effect to allowing it to take full advantage of the alleged injury done to its business operations. It is more likely that the smaller the relevant industry, the greater the likelihood of injury being found since the more an investigation concentrates on the economic health of one company, the less likely that other more efficient and profitable companies engaged in similar production will be brought within the scope of the investigation. Hence there is a greater chance of proving injury.

A number of rules have been formulated by the ITC to assist in this task. First, 'like products' includes more than absolutely, or even virtually, identical products because the definition extends to 'substantially similar articles'.

Second, likeness is determined on the basis of characteristics and uses. For this determination, the ITC generally considers to following factors: (a)

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[364] F. Victor, "Injury Determinations by the ITC in Anti-Dumping and Countervailing Duty Proceedings", in F. Victor (ed), The Trade Agreements Act of 1979 (1983) 117, 128.

physical appearance; (b) end users; (c) customer perceptions; (d) common manufacturing facilities and employees; (e) production processes; (f) channels of distribution; and (f) the interchangeability of the product with others.[365] Naturally, certain of these factors are given more weight than others depending on the nature of the product under investigation. For instance, in cases involving chemicals, investigations often concentrate on the interchangeability of product uses as well as chemical formulations.[366]

A few examples will serve to demonstrate the biased methodology adopted by the ITC in its investigations.

The first case is typical of the problems of distinguishing which products are like products from those that are not when the merchandise under consideration is electrical equipment. In Color Picture Tubes From Canada, Japan, the Republic of Korea and Singapore, several of the respondents argued that television picture tubes could be distinguished into two groups - those larger than 30 inches and those smaller than 30 inches.[367] The basis for this distinction was that the larger tubes used more advanced technology than the smaller ones. They were also considerably more expensive and were purchased by different consumer groups.

Despite these differences, the ITC held that the large tubes could not be separated from the smaller models

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[365] Certain Stainless Steel Pipes and Tubes From Sweden, ITC Inv. No. 731-TA-354 (1987); reproduced at (1988) 22:2 JWT 127.

[366] See, for example, Industrial Nitrocellulose From France, 48 Federal Register 11,971 (1983).

[367] Inv No. 731-TA-367 (1987); reproduced at (1988) 22:3 JWT 95.

since 'the similarities between the large and small models far outweigh the differences'. In other words, regardless of size, the Commission considered that all such products were made up of the same essential parts, performed the same function and, for the most part, were all produced by a similar manufacturing process. In addition, while the Commission acknowledged that the technological requirements of the larger models were more advanced, both sizes were produced with the same basic technology.

This is merely an application of the general rule that, in the event that certain products have essentially the same general features and the same general physical characteristics, but differ in technical specifications, this last factor is not considered sufficient to allow the separation of each product into different groups.[368]

In Amplifier Assemblies and Parts Thereof From Japan, the product being investigation was radio frequency power amplifiers specifically designed for transmitting signals from ground stations to communications satellites.[369] The product was manufactured according to the specifications set in two contracts between the manufacturer and the Communications Satellite Corporation (COMSAT). Both contracts were for the supply of amplifiers of over three kilowatts which permitted the transmission and reception of both radio and television signals. These specifications were deemed sufficient to identify the purposes and uses for identifying like products.

In the first stage of its investigation, the ITC

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[368] Fabric and Expanded Neoprene Laminate From Taiwan, Inv No. 731-TA-371 (1987); reproduced at (1988) 22:2 JWT 137.

[369] Inv. No. 731-TA-48 (1982).

attempted to identify all products that were intended for the purposes and use of those under investigation. Like products were deemed to include all amplifiers which satisfied the basic features required for an amplifier, with a distinction drawn between those with an output of over one kilowatt and those with an output of less than that level. The basis of this distinction was simply that amplifiers over one kilowatt were capable of transmitting both radio and television signals while those of less power could only transmit radio signals.

The next step was to identify like and substitutable, or interchangeable, products. The ITC found that amplifiers which bounced signals off a particular layer of the atmosphere (the troposphere) to relay signals could not be classified with those which required a satellite for retransmissions on the basis that 'troposcatter and satellite amplifiers are not interchangeable, and thus one could not plug a ten kilowatt troposcatter amplifier into a satellite system and have it work.' Both these distinctions were critical because they defined the imported goods in terms of both their characteristics and uses.

This example illustrates that the greater the degree of specification to which a product has been manufactured, the easier the determination of like product. Consequently, in cases of high technology products, like products are easier to identify than products which have undergone basic first stage or even second stage manufacturing transformation. This is obvious when basic commodities such as steel or other metals are considered as opposed to products that are manufactured to contractual specifications. Again this distinction can be made clear from an example.

In Pipes and Tubes From Japan, the ITC had to identify which products were like products to seamless steel pipes and tubes.[370] The petitioners argued that the like products included seamless stainless steel pipes and tubes, seamless heat resistant steel pipes and tubes and seamless alloy pressure pipes and tubes because of the seamless character of the product. In response, the respondents argued that the chemical composition of the product should define like products.

The Commission observed at the outset of its investigation that there could be as many as three, or as little as one, separate products. If the chromium content criterion was employed, there would be three industries, if the production processes were the important consideration there would be two, and if the physical property criterion was used, there would be only one.

Eventually, the ITC agreed with the respondents that the overriding characteristic was the chemical composition and, as a result, found three separate industries.

In the recent past, the Commission has also had to determine whether steel wire rope and stainless steel wire rope are like products[371], whether galvanised and ungalvanised wire rope are like products[372], and whether porcelain-coated carbon steel cooking pans and stainless steel cooking pans are like products.[373]

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[370] Inv. No. 731-TA-87 (1982).

[371] Steel Wire Rope From the Republic of Korea, Inv. No. 731-TA-112 (1982).

[372] Ibid.

[373] Porcelain-on-Steel Cooking Ware From Mexico, the Peoples Republic of China and Taiwan, Inv. No. 701-TA-265/66 (1986).

While there is little doubt as to the difficulties of applying this test, at the same time the ITC rarely discontinues an investigation on the ground that a petitioner does not manufacture like products to those under investigation.[374] Similarly, it is widely admitted among practitioners that, in like product determinations, the petitioner is far more likely to be successful in his contentions than the respondent.[375]

The issue of identifying the relevant domestic industry is further complicated by the existence of special rules for agricultural products, regional industries and related parties. While there are rules in the Subsidies and Anti-dumping Codes to deal with related parties and regional industries[376], the other subject is an example of the United States unilaterally creating rules for the administration of countervailing and anti-dumping duties.

(2) Special Rules for Agricultural Products

The special rules in the agricultural sector are designed to assist determine whether producers and processors constitute a single industry. These rules have been developed in ITC practice and by legislative amendment. The justification for this exceptional rule is merely the sheer lobbying power wielded by the farming lobby in the United States Congress.

An example of such legislative intervention is the rule contained in section 612(a)(1) of the Trade and Tariff

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[374] N.D. Palmeter, "Injury Determinations in Anti-Dumping and Countervailing Duty Cases - A Commentary on U.S. Practice", (1987) 21 JWTL 123, 131-132.

[375] Ibid.

[376] Article 6(7), Subsidies Code 1979; Article 4(1)(ii), Anti-dumping Code 1979.

Act of 1984 which amended the definition of like product to allow grape producers to bring countervailing and anti-dumping actions against European wine manufacturers. The international implications of this measure have already been dealt with.[377] However, the 1988 Act also contained rules relating to injury that are applicable only to agricultural products and as such appear, prima facie, to violate the Subsidies Code.[378]

A number of commentators have questioned the need, and the legitimacy of, such special treatment. Even the ITC itself has reservation and one Commissioner has observed that 'it is not clear to me why agricultural raw material suppliers are necessarily in a different position than the raw material suppliers to any other group of domestic manufacturers.'[379]

Nevertheless, the ITC itself has developed rules that encourage favoured protection for agricultural producers. For example, it developed a two-part test to allow agricultural growers to be included within the definition of a domestic industry where the product under investigation is a processed agricultural product. An agricultural producer may fall within the scope of a domestic industry which produces the finished product if:

(a) the raw agricultural product enters a single, continuous line of production resulting in the end-product; and

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[377] See text supra, pp.213-215.

[378] See N.D. Palmeter, "Agriculture and Trade Regulation; Selected Issues in the Application of United States Anti-Dumping and Countervailing Duty Law", (1989) 23 JWT 47, 65.

[379] Per Commissioner Rohr, in Frozen Concentrated Orange Juice From Brazil, Inv. No. 731-TA-326 (1987).

(b) there is a commonality of economic interests between the growers and the processors.[380]

By allowing agricultural producers to attack products that are not like products, greater protection is afforded to this sector of the economy.

A raw product producer is considered to have entered a continuous line of production if the raw agricultural product is sold almost exclusively to produce the final processed product.[381] The volume of raw product which must be sold for processing in order to constitute a single continuous line of production varies according to the type of product. While sixty nine percent of production was sufficient to establish a continuous process between tomatoes and tomato juice[382], seventy percent was considered insufficient to convince the ITC that cling peach production was a continuous process ending with canned cling peaches.[383]

A commonality of economic interest seems easier to establish. In applying this test, the Commission examines the economic integration and identity of interests between growers and processors. If there is substantial interlocking ownership, shared revenues, or related prices between growers and processors, it is likely that a commonality of interests will be found in

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[380] Ibid.

[381] Live Swine and Pork From Canada, 50 Federal Register 25,097 (1985).

[382] Tomato Products From Greece, Inv. No. 104-TA-23 (1984).

[383] Sugar Content of Certain Articles From Australia, Inv. No. 104-TA-26 (1985).

the investigation.[384] Other factors which are deemed relevant in this decision include the degree of legal interaction between growers and processors. Conversely, where either growers or processors benefit from higher or lower prices relative to the other, it is unlikely that each industry will share the same economic interests.[385]

The 1988 Act did not equate the treatment of agricultural and industrial producers but in fact confirmed the practice of the ITC by adding a new provision based on the distinction between agricultural growers and processors. Now, in an investigation involving a processed agricultural product produced from a raw agricultural product, a producer may be considered part of the industry producing the final product if:

> (a) the processed agricultural product is produced from a raw agricultural product through a single continuous line of production; and
> (b) there is a substantial coincidence of economic interest between the producers or growers of the raw agricultural product and the processors of the processed agricultural product based upon relevant economic factors which may include price, added market value, or other economic interrelationships.[386]

A single continuous line of production is deemed to exist where the raw agricultural product is

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[384] See Lamb Meat From New Zealand, Inv. No. 701-TA-214 (1984).

[385] Table Wines From France and Italy, Inv. No. 701-TA-167 (1984).

[386] Section 771(4)(E), Tariff Act of 1930, as amended by Section 1316(a) of the Omnibus Trade and Competitiveness Act of 1988.

substantially or completely devoted to the production of the processed product and the agricultural product is substantially or completely formed out of the raw product.

The statute also specifies economic factors that are relevant to the coincidence of economic interest. If price is taken into account, the degree of correlation between the price of the raw agricultural product and the price of the processed product is relevant. Also, if added market value is taken into account, whether the value of the raw agricultural product constitutes a significant percentage of the value of the final product is considered important.

The 1988 Act did not alter the prior ITC practice and by adding new provisions differentiating between agricultural and industrial products, Congress recognised that in fact this artificial distinction exists.

(3) Regional Industries

While in ordinary cases the ITC is obliged to apply the concept of domestic industry to the whole of the United States, in 'appropriate circumstances', the United States may be divided into a number of 'regional markets' for the purposes of material injury determinations. If injury is found within such a restricted market, an affirmative determination on behalf of the whole nation is possible, notwithstanding that the same industries in other parts of the United States remain unaffected.[387]

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[387] See generally, M.P. Mabile, "Regional Industry Analysis in Anti-Dumping and Countervailing Duty Proceedings: The ITC's Evolving Approach", (1992) 32:3 Virginia J. Int'l Law 625.

The concept of 'appropriate circumstances' is not defined in the statute, but the statutory requirements for the establishment of a regional market are that:

> (a) the producers within a regional market sell all, or almost all, of their production of the like product in that market; and
> (b) the demand in that market is not supplied, to any substantial degree, by producers of the product in question located elsewhere in the United States.[388]

Material injury, the threat of material injury and material retardation may all be established on a regional basis.

In practice, the ITC has taken it upon itself to define the appropriate circumstances in which a regional industry may be found to exist. Two circumstances justify a finding of appropriate circumstances. First, a particular region must account for a significant share of domestic consumption and production. Second, the condition of producers of the like product in the region should be worse than that of the industry throughout the rest of the United States.[389] Neither of these conditions are required by the statute and are therefore an interpretative gloss put on the legislation.

Both Codes call for the use of this technique only in 'exceptional circumstances'. This implies a more onerous standard than 'appropriate circumstances'. Naturally, the more specific a domestic industry, the easier it will be to establish injury and so domestic industries

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[388] Section 771(4)(C) Tariff Act of 1930, as amended.

[389] Steel Wire Nails From the Republic of Korea, Inv. No. 731-TA-26 (1980). See also Atlantic Sugar Limited v United States, 744 F.2d 1556 (Fed. Cir. 1984).

securing regional interest treatment will be more successful than those which have to satisfy the whole United States territory standard.

Further, the ITC has not even confined itself to consideration of only these two conditions. In fact, the Commission has tended to examine the behaviour of the industry and consumers in the local market place. Factors such as taste, tradition and local culture are relevant as is contiguity.[390]

(4) The Related Parties Rule

The final rule authorising deviation from the ordinary concept of domestic industry is that of 'related parties'. Related parties refers to the problems which arise from the existence of transnational company operations. When producers are related to foreign exporters or domestic importers, it means simply that they are themselves importers of the allegedly subsidised or dumped merchandise. In such circumstances, the term 'industry' is defined in such a way as to exclude these producers from being represented as part of the relevant domestic industry.[391]

The typical situation which this concept is designed to tackle is the parent/foreign subsidiary relationship. The Commission can exclude from the relevant domestic industry an entity, or group, that has benefited from subsidisation or has engaged in dumping through its foreign subsidiary and has imported the products back to the United States.

The rules on this subject are not hard and fast. For

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[390] Fresh Potatoes From Canada, Inv. No. 731-TA-124.

[391] Section 771(4)(B) Tariff Act of 1930, as amended.

example, in one case the Commission excluded from the scope of the injury investigation a domestic producer which was wholly owned by a Swedish company because the domestic company was the exclusive U.S. importer of products from the parent which allowed the parent to avoid competition with other American producers and because the domestic company appeared to have benefited from consistently lower prices of imported goods relative to domestic producers.[392] This was despite the fact that the subsidiary was free to buy the products from any other U.S. producer if these could be obtained at prices comparable to, or lower, than those offered by the parent, but also because certain of the imports from the parent could not be obtained from U.S. suppliers.[393]

Another major criticism is that companies producing like products in the United States are excluded from the scope of the injury investigation if they are owned by foreign companies involved in the production of the goods that are the subject of investigation. For example, in the ITC investigation above, the defender companies had production facilities in the United States employing a number of people in research and development. Nevertheless, the American division of this operation was excluded from the investigation into injury.

This policy can lead to strange results. Thus, in one case involving a complaint by Texas Instruments into the sale of semi-conductors in the United States, the ITC held that NEC, a Japanese company was not a domestic

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[392] Stainless Steel Pipes and Tubes From Sweden; reproduced at (1988) 22:2 JWT 127.

[393] But contrast with the approach taken in Rock Salt from Canada, Inv. No. 731-TA-239 and Low-Fuming Brazing Copper Wire and Rod From New Zealand, Inv. No. 731-TA-247 (1986).

manufacturer of the conductors in question when NEC produced its chips in California (and exported a considerable amount of its production to Japan) while Texas Instruments manufactured its chips in Japan and the Far East.[394] Nevertheless, Texas Instruments was allowed to lodge a petition complaining of dumping of semiconductors by Japanese companies in the United States.

(D) Causation

A causal connection between the subsidised imports and the injury to the domestic industry is, of course, the sine qua non of the whole countervailing and anti-dumping procedures and is an essential requirement in American trade law.[395]

In practice, the Commission rarely makes separate statements of causation because the factors which are taken into account in ascertaining material injury or the threat thereof contain elements which refer to causation. Thus, for example, in assessing the effect of imports on domestic prices, the ITC is instructed to consider the effect of imports on the price of domestic goods. Similarly, the ITC is instructed to evaluate the impact of merchandise on domestic production through such factors as actual or potential decline in output, sales, profits, productivity, return on investment and employment.

The immediate consequence of this situation is that the ITC tends to assume a presumption that, if subsidisation

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[394] Dynamic Random Access Memory Semiconductors of 256 Kilobits and Above From Japan, 51 Federal Register 1,009 (1986).

[395] Section 701(a)(2) and 731(2) of the Tariff Act of 1930, as amended.

or dumping and injury are present, the latter has been caused by the former.[396] There are clearly a number of factors that the ITC has, in the past, placed great reliance upon in establishing causation. In particular, three factors assist the Commission determine whether imports have contributed to the condition of the industry: underselling, lost sales and import trends.[397]

Underselling occurs when the average price of imported merchandise in the United States market is below that of competing American goods. As a general rule, underselling is considered to be evidence of causation and overselling mitigates against causation. As one member of the ITC has observed, in almost every case where the Commission has made and affirmative determination of injury, the price of the imported product has been below that of its American competitor.[398] The rationale for this rule is simply that the displacement of sales by U.S. companies or producers strongly suggests that market share is being lost.[399]

However, in considering the element of price undercutting, the ITC makes no reference to relative quality. In other words, the quality of the products may account substantially for the price difference and yet this would never be considered a factor in judging the degree of causation.

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[396] See Palmeter, supra note 374, at 147.

[397] See M.S. Knoll, "An Economic Approach to the Determination of Injury under U.S. Anti-dumping and Countervailing Duty Law", (1989) 22 N.Y Univ. J. Int'l Law & Politics 37, 54.

[398] See Perry, supra note 357, 408.

[399] See Top-of-the-Stove Stainless Steel Cooking Ware From Korea and Taiwan, 51 Federal Register 46,664 (1986).

Price undercutting is in fact an indirect, and more justifiable method from a competition point of view, of determining future market share of the product. This is because price undercutting will eventually decrease market shares for the U.S. industries. By selecting this element, the ITC avoided the need to analyze future trends in the market-place.

Lost sales occur when an American consumer purchases a foreign product in place of one made by in the United States, chiefly because of price differences. This is perhaps the most direct means of confirming that U.S. companies are being hurt by foreign imports.[400]

Finally, there is the element of import trends. This is a more nebulous concept than the other two, but essentially concerns an examination of the quantity and market penetration of imports from countries under investigation. In particular, the Commission examines increases in the indicators which favour the foreign exporters.

Concentration on these three elements tends to minimise the weight given by the ITC to other factors such as industrial relations problems, supply problems, changes in consumer preferences and fashion as well as general economic recession.

As a general rule, the material injury must be caused 'by reason of the imports of merchandise' under investigation, whether the products have been subsidised or dumped. The main question is to what extent must the injury be attributable to the imported products. On the one hand, must the imports be the main cause of the injury, or on the other hand can they one of the causes

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[400] See Cellular Mobile Telephones and Subassemblies Thereof From Japan, supra note 364.

of injury.

The Commission in fact does not attempt to evaluate whether the subsidised or dumped products were the primary cause of the injury.[401] The ITC, supported by the CIT, has required that the imports cause a 'significant part' of the injury to the domestic industry.

In one particular case, the ITC had to determine whether the injury to the domestic industry was caused by that industry's own multiple cost layering as opposed to the effect of the imports. While the Commission made an affirmative determination of injury, it acknowledged that some of the injury occurred as a result of the industry's own inefficiency. This decision was appealed to the CIT which ruled that:

> 'The Court has no doubt that the state of the domestic industry was attributable largely to its own multiple cost layering, but this does not mean that LTFV imports did not cause material injury....The industry was materially injured and ITC's determination that injury was caused in significant part by LTFV imports was supported by the record evidence on volume, market penetration and price depression'.[402]

Thus, imports need only be a cause of material injury and not the cause, and certainly not the only case.

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[401] G. Bryan & D.G. Boursereau, "Anti-dumping Law in the European Community and the United States: A Comparative Analysis", (1984) 18 Geo. Wash. J. Int'l Law & Econ., 631, 681.

[402] Iwatsu Electric Co Ltd v United States, reproduced at (1991) 2: WTM 1.

In situations in which a particular industry is generally depressed as a consequence of national economic recession, despite the protestations of the ITC to the contrary, it is undoubtedly easier to prove the existence of injury or threat of injury. This was made clear in the steel wars episode between the United States and the European Community.

A number of Community producers of steel were held to have engaged in subsidisation, dumping and causing injury to the American steel industry. British Steel appealed against this decision on the ground that when American prices had declined during the investigation, British imports had also declined, due to the decrease in domestic demand through contraction caused by a recession. Correspondingly, when American prices increased so did British imports of steel. The argument was therefore advanced that the volume of British steel imports had little or no injurious effects by itself, but rather was proportional to the economic welfare of the American steel industry itself.

The Court of International trade rejected this argument, instead holding that foreign imports need not be the sole or principal cause of material injury.[403] It was sufficient that the imports in question contribute to the decline of the domestic industry.

Another major problem arising under causation relates to situations in which the ITC has concluded that some, but not all, of the imports subject to investigation have benefited from subsidies. In such circumstances, the ITC must consider only those imports from the sources that have been found to be recipients of subsidies.

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[403] British Steel Corporation v United States, 593 F.Supp 405 (CIT 1984).

Further problems also arise in the application of causation standards if the ITA determines that, although companies have been indulging in subsidisation, only a certain percentage of the goods which have been subject to the investigation have in fact benefited from a countervailable subsidy. At present, the existing Commission jurisprudence on this point is inconsistent.[404]

Finally, there has been criticism of the application of the causation test in countervailing cases in particular. Commenting on the practice of the ITC, two writers have observed that:

> 'with a burgeoning growth in its own case evidence, the ITC has relegated the requirement for proving a causal linkage between material injury and the foreign subsidy to secondary importance. Of primary importance today is the protection of American industry at the expense of consumers and foreign competitors.'[405]

There are certainly cases in which the Commission has provided little or no analysis of the issue of causation. Further, in at least one case, Chairperson Stern has declared that she 'did not believe it necessary or desirable to make a determination on the question of material injury separate from the consideration of causality'.[406]

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[404] Palmeter, supra note 374, 148.

[405] A.M. Rugman & A. Anderson, "A Fishy Business: The Abuse of American Trade Law in the Atlantic Groundfish Case of 1985-86", (1987) 13 Canadian Public Policy 152, 162.

[406] Fresh Atlantic Groundfish From Canada, 51 Federal Register 10,041 (1986).

**(4) Observations**

In the introduction to this chapter, the United States was accused of three separate abuses of the international rules, namely, actively promoting and encouraging the use of measures of administered protection, failing to abide by the terms and the spirit of GATT commitments and complicity in deliberately facilitating disruption of patterns of trade. It is now time to justify these charges after having reviewed the content and administration of the measures in question.

The accusation of promoting and encouraging the use of anti-dumping and countervailing duty measures is substantiated by two facts. First, the U.S.Congress, and to a lesser extent the International Trade Administration (ITA), have both progressively liberalised the rules regulating these practices over the course of the last fifteen years. If the starting point for evaluation is taken to be 1979[407], and assuming (at least hypothetically) at this point the creation of a GATT-consistent legal environment, U.S. trade laws have been manipulated and assuaged in the interests of domestic industries and in a manner often inconsistent with the GATT rules.

Consider the trend exhibited by Congress towards the liberalisation of these measures. Amendments have been made to respond to the desires of domestic industries through the enactment of the 1984 and 1988 statues. In these measures, Congress has either reversed rulings of the administering agencies which are objective or, in the worst case, refined the rules to increase the

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[407] ie. the date of enactment of the Trade Agreements Act of 1979, when the United States was supposed to have incorporated the obligations of the 1979 Subsidies and Anti-dumping Code into United States law.

possibilities of affirmative determinations against foreign producers and manufacturers.[408] As evidence of this trend, we can cite the new measures for component dumping, the continued removal of discretion from the administering agencies, the new standards for assessing material injury and the proposals for the creation of statutory countervailable subsidies. In fact, there is no single instance of Congress enacting a rule which does not favour domestic industries over foreign competitors.

The consequence of these amendments has been not only a progressive increase in the volume of complaints received by the ITA, particularly when innovative forms of relief have been involved, but also in the proportion of successful complaints in both anti-dumping and countervailing duty cases. The organic cause of this phenomenon can be traced back to the increasing liberalisation of the underlying legislative base for these measures.

The second charge - responsibility for deliberate laxity in the development and application of anti-dumping and countervailing duty rules - relates to the first. In liberalising access to these measures and indirectly to protective measures, the United States government - both the Executive and Legislative branches - are responsible for the adoption of illegal or GATT-inconsistent measures. In addition, advantage has been taken of loop-holes in the terms of the international Codes to exploit opportunities to extend unfair protection to United States industries. The evidence for these propositions is overwhelming and is illustrated by the plethora of examples of illegal behaviour which will be listed in a

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[408] This is a more pronounced trend in procedural matters, such as standing, petition requirements, etc, which will be discussed in the next chapter.

moment.

The final charge - complicity in deliberately disrupting patterns of international trade to protect domestic industries - is an immediate consequence of the first two practices. According to a recent GATT report, each year between 2-4% of imports into the United States are affected by these measures.[409] This figure is calculated on a trade-weighted basis and might seem insignificant but in dollar-terms the figure is certainly not insignificant and, more importantly, represents lost opportunities for foreign producers especially those from developing countries.

There is no doubt that much of the pressure on Congress and the Executive stems from a perception that domestic industries are failing, not because of national economic policy, but because of unfair foreign practices. It is easier to blame declining competitiveness on foreign manufacturers who are often placed at a disadvantage in effectively defending their positions. Congressmen often pander to vociferous industries within their constituencies and, to silence possible opposition, frequently introduce proposals in Congress to increase protect for local industries. The result is often that, not only is greater protection granted, but legislative measures are targeted against particular states competing with these local industries.

Illustrations of illegal behaviour abound throughout United States anti-dumping and countervailing duty law. These practices may be attributed to one of the four agencies involved in the administration of administered protection - the U.S. Congress, the ITA, the International Trade Commission (ITC) or the Court of

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[409] GATT, Trade Policy Review Mechanism for the United States (1990), 35.

International Trade (CIT).

Among the illegal practices contrived by the U.S. Congress are the amended definition of domestic industry for wine and grape products introduced by section 612(a)(1) of the 1984 Act[410], upstream subsidies on agricultural products, introduced by section 771B of the 1988 Act[411] and the proposed statutory countervailable subsidies introduced in bills before Congress from time to time. Illustrations of Congress removing discretion from the administering agencies are also common and, among these, are the removal of discretion in the calculation of net subsidies, the determination of both the threat of material injury and material retardation of an infant industry and interference in constructed value calculations. In most of these amendments to the statutory rules, the Congress has demonstrated a pernicious disregard for the medium and long-term trade policy objectives promoted by the United States in favour of short-term political gains.

It is more difficult to assess the legality of actions and practices of the ITA. As a general rule, the ITA exercises considerable discretion in the application of these rules which stems from the lack of detail in the statutory framework. A similar lack of detail also characterises the international rules on the actual practical administration of measures of administered protection. Hence, the position is not so clear. Nevertheless, ITA practices which are likely to be illegal include the selection of third country

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[410] United States - Definition of Industry Concerning Wine and Grape Products, GATT Doc. SCM/71 (March 1986); GATT BISD, 39th Supplement 436 (1993).

[411] See United States - Countervailing Duties on Fresh, Chilled and Frozen Pork From Canada, GATT Doc. DS7/R (September (1990); GATT BISD, 38th Supplement 30 (1991).

surrogates when determining foreign market value[412], the potential extension of dumping to services, constructed value calculations, the methodology of comparing United States price with foreign market values (exchange rates, sampling, etc) and asymmetrical adjustments. The ITA is a political body and no doubt responds to prevailing pressures from political circles but, at the same time, has to contend with the trade implications of its actions relative to third countries.

The ITC is a politically-appointed agencies which is instructed to act as a reservoir of economic expertise. In its operations, it is intended to act impartially, but even its activities have caused concern among United States trade partners. It is responsible for a number of dubious GATT-consistent practices including the application of factors to take into account when assessing material injury and other indicators of injury, the definition of domestic industry, the determination of causation and the application of the related parties rule.

The final agency - the Court of International Trade - is, of course, a legal body which is instructed to apply legal rules. The rules which it applies are United States domestic laws and not international rules. In fact, as we have seen, the CIT is specifically instructed not to apply the rules contained in the 1979 Code and is therefore manacled from conducting judicial review of national laws against international standards. For the most part, the decisions of the CIT are objective and the agency cannot be faulted for discriminating against foreign exporters in its review of the application of the laws of administered

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[412] United States Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon From Norway, GATT Doc. ADP/61 (October 1991).

protection.

The causes of non-compliance are numerous and, to a certain extent, are merely a microcosm of the larger political picture painted in Chapter 6. However, the conflicts between these agencies are illustrative of the influences impinging on each to act in a certain fashion. These tensions can be grouped into the following categories: (a) Congress versus the ITA; (b) Congress versus the ITC; (c) ITA versus Court of International Trade; (d) ITC versus Court of International Trade.

The source of much conflict in the application of measures of administered protection originates in the relationship between the Congress and the ITA. Consider for a moment the history of the issue of indirect subsidies. For a considerable period, the ITA rejected pressures to include indirect subsidies in the calculation of countervailable subsidies. This policy was based on a fair and objective interpretation of the statutory provisions. Nevertheless, Congress overruled the ITA's interpretation in the 1984 Act and made indirect subsidies countervailable. The reaction of the ITA has been to accept this amendment but to apply it strictly which again provoked the Congress to introduce a further amendment. It was this amendment which eventually lead to the United States being brought before a GATT panel to justify its actions.

The episode illustrates the conflicting interests between the Congress and the ITA. While the Congress responds to internal domestic calls with little regard to the international commitments of the United States, the ITA is compelled to take into account these commitments as part of the Executive arm of government. There is little doubt that this illustrates the tendency

of Congress to put domestic considerations before international obligations.

A similar result occurred when Congress decided to intervene in the dispute between the ITA and the Court of International Trade in the specificity dispute. Here, the Congress sided with the CIT for the principal reason that the CIT wished to apply a more restrictive test and not because of objective reasons. In fact, the House Report accompanying the bill expressly acknowledged that the amendment would provide a basis for a substantially broader definition of countervailable domestic subsidy. Other instances of the Congress overruling the ITA will be considered in the next chapter in relation to the standing requirements for petitioners and anti-circumvention provisions.

Congress has also been in competition with the ITC and, on numerous instances had overruled the administrative practices of the agency by statutory amendment. In fact, between 1979 and 1988, the applicable rules to be applied by the ITC have been almost completely rewritten. In particular, the Congress has increased the scope of indicators of injury to be considered by the ITC, overruled the ITC on cumulation and cross-cumulation, and extensively liberalised the indicators for threat of material injury.

The ITA has also had its confrontations with the Court of International Trade. The CIT has acted impartially in most of these confrontations. For example, the Court removed many of the arbitrary rules for the treatment of dumping from non-market economies. Hence, the CIT acts as a shield against impropriety and arbitrariness but can only be so relative to the domestic rules of law and not international standards, Hence, its potency is considerably weakened.

The ITC and the CIT have also come into conflict in many instances. The Court has criticised the ITC for applying too lax standards for assessing preliminary injury in anti-dumping and countervailing duty cases. However, the ITC has also effectively ignored rulings of the CIT which it believes are erroneous underlying a certain degree of contempt for the review of its decisions by the court. This attitude prevails, of course, until the Congress decides to support the CIT in which case the ITC is bound by its statutory obligations.

These tensions illustrate the confusing interplay of participants in the decision-making process culminating in the application of measures of administered protection. The single overriding conclusion which can be deduced is that international obligations rarely play a part in the application of such measures. For the most part, the United States system for administered protection is a self-contained order functioning independently of the international system, with little interaction except for the occasional adverse panel ruling.

Congress, for example, is well aware that legislative measures will rarely be challenged at the international level and acts with virtual contempt for the international system. Quite clearly, it does not draft legislative measures with an eye on the international commitments of the United States. The lack of effective judicial review also removes the element of control on Congressional activities which would otherwise be present.

The simple conclusion is therefore that the practical application of the United States anti-dumping and countervailing duty laws escapes international regulation and the United States acts independently from

international normative influence when enacting and implementing rules implementing these systems.

## 9 United States - Asymmetry of Procedural Rights in Anti-Dumping and Countervailing Duty Investigations

Illegitimate protection can be provided in the form procedural bias in the administration of anti-dumping and countervailing duty laws in much the same way as by manipulating the substantive rules in a manner inconsistent with international obligations. In fact, both the Anti-Dumping and Subsidies Codes provide detailed rules on procedural requirements which must be implemented during investigations. Failure to comply with these obligations is evidence of the limited normative impact of the international rules not only on the legislative content of anti-dumping and countervailing duty law but also in their adminstration by the responsible government agencies.[413]

Nevertheless, again both Codes were unsuccessful in compelling the United States to act in a manner consistent with its international obligations when conducting investigations. In part, this was due to the inherent bias in anti-dumping and countervailing duty proceedings themselves but also manipulation by the United States authorities which took three forms.

First, the procedural apparatus set up to administer these actions operated against the interests of foreign

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[413] On the administration of United States anti-dumping and countervailing duty laws in general, see S.J. Powell, et al., "Current Administration of U.S. Anti-dumping and Countervailing Duty Laws", (1990) 11 Northwestern J. Int'l Law & Bus 177; G.N. Horlick, "The United States Anti-Dumping System", in J.H. Jackson & E.A. Vermulst (eds), Anti-Dumping Law and Practice, 99-165; G. Bryan & D.G. Boursereau, "Anti-Dumping in the European Communities and the United States", (1985) 18 Geo. Wash. J. Int'l Law & Econ. 631, 681-690; E.A. Vermulst, Anti-Dumping Law and Practice in the United States and the European Communities (1987)

producers. Foreign producers were required to justify their commercial decisions and actions to the administering agencies while domestic parties had the passive role of initiators of proceedings. In other words, foreign respondents had the onus of proving that they had not been engaging in offending practices.

Once a complaint was initiated, the contest was really between the United States authorities, with the resources of the state behind them, on the one hand, and foreign producers, often from developing countries with their limited resources, on the other. It is little wonder that, on a number of occasions, the lodging of a petition of a United States producer was sufficient for some producers to shift exports to another country in order to avoid the costs of defending against such allegations regardless of the merits of the petition.

This process was in fact rather one-sided. It operated to protect the interests of domestic producers at the expense of foreign manufacturers. Even the interests of other domestic groups, such as consumers, were often subsumed to those of industrial groups wielding considerable influence and power. When these laws were enacted, foreign producers had little direct political influence and were therefore ignored by Congressmen representing the interests of their own constituencies.

Second, the detailed procedural and administrative rules of the United States anti-dumping and countervailing duty laws were also heavily weighted against foreign producers. The inherent discrimination in anti-dumping and countervailing proceedings was reflected in the rules concerning time limits, disclosure of confidential information, the far from stringent standing requirements set for potential petitioners and in costs

of defending against unsubstantiated allegations.[414]

The third factor was the tendency of the administering agencies to adopt interpretations of these laws that have as their implicit purpose the protection of domestic interests.

This chapter will investigate these issues in more detail to demonstrate that the whole procedural system was, at its heart, a glorified form of protection. Little countenance was given to the international rules established in the Tokyo Round Codes. Once again, this analysis will not, however, involve an examination of the compatibility of these procedural rules with the terms of the Anti-Dumping Code 1994.

**(1) Standing to Initiate Proceedings**

Both countervailing duty and anti-dumping investigations are commenced whenever the International Trade Administration (ITA), an agency of the Department of Commerce, decides that, from the information available to it or submitted from private sources, a formal investigation is warranted into whether imported goods have benefited from foreign subsidies, or enter the American market at less than fair value, with the effect of injuring a domestic industry.[415]

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[414] A.L. George, "Settling Anti-Dumping Cases: Practical and Policy Analysis", (1987) 19:3 Law & Pol'y Int'l Bus. 455.

[415] While private petitions must be filed with the Department of Commerce and simultaneously with the International Trade Commission (ITC), it is the ITA that has the responsibility of deciding whether an investigation should be commenced.

The laxity of the standing requirement for the initiation of these investigations has, for some considerable time, been seen as an effective non-tariff barrier because of the wide range of parties (interested and otherwise) entitled to initiate complaints.[416]

(A) United States Government Agencies

The ITA is authorised to self-initiate investigations into subsidised goods from: (a) states that are not parties to the 1979 Subsidies Code (unless the state in question has assumed equivalent obligations)[417]; (b) countries that are parties to the 1979 Subsidies Code[418]. In a similar vein, the agency can self-initiate investigations into alleged dumping of goods from any country.[419]

For the purposes of establishing standing to bring a complaint, the ITA is a privileged applicant. It need not establish a prima facie case of subsidisation or dumping and it is sufficient that the ITA deems that, from the informational available to it, a 'formal investigation is warranted'. Nor need the ITA establish that it represents a particular industry, its interest in the general economy of the United States being sufficient to substantial an interest in any

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[416] H. Brandt & W.A. Zeitler, "Unfair Import Trade Practice Jurisdiction: The Applicability of Section 337 and the Countervailing and Anti-dumping Laws", (1980) 12 Law & Pol'y Int'l Law 95, 109.

[417] Section 303(a)(3)(B) Tariff Act of 1930, as amended by Section 331(a) of the Trade Act of 1974.

[418] Section 702(a) Tariff Act of 1930, as amended by Section 101 of the Trade Agreements Act of 1979.

[419] Section 732(a) of the Tariff Act of 1930, as amended by Section 101 of the Trade Agreements Act of 1979.

investigation.

(B) Private Parties Under Section 303 of the Tariff Act of 1930

United States countervailing law makes a distinction between investigations into goods originating from states that are parties to the 1979 Subsidies Code (or who have assumed equivalent obligations) and countries that are not parties to that agreement.[420] Section 303 of the Tariff Act of 1930, as amended, governs procedure against non-parties while Section 701(a) regulates investigations into goods from signatory states.[421]

The legal requirements for proving standing to initiate such a complaint are considerably more relaxed under Section 303 than under Section 701(a). An investigation under this provision is initiated upon the filing of a petition by 'any person setting forth his belief that a bounty or grant has been paid or bestowed, and the reasons therefor'.[422] In other words, to commence an investigation, a petitioner need only be a private or legal person who believes that a subsidy has been conferred. There is no requirement that the individual represents an industry or that the individual has an interest in the proceedings.

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[420] See text supra, pp.175-176.

[421] For the purposes of cross-reference, Section 701(c), as amended by Section 101 of the 1979 Act provides as follows:

> "For provisions of law applicable in the case of merchandise which the product of a country other than a country under the Agreement, see Section 303 of the Act".

[422] Section 303(a)(3)(A) Tariff Act of 1930, as amended.

(C) Private Parties Under Sections 701(a) and 731(a) of the Tariff Act of 1930

In theory, the statutory requirements for establishing standing to initiate a countervailing duty action against goods originating in a Code signatory state, or against any goods regardless of origin in the case of an anti-dumping complaint, can be broken down into two components.[423] The petitioner must qualify as an interested party and must have filed the petition on behalf of a domestic industry.[424]

(1) Interested Parties

Relevant interested parties include the following:

(1) Manufacturers, producers or wholesalers in the United States of like merchandise;
(2) Trade or business associations, a majority of whose members manufacture, produce or wholesale the subject merchandise or like merchandise;
(3) Recognised unions or groups of workers representative of an industry engaged in the manufacture, production or wholesaling in the United States of like products
(4) Coalitions of firms or trade associations that are engaged in the manufacture of like products.[425]

At least one commentator has suggested that the category

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[423] See generally C.H. Cosgrove, "Technical Analysis of the Subsidies and Countervailing Measures Agreement", (1979) 11 Law & Pol'y Int'l Bus., 1497.

[424] Sections 702(b)(1) and 732(b)(1) Tariff Act of 1930, as amended.

[425] Section 771(9), Tariff Act of 1930, as amended.

of interested parties extends to foreign manufacturers, producers or exporters or the government of the country in which the subject merchandise is produced or manufactured, or from which it is exported.[426] This is an erroneous view since, although these groups are classified as 'interested parties' by the statute, sections 702(b)(1) and 732(b)(1) identify only the above four groups as interested parties for the purposes of commencing countervailing and anti-dumping investigations.

The effect of this exclusion is to prevent foreign importers challenging dumped or subsidised imports in the United States market from third country sources. In other words, a European exporter could not initiate an investigation into the dumping of goods by a Taiwanese manufacturer of like products in the United States.

The 1988 Act added an additional, and controversial, category to the list of eligible petitioners. Section 1326(c) introduced an amendment which provides that, in any investigation into processed agricultural products, a coalition or trade association which is representative of processors, of processors and producers, or of processors and growers, is deemed to be an interested party for the purposes of these sections.[427]

Granting standing to groups consisting of agricultural commodity producers as well as first and second stage producers is clearly contrary to the 1979 Codes because only one of these parties can be producers of goods that

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[426] R.C. Cassidy, "The Procedural Rights of Private Parties in United States Anti-Dumping and Countervailing Proceedings", A Paper presented at the Brugges Annual Conference, 14-16 September 1989, p.3.

[427] Section 771(9)(G) Tariff Act of 1930, as amended by Section 1326 of the Omnibus Trade and Competitiveness Act of 1988.

are like products to those identified in the complaint. The dubious legality of this measure is highlighted by the fact that Congress qualified the continued application of this right with a declaration that it is only valid until successfully challenged at the international level as being contrary to the international obligations of the United States.

This displays the contempt that Congress has for rules of international trade law. It is widely known that only producers of like products can initiate complaints against foreign imports yet this provision extends that right to groups either making goods out of a raw product or providing the raw product for manufacturing into a refined product. Congress recognised the illegitimacy of the measure by acknowledging is conditional validity until challenged. Nevertheless the measure remains on the statute book until successfully challenged.

(2) Representative of a domestic industry

The second requirement is that the complainer must represent a domestic industry before a complaint can be accepted. This stems from the condition that the petition is lodged 'on behalf of an industry' which is imposed by both sections of the statute.

The Court of International Trade originally defined this requirement as the need for a petitioner to 'show that a majority of the industry backs its petition'.[428] However, in practice, the Department of Commerce has not construed this condition to mean that the petitioner must prove that it is representative of such an industry but, conversely, that the respondent must prove that the

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[428] Gilmore Steel Corporation v United States, 585 F.Supp. 670, 676 (CIT 1984).

petition is not filed on behalf of an industry.[429] In other words, the Department of Commerce deliberately refused to comply with the judgment of the Court of International Trade where its ruling would have had the effect to restricting its ability to determine the standing of applicants.

The Court of International Trade has subsequently reviewed this requirement in a more recent case where the appellants were appealing against a final affirmative determination of countervailing duties.[430] In Comeau Seafoods Ltd v United States[431], the Court changed its earlier policy by deciding that the ITA 'has discretion to dismiss, but its not required to dismiss, petitions that are not shown to be actively supported by a majority of the domestic industry'.[432] The Court concluded that there was nothing in the statute, in its legislative history, or the ITA regulations, that requires petitioners to establish that they have the support of the majority of the producers in their industry. It was for the ITA and not the petitioner to establish that its complaint was 'on behalf of an industry'.

The overall effect of this interpretation is to place the foreign respondent at a distinct disadvantage because not only does this require the respondent to incur substantially more expense than the petitioner in disputing this point, but also because the respondent

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[429] Textile Mill Products and Apparel From Malaysia, 50 Federal Register 9852 (1985).

[430] Fresh Atlantic Groundfish From Canada, 51 Federal Register 10,041 (1986).

[431] Slip Op. 89-155, reproduced at (1990) 2:1 WTM 141.

[432] See also Citrosuco Paulista SA v United States, 704 F.Supp. 1075 (CIT, 1988).

may not have access to information to refute the claim. At the same time, domestic industries which will benefit from any such investigation are hardly likely to assist a foreign competitor defend its position in the United States market.

This disadvantage is compounded by the fact that United States anti-dumping law now requires both the ITA and the ITC to provide 'technical assistance' to small American businesses to enable such entities to prepare and file anti-dumping petitions.[433] Therefore, a petitioner can obtain government assistance to substantiate its position regarding standing, even although the ITA does not strictly require such evidence, while foreign respondent is required to shoulder the expense of rebutting the presumption that the petitioner does not have standing.

Another inequitable practice in the determination of standing is the practice of the ITA of excluding from the relevant domestic industry all domestic producers who are also importers. For example, in Frozen Concentrated Orange Juice From Brazil, the exclusion of foreign producers manufacturing the product in the United States was critical to the finding that the remaining domestic producers constituted a sufficient proportion of the domestic industry to allow the complaint to proceed.[434] The effect of this rule can be brutal when the excluded companies are not foreign owned or controlled. In any event, if a foreign enterprise has engaged in significant investment in the economy of the

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[433] S.J. Powell et al., "Current Administration of U.S. Anti-Dumping and Countervailing Duty Laws: Implications for Prospective U.S.-Mexico Free Trade Talks", (1990) Northwestern Journal of Int'l Law & Bus., 177, 198.

[434] 52 Federal Register 8324 (1987).

United States to produce specific goods, the fairness of excluding that producer from the relevant domestic industry in such circumstances cannot be explained on equitable grounds particularly if the majority of production is sold in the domestic market. The effect of this rule is blatantly to discriminate against foreign investment.

In any event, it is clearly not the Department of Commerce which is in the best position to ascertain whether or not a petitioner represents a domestic industry. While the statute charges the ITA with this responsibility, it is the International Trade Commission that defines the relevant industry when assessing the degree of injury sustained by a specific industry. The Commission has the advantage of statistics to hand regarding the composition of particular industries as well as experience and expertise to decide these issues. In the circumstances, there is a strong argument in favour of passing authority to decide the necessary degree of representation to the Commission.

If the ITC were to assume the responsibility of determining whether petitioners were representative of a domestic industry, it is likely that many complaints would be rejected at this stage. The ITC is in a position to evaluate this requirement with a certain degree of objectivity, thereby removing the political element that is inherent in the ITA's practice on this matter. This is also the reason that this responsibility will never be passed to the Commission.

Both the ITA and the Court of International Trade have vigorously affirmed that jurisdiction to decide this question resides in the Department of Commerce and all determinations on this point are independent of any decisions made by the Commission. For example, the Court

has recently expressed the view that:

> "The ITA's standing determination is made within the first twenty day period after the filing of the petition and is not connected in any way with the ITC's like product determination.'[435]

There is therefore little doubt that it is the ITA which has absolute discretion to decide whether an application should be dismissed on the ground that a petitioner does not represent an industry.[436] Furthermore, the Commission itself has been unwilling to enter into questions regarding standing, instead abjuring responsibility for such decisions to the ITA.[437]

Nevertheless, the contention that the ITC is better suited to answer the preliminary question of standing has gained some support among commentators on the subject.[438] Their arguments are based on the related points that the Commission decides the issue of the relevant domestic industry in the course of its injury determination and has the data available to decide this question relatively promptly.

In any event, in practice, complaints are rarely rejected on the basis that a petitioner lacks standing

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[435] Sandvik AB v United States, 721 F.Supp. 1322, 1329 (CIT 1989), aff'd 901 F.2d 46 (Fed. Cir. 1990).

[436] See Gilmore Steel Corporation v United States, 585 F.Supp. 670 (CIT 1984).

[437] See Laser Light-Scattering Instruments From Japan, Inv. No. 731-TA-465 (May 1990); and Martial Arts Uniforms From Taiwan, Inv. No. 731-TA-424 (Dec. 1988).

[438] See E.D. Madaj & C.H. Nalls, "Bifurcation Without Direction: The USITC and the Question of Standing in Anti-Dumping and Countervailing Cases", (1991) 22 Law & Pol'y Int'l Bus. 673.

because the evidential requirements are so low.[439]. Indeed, there is a presumption that petitioners possess standing and no preliminary investigation is undertaken by the ITA to ascertain the exact legal position of the complainer as a representative of a group.

There also seems little scope for a respondent to challenge the standing of a petitioner because, until the initial twenty day period has expired, the respondent has no status in the investigation and it is during this initial stage that the determination of standing is made. The sole remedy of the respondent in such circumstances is to challenge the final decision by way of appeal.

(D) Private Parties Petitioning for Relief From Third Country Dumping

The Omnibus Trade and Competitiveness Act of 1988 introduced a procedure for American producers and manufacturers to seek relief from dumped foreign products in third country markets. A United States industry may petition the United States Trade Representative (USTR) to request a country to take appropriate action under its laws to counter dumping from third countries.[440] This right is reserved to anti-dumping actions and does not extend to countervailing duty complaints.

The stimulus for this amendment arose from the 1986 semiconductor dispute between the United States and

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[439] G.N. Horlick & F.A. DeBusk, "Commerce Procedures Under Existing and Proposed Anti-Dumping/Countervailing Duty Regulations", (1988) 22:1 Int'l Lawyer 99, 100-104.

[440] Section 1317 Omnibus Trade and Competitiveness Act of 1988.

Japan. In addition to allegations that Japanese manufacturers were dumping semiconductors on the United States market, United States manufacturers contended that third country markets were being closed to American suppliers because Japanese producers were also dumping in these areas. The third country dumping procedure places even greater pressure on foreign manufacturers than merely imposing duties on imports into the United States.

A domestic industry that produces goods that are like, or directly competitive with, merchandise produced by foreign manufacturers may petition the USTR to initiate an anti-dumping action in a third country.[441] Standing is reserved to 'domestic industries', a term which will presumably be interpreted to producers of like and directly competitive products in line with the normal anti-dumping procedure.

There is no express requirement that the petitioners represent the majority of manufacturers or producers in a particular domestic industry and it is unlikely that this requirement will be implied by the USTR into the procedure. It should also be noted that it is the USTR who has jurisdiction to decide whether petitioners represent an industry and not the ITA or the ITC which brings a political element into play.

(E) Downstream Product Monitoring Applications

Another procedure introduced by the 1988 Act in response to domestic pressure groups is one which allows a petitioner to apply to the ITA for the designation of a

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[441] Section 1317(b)(1), Omnibus Trade and Competitiveness Act of 1988.

particular item as a downstream product.[442] Downstream products are simply goods that have been made from, or containing, dumped or subsidised components. Naturally, products that have benefitted from cheaper component parts will have a competitive advantage compared to comparable domestic goods that have not. The downstream product monitoring provisions are an attempt to tackle this problem.

A producer of an article that is 'like' a component part or a downstream product may petition the ITA to designate that article as a downstream product liable for monitoring under Section 1320 of the 1988 Act. The term 'domestic producer' implies that individual businesses or companies have standing to lodge such a petition. The petitioner's interest is presumed if it is a product that is like a component part or downstream product.

There is no requirement that the petitioner must be acting on behalf of a domestic industry by representing the majority of the relevant industry. Since the procedure may culminate in duties that are akin to countervailing and anti-dumping duties, the consistency of this procedure with the United States international obligations must be questioned.

(F) Short Life Product Cycles

Without any attempt to disguise its motives, Congress introduced the concept of 'short life cycle products' in the 1988 Act to ensure that high technology products from Japan could be subject to effective anti-dumping

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[442] Section 780 Tariff Act of 1930, as amended by Section 1320 Omnibus Trade and Competitiveness Act of 1980.

duties before the technological advances engineered into the products expired. A short life product is defined as 'any product that the Commission determines is likely to become outmoded within four years, by reason of technological advances after the product is commercially available'.[443]

In contrast to the normal countervailing and anti-dumping proceedings, it is the ITC which assumes the role of investigating a complaint into the existence of injurious short life cycle products entering the United States market.[444]

Any 'eligible domestic entity' is entitled to file a petition with the International Trade Commission requesting that a product category be designated as a short life product cycle.[445] This procedure represents a major departure from the ordinary anti-dumping procedures for two reasons. First, it is the ITC and not the ITA that is responsible for deciding whether a petitioner has standing to lodge a complaint. Second, the concept of relevant domestic industry specified under normal countervailing and anti-dumping processes has been replaced by another concept, called 'an eligible domestic entity'.

An eligible domestic entity is defined as 'a manufacturer or producer in the United States, or a certified union or recognized union or group of workers which is representative of an industry in the United

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[443] Section 739(b)(4) Tariff Act of 1930, as amended by Section 1323 of the Omnibus Trade and Competitiveness Act of 1988.

[444] Section 739(a)(1)(A) Tariff Act of 1930, as amended by Section 1323 Omnibus Trade and Competitiveness Act of 1988.

[445] Section 739(a)(1), ibid.

States'. The emphasis is clearly on the ability of individual firms, companies or entities to bring petitions which raises confusion as to the term 'representative'. In order to be representative of an industry, is an entity required to have the support of the majority of the domestic industry or must its production capacity account for the majority of output in the industry concerned? Alternatively, can groups of manufacturers or producers be deemed 'entities' under the provision?

Since the short life product cycle procedure, if successfully initiated, results in the imposition of anti-dumping duties, it is a flagrant violation of the 1979 Anti-Dumping Code because it allows such representatives to acquire standing where they may not in fact represent the relevant industry.[446]

**(2) Slack Petition Requirements**

A petition must allege the existence of the elements necessary for the imposition of countervailing or anti-dumping measures. This obviously includes allegations of subsidisation or dumping, as appropriate, and material injury to a domestic industry.[447] In addition, the petition must be 'accompanied by information reasonably available to the petitioners supporting those allegations.'

The 'reasonable indication' standard makes a mockery of any attempt to impose any semblance of an evidentiary

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[446] See Article 4, Anti-Dumping Code 1979.

[447] See generally, N.D. Palmeter, "Injury Determinations in Anti-Dumping and Countervailing Duty Cases: A Commentary on United States Practice", (1989) 28:2 JWT 123, 125.

threshold for the initiation of complaints. The degree of injury information required to trigger an investigation for example is considerably less than that needed to reach an affirmative preliminary determination.[448] Examples of the ITA rejecting complaints on the basis of the sufficiency of the evidence are rare.

Although the petition is submitted on a prescribed form, a complainer has a distinct advantage which can be exploited at this stage. Specifically, the complainer can submit arguments which will affect how the Department of Commerce defines the scope of its investigation especially into the critical issues of product specification, domestic industry identification and quantification.

In contrast, the foreign respondent to the complaint is prohibited from having preinitiation contact with the Department of Commerce and therefore has no influence on the decision to initiate an investigation into its business.[449] While there is no sanction for attempting to make preinitiation contact, the ITA simply refuses to accept oral arguments before a decision has been made and will return documents containing arguments against commencing an investigation.[450] Foreign companies attempting to engage in preinitiation contact may find any final decision in their favour being overturned on

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[448] These evidentary requirements were considered in American Lamb Company v United States, 785 F.2d 994 (Fed. Cir. 1986).

[449] See United States v Roses Incorporated, 706 F.2d 1563 (Fed. Cir. 1983).

[450] See the Department of Commerce, Countervailing Duty Regulations, 51 Federal Register 29,059 (1986). These regulations prohibit any preinitiation contact from interested parties except the petitioner.

appeal.[451]

**(3) Inequitable Conduct of Investigations**

The division of responsibility for the conduct of investigations is as follows:

(a) the International Trade Administration decides:

(i) if a foreign country is providing, directly or indirectly, a subsidy with respect to the manufacture, production or exportation merchandise into the United States; or

(ii) if a foreign manufacturer, producer or exporter is selling goods at less than fair value in the United States market.[452]

(b) the International Trade Commission investigates whether or not an industry in the United States is materially injured, threatened with material injury or the establishment of an industry is materially retarded by reason of such imports.[453]

The actual delegation of responsibilities between these

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[451] See Horlick & DeBusk, supra note 439, 103.

[452] Sections 701(a)(1) and 731(2), Tariff Act of 1930, as amended.

[453] Sections 701(a)(2) and 732(a)(2), Tariff Act of 1930, as amended.

agencies is not absolutely clear-cut, leading the Federal Court to comment that 'naturally the specifics of who does what is for dispute and discussion'.[454] For example, the ultimate power to decide which agency has jurisdiction over particular issues in the event of conflicting jurisdiction, is not expressed in the statute.

Similarly, there are a number of overlapping substantive issues. For example, is the level of subsidisation, as defined by the ITA, a factor that the Commission is required to consider in its assessment of injury and is the Commission bound by this figure? What about the pricing of goods allegedly at less than fair value. If the ITA finds that goods have been dumped at a particular price, is the ITC bound by this valuation in its assessment of injury.

These questions, and many more, arise simply because of the bifurcated nature of the United States system for the investigation of countervailing and anti-dumping complaints.

(A) Initial Petition Determination

An investigation is commenced whenever the ITA decides that, from the information available, a formal investigation is warranted.[455] In the notice of initiation, it is the ITA that sets out the scope of the investigation. The notice itself is critical because it defines the product-range of the investigation, the countries affected by the investigation and the relevant

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[454] Algoma Steel Corporation v United States, 865 F.2d 240 (Fed. Cir. 1989).

[455] Section 702(a), Tariff Act of 1930, as amended.

industry for the injury determination.

The fact that the ITA defines the product scope of the investigation can lead to conflicts between the ITA and the ITC where the two agencies are required to investigate similar matters, such as the issue of the relevant domestic industry or like products. In the past, a certain degree of inconsistency has arisen. For example, in Valves, Couplings, Nozzles and Connections of Brass, Suitable For Use in Fire Protection Systems, the ITA found that all these products constituted a single industry based on their purpose, ie. the prevention of fire, while the ITC held that there were seven separate industries of which only two were materially injured.[456]

Nevertheless, as we have seen the ITA has the final say on matters which fall within the mutual jurisdictions of the agencies although the ITA has occasionally modified its findings to accommodate the preliminary views voiced by the ITC.[457]

(B) Exclusion Requests

The ITA is required by statute to exclude any manufacturer, producer or distributer from an investigation if it can be shown that the party in question has not benefitted from any subsidies or had not engaged in dumping. However, in its internal administrative guidelines, the ITA has decreed that it is only required to consider a request to exclude a

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[456] Commerce Determination, 49 Federal Register 47,066 (1984); Commission Determination, 49 Federal Register 47,071 (1984).

[457] This practice has been upheld; see Badger-Powhatan v United States, 608 F.Supp. 653 (CIT 1985).

party 'to the extent practicable.'[458] In other words, such an exclusion request does not guarantee that a party will be excluded from the investigation even if the party in question is not engaged in subsidised production or dumping.

(C) Questionnaires

The information for making determinations by the ITA is derived from questionnaires dispatched to foreign manufacturers and exporters, as well as American manufacturers or producers of competing products.[459] The questionnaire involves detailed transactional information for all home market sales, third country sales and United States during the period of the investigation.

Failure to complete the questionnaires accurately or timeously will allow the ITA to make determinations on the basis of the 'best information otherwise available' rule. The most extensive use of the best information rule is in the calculation of dumping margins where the only other source of information is the allegations of the petitioner. In general, a petitioner alleges the widest possible dumping margin and consequently the foreign exporter is placed at an immediate disadvantage.

In recent times, the ITA in particular has come to rely more upon the submission of information in the form of

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[458] Department of Commerce, ITA Regulations, 54 Federal Register 23,366 (1989).

[459] On this subject, see G.N. Horlick & F.A. DeBusk, "Commerce Procedures Under Existing and Proposed Anti-Dumping/Countervailing Duty Regulations", (1988) 22:1 Int'l Lawyer 99, 100-104.

computerised data.[460] The Court of International Trade initially ruled that, where a respondent does not customarily maintain computerised records, it is unreasonable for the ITA to demand the submission of information in that form.[461] Such a request would otherwise cause considerable inconvenience and raise the already expensive costs of defending an anti-dumping action.

However, the ITA has persisted in making demands that information is submitted in computerised tape format regardless of the form of the respondents business records.[462] The Court of International Trade subsequently reversed its position on this issue by ruling that the Commerce Department can require the submission of information in this format as long as the costs of providing the data in this form is not 'inordinate'.[463]

This requirement presents two problems for foreign respondents. First, the costs of converting information into computer data and often translating the business information into English may outweigh the benefits of continuing exports. Second, the risk of the disclosure of sensitive information through accidental or deliberate transmission or access to such data increases significantly once the information takes computerised

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[460] See generally, A.P. Victor & M.F. Friedman, "The Submission and Release of Computer Tapes in Anti-Dumping Investigation: The Respondent's Perspective", (1991) 22 Law Pol'y Int'l Bus. 647.

[461] Timkens v United States, 659 F.Supp. 239 (CIT 1987).

[462] Fishnetting of Man-Made Fibers From Japan, 55 Federal Register 12,742 (1989).

[463] Rhone Poulenc Inc. v United States, 710 F.Supp 341 (CIT 1989), aff'd 899 F.2d 1185 (Fed. Cir. 1990).

form.[464]

(D) Failure to Protect Foreign Producers from Abusive Behaviour

The right to submit written views or information to the appropriate agencies is not limited to the parties to the proceedings. All interested parties are allowed to submit factual information within the time limits specified for that purpose, but it is only the parties to the proceedings, namely the petitioner, the respondents and parties joining the proceedings, that have the right to be heard by the agencies.

Nor are the procedural rights of the complainer and the respondent symmetrical under this legislation. True, both parties are given equal procedural rights to notices of proceedings, progress reports, submission of information and opinions, access to information, the right to be heard in public hearings and access to the complete public record of the proceedings. But, essentially the proceedings are inquisitorial and accusatorial rather than adversarial. Once the complainer has made his case, the ITA or the ITC subjects the respondent to allegations of subsidisation, dumping, injury and causation. It is the respondent that must satisfy the ITA or ITC as to the allegations while the role of the complainer becomes subsumed by the relevant agency.

The alternative to such a procedure would be for the administering agency to sit as a court or tribunal to

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[464] See P.C. Rosenthal & N.B. Giordano, "The Impact of Computerisation on Anti-Dumping Practice: The Petitioner's Perspective", (1991) 22 Law & Pol'y Int'l Bus., 657.

decide impartially the merits of the allegations submitted for examination. The complainer would be required to establish his case in the same way as a respondent must prove his defence under the existing procedure. Certainly, this adversarial process has been adopted when domestic producers make similar allegations of anti-competitive practices under the anti-trust laws of the United States.

This would allow both parties equal procedural rights and could possibly decrease the likelihood of frivolous claims if unfounded allegations resulted in the payment of expenses by an unsuccessful complainer. Power to compel witness and to examine documents could be granted to parties to substantiate claims.

**(4) Failure to Protect Confidential Information**

The protection of industrial or trade secrets is a significant factor for many companies during countervailing and anti-dumping investigations. Production statistics, marketing strategies, profit margins and investment figures are all important elements in maintaining a competitive advantage over other producers.[465] Disclosure of such information may have damaging effects on the continued competitiveness of a foreign producer. For example, revealing channels of distribution and the destination of products could jeopardise plans to develop new markets.

The right of confidentiality entails a trade off between

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[465] J.A. Taylor & E.A. Vermulst, "Disclosure of Confidential Information in Anti-Dumping and Countervailing Duty Proceedings Under United States Law", (1987) 21:1 Int'l Lawyer 43-70.

two competing interests. On the one hand, there is the right of the foreign party to have its business welfare protected by the prevention of unauthorised and unnecessary disclosure of sensitive information to parties who, by definition, are competitors. On the other hand, there is the right of interested parties to have an opportunity to view certain information in order to respond to the disclosure of such information.

Generally, the broader the right to confidentiality, the more protection offered to foreign producers while the narrower the right the less protection and the greater the exposure to competitors. The United States has decided that the interests of private parties to such information exceeds the need for protection. Consequently, the United States rules on disclosure clearly discriminate against foreign producers by requiring far too great a degree of disclosure than is strictly necessary.[466]

The statutory requirements for the disclosure of confidential information have been progressively liberalised which operates against the interests of foreign exporters. The original rule in the 1979 Act was that information designated as confidential by the person submitting it could not be disclosed to any other person other that an official of the ITA or the Commission without the consent of that person.[467] Both agencies were required to issue administrative protection orders to govern access to confidential information by parties other than those submitting the

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[466] See J.H. Bello, "Access to Business Confidential Information in Anti-Dumping Proceedings", in J.H. Jackson & E.A. Vermulst, Anti-Dumping Law and Practice (1989), 345.

[467] Section 777(b)(1) Tariff Act of 1930, as amended by Section 101 of the Trade Agreements Act of 1979.

information.[468]

The 1988 Act amended the 1979 regime to render all business proprietary information available to all interested parties on the basis of administrative protection orders.[469] The result of this amendment has been a dramatic reduction of the right of respondents to have information withheld from interested parties.[470]

New administrative guidelines have been established for defining the scope of the right of confidential information in countervailing investigations. These guidelines narrowly define the term 'confidential information' and exclude information previously considered confidential such as channels of distribution and the destination of products.[471]

Similarly, a greater amount of information may be released than previously by the amendments to the guidelines which allow the release of information under administrative protective orders. Despite the fact that the procedure is inquisitorial and not adversarial, a petitioner's counsel is entitled to obtain access to the respondents submissions through such orders.

Both agencies allow independent counsel for both parties to review business data, subject to an undertaking by the relevant counsel strictly limiting the use of such

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[468] See also Section 619 of the Trade and Tariff Act of 1984.

[469] Section 1325 of the Omnibus Trade and Competitiveness Act of 1988.

[470] On the application of this section, see Allied Tube and Conduit Corporation v United States, 721 F.Supp. 305 (CIT 1990), aff'd 878 F.2d 780 (Fed. Cir. 1990).

[471] ITA Regulations, supra note 458.

information. Although originally in-house counsel were prohibited from obtaining access to confidential information under an administrative protection order, this rule has been relaxed and in-house corporate legal advisers may gain access to sensitive information under certain conditions.

The disclosure provisions therefore weigh heavily against foreign respondents. There is little that a respondent can do once the requested information has been submitted to the ITA to protect its confidentiality. Disclosure of information through an administrative protective order is just as damaging as full public disclosure because the respondent is mainly concerned with preventing its competitions from seeing just such information and it is likely that it its just such competitors that have initiated the complaint.

At least one expert involved in the administration of countervailing and anti-dumping investigations has cited an example of the disclosure of sensitive information prejudicing the rights of a party.[472] In one case, the ITA opened an investigation into the alleged dumping of goods from Roumania. In the absence of comparable domestic prices for the less than fair value comparison, the ITA used statistics from Finnish producers of identical goods.[473] This information was supplied in confidence by Finnish producers to the ITA.

Subsequently, representatives of the United States industry manufacturing competing products filed a

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[472] Bello, supra note 466, 350.

[473] Steel Products From Roumania, 50 Federal Register 1,254 (1985).

dumping complaint against the Finnish producers.[474] The statistical data for this petition was provided from the information submitted in confidence from the Finnish producers.

Not only can the irresponsible disclosure of information affect foreign parties to the proceedings, but information provided in investigations may provide a basis for dumping investigations at a later point into goods originating from other foreign countries.

**(5) Illegal Carrying out of Simultaneous Investigations**

Article VI of the GATT prohibits the levying of countervailing and anti-dumping duties on the same merchandise if both determinations arise from the same factual circumstances. It does not prevent the simultaneous conduct of two investigations to determine if both subsidisation and dumping has occurred.

The United States has taken advantage of this fact and Section 705(a)(1) of the 1930 Act provides that when an investigation into subsidisation has been initiated simultaneously with one for dumping, and involves the same class or kind of merchandise from the same countries, the ITA is authorised to extend the date of the final subsidy determination until the date of the final anti-dumping determination.[475]

This clearly envisages the possibility that private petitions may raise both types of action to optimise the opportunity of relief and, as we have seen, this has

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[474] Steel Products From Finland, 53 Federal Register 9,651 (1988).

[475] Added by Section 606 of the Trade and Tariff Act of 1984.

been the deliberate strategy of certain industries.[476] Dual petitions ensure that the petitioner has the greatest possible change of obtaining the imposition of duties against the relevant goods.

Even more disconcerting, there is no specific provision in United States law to prohibit the imposition of both countervailing and anti-dumping duties on the same merchandise. However, admittedly in practice such double determinations are rare.

### (6) Preliminary Determinations

Both the ITA and the ITC are required to render preliminary determinations on the issues of subsidisation or dumping and material injury respectively.

The preliminary determination is made on the basis of the 'best information available at the time of the determination'. The ITC, for example, relies extensively on information provided by the petitioner in its complaint to arrive at a preliminary finding as to injury. Although the Commission distributes questionnaires to relevant and interested members of the industry concerned and has the power to subpoena answers to such questionnaires, in practice little reliance is placed on such information compared to the data submitted by the petitioner.

Where a petitioner has set forth a reasonable prima facie case, the ITC is generally satisfied that a reasonable indication of injury has been established and

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[476] See text, supra pp.388-410.

this practice has been upheld by the Court of International Trade.[477]

### (7) Discrimination in Providing Relief

Within seven days after the ITC renders an affirmative final determination of material injury, the ITA is required to publish an anti-dumping or a countervailing duty order which: (a) directs customs officers to assess a countervailing duty equal to the amount of the net subsidy determined or estimated to exist; (b) applies to all merchandise of such class or kind exported from the country investigated; and (c) requires the deposit of estimated countervailing duties pending liquidation of entries of merchandise at the same time as estimated normal customs duties on the merchandise are deposited.[478]

Countervailing duties need not apply on a country-wide basis. The United States law allows the ITA to make a company specific order if it determines that there is a significant differential between companies receiving subsidies or a state-owned enterprise is involved.[479] In such cases, the order will allow for differing rates of countervailing duties on companies exporting goods manufactured in the same country.

There appears to be no counterpart provisions authorising such action in the anti-dumping legislation.

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[477] See Republic Steel Corporation v United States, 591 F.Supp 640 (CIT 1984); and American Grape Growers Alliance v United States, 615 F.Supp. 603 (CIT 1985).

[478] Section 706 Tariff Act of 1930, as amended by Section 607 Trade and Tariff Act of 1984.

[479] Ibid.

However, it is unlikely that unrelated companies would dump goods at the same price in the same market and, in the absence of a coordinated pricing policy, if this did occur, it is unlikely that it would be for the objective of obtaining a monopoly in the market-place.

As an alternative to the imposition of duties, the ITA may enter into an undertaking with exporters. These agreements may require foreign exporters to maintain certain minimum prices and, in effect, this amounts to a state-sanctioned form of retail price maintenance which is itself anti-competitive.

On the other hand, the ITA may require the acceptance of undertakings which impose quantitative restrictions. However, the ITA has recently changed its policy in this respect and will only enter into such agreements when they can be easily administered.[480]

**(8) Innovative Forms of Investigation I - Downstream Product Monitoring**

In 1984, a new section was added to the anti-dumping legislation to regulate the problem of persistent dumping.[481] This legislation authorised the ITA to establish a monitoring programme over a class of merchandise if the following circumstances were proved to exist:

(a) more than one anti-dumping order was in effect with respect to that class or kind of merchandise;

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[480] See Portland Hydraulic Cement and Clinker From Mexico, 55 Federal Register 29,244 (1990).

[481] Section 609, Trade and Tariff Act of 1984.

(b) in the judgment of the ITA, there was reason to believe or suspect that there was an extraordinary pattern of persistent injurious dumping from one of more additional supplier countries; and

(c) again in the judgment of the ITA, the extraordinary pattern was causing a serious commercial problem for the domestic industry.

No time limits were set for this investigation and no guidelines established for a number of important concepts such as 'extraordinary pattern', 'serious commercial problem', etc.

To this mechanism, the 1988 Act appended the downstream product monitoring system.[482] This system was added because of concerns from United States producers that goods that have been subsidised or dumped could be manufactured abroad into further stage products which are no longer classified as the goods subject to the dumping or countervailing duty order.[483] Downstream products are simply manufactured items that have been imported into the United States and which incorporate a component part.[484]

The provision applies in three circumstances:

(a) if the component part is already subject to a monitoring programme already in existence

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[482] Section 780 Tariff Act of 1930, as amended by Section 1320 Omnibus Trade and Competitiveness Act of 1988.

[483] G.N. Horlick & G.D. Oliver, "Anti-Dumping and Countervailing Duty Law Provisions of the Omnibus Trade and Competitiveness Act of 1988", (1989) 23:3 JWT 5, 27-28.

[484] Section 780(d)(2), ibid.

under the bilateral arrangements on steel imports;

(b) there is a large number of cases on related products from the same country; or

(c) there are two or more cases against the same company on related products.

In addition to any one of these three circumstances, there must be a reasonable likelihood that imports into the United States of the downstream product will increase as an indirect result of any diversion with respect to the component part.[485]

Upon the finding of these elements, any imported manufactured article which incorporates the product formerly found to have been dumped or subsidised can be subject to monitoring by the ITC upon a petition by domestic manufacturers of the dumped product or the downstream product. Therefore manufacturers of products that are like either the original or the final product can initiate an anti-dumping or countervailing duty complaint indirectly through this process.

The implications of this development are staggering. Suppose that a European producer of steel products was found to have dumped steel on the United States market with a margin of dumping of more than fifteen percent. Thereafter, all steel products from that country, from cars to ballbearings, could be subject to monitoring

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[485] A component part is defined as any imported article that, during the five year period immediately preceding the date the downstream monitoring petition is filed, a countervailing or anti-dumping duty order that requires a deposit of estimated duties of at least fifteen percent has been issued, or an agreement was entered into after a preliminary determination was made by the ITA of an estimated net subsidy or margin of dumping of at least fifteen percent.

and, in the event that imports of such items increase, an anti-dumping investigations would follow virtually automatically.

The standards for imposing anti-dumping or countervailing duties are not altered and the same facts must be shown to exist as in normal investigations, namely subsidisation or dumping, material injury and causation. However, the provision is definitely in contravention of the 1979 Anti-Dumping Agreement as well as the Subsidies Agreement, because it has the effect of allowing producers of products that are not like products to initiate investigations.

### (9) Innovative Forms of Investigation II - Short Life Cycle Product Investigations

The object of this type of investigation is to prevent foreign companies producing a range of related goods from persistently dumping such goods in the United States market. The original House and Senate versions of the bills which became the 1988 Act intended to expedite proceedings against all products found to have been dumped, but the version adopted in the final legislation was restricted to 'short-life cycle products'.[486]

A short-life cycle product is defined as 'any product that the Commission determines is likely to become outmoded within four years, by reason of technological advances after the product is commercially available.'[487] It is therefore industries such as the

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[486] See Cameron, D.B. & Crawford, S.M. 'An Overview of the Anti-Dumping and Countervailing Duty Amendments', (1989) 20:3 Law & Pol'y Int'l Bus., 471, 491.

[487] Section 739(b)(4), ibid.

electronics industry that is most likely to be affected by this provision and in particular semiconductors producers.

Companies that are deemed 'second offenders' or 'multiple offenders' under the legislation will be subject to an expedited dumping investigation process if they are found to be engaged in the product of short life cycle goods. A second offender is defined as a company that has been subject to at least two affirmative dumping findings of margins of fifteen percent or more within an eight year period in the same short life cycle product. A multiple offender is a company specified in three or more such affirmative findings over the same period.

In the event that the ITC deems that a second offender or a multiple offender is exporting short life cycle products to the United States and an investigation is initiated, the time limits for conducting enquiries are shortened depending on the status of the offender. For second offenders, a preliminary determination of injury must be rendered within 120 days rather than the normal 160 days, and within 100 days in the case of a multiple offender. In both cases, no extensions will be granted for rendering final determinations unless the relevant United States industry agrees and certain conditions for a finding of critical circumstances will be deemed automatically present in such circumstances.

**(10) The Legality of U.S. Anti-Circumvention Laws**

It is in the drafting of anti-circumvention provisions that the determination of the United States government to enforce the anti-dumping and countervailing legislation to the fullest extent possible becomes

evident.[488] Once a product from a particular foreign manufacturer has been identified as being susceptible to duties, this characterisation is fixed to the product as well as its components and any attempt to relocate production in another country, including the United States, will not allow a producer to escape liability.

The immediate result is that whole production strategies have been altered to avoid the imposition of duties. Anti-dumping duties in particular have been directly responsible for increased direct foreign investment in the United States as foreign companies the size of Nissan, Honda and BMW build factories inside the United States to assemble foreign parts in order to avoid paying duties.

The problem of the circumvention of anti-dumping and countervailing duty orders by foreign manufacturers simply by breaking down their product and exporting the components to the United States or third countries resulted in the enactment of a comprehensive anti-circumvention framework in the 1988 Act.

Before this statute was enacted, however, the problem of circumvention had been considered in a number of ITA investigations. For example, in its investigation into Colour Television Tubes From Korea, the ITA imposed anti-dumping duties on colour television receivers from Korea in 1984.[489] Subsequently, Korean exporters

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[488] Generally on these provisions, see E.A. Vermulst & P. Waer, "Anti-Diversion Rules in Anti-Dumping Procedures", (1990) 11 Michigan J. Int'l Law 1119; J. Steenbergen, "Circumvention of Anti-dumping Duties by Importation of Parts and Materials", (1988) Fordham Journal Int'l Law 332; and J.H. Bello & D. Holmer, "Anti-Circumvention Measures: Shifting the Gears of Anti-Dumping and Countervailing Duty Laws", (1990) 24:1 Int'l Lawyer 216.

[489] 49 Federal Register 18,336 (1984).

commenced shipping colour picture tubes and printed circuit boards, two of the main components of television receivers to the United States. While these components were entering the United States for assembly into television receivers, they were separate products from those identified in the anti-dumping order and were not like products to those covered by the order.

In a blanket ruling, the ITA determined that the original anti-dumping order extended to both component parts and ordered the payment of additional duties on these imports.[490] The assessment was made on the determination that the order covered these imports, and was not reached after a further investigation.[491] This decision was rendered despite the fact that the difference between the customs value of the imported components and the final sales price in the United States stores was over forty percent. The Court of International Trade affirmed the findings of the ITA.[492]

Indeed, it has been the Court of International Trade that was instrumental in formulating the pre-1988 Act law on anti-circumvention measures. In another investigation, this time involving portable typewriters, the ITA decided that portable typewriters were not similar products to electric typewriters which were the

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[490] Certain Colour Television Receivers From Korea, 52 Federal Register 24,500 (1987).

[491] On the pre-1988 practice of the ITA, see A.F. Holmer & J.H. Bello, "The Scope of Class or Kind of Merchandise in Anti-Dumping and Countervailing Cases", (1986) 20 Int'l Lawyer 1,015.

[492] Gold Star v United States, 692 F.Supp. 1382 (CIT 1988). But see also the subsequent decision of the CIT in International Association of Machinists and Aerospace Workers v United States, Slip Op. 92-132; reproduced in (1992) 4:6 WTM 187.

subject of an earlier anti-dumping order.[493] The petitioner appealed against this decision and the Court of International Trade found in its favour. According to the Court the ITA had drawn too narrow a classification by relying on the various tariff classifications and that, on the facts of the case, portable memory typewriters should have been included in the order.[494] This case was an early precedent on the point of later-developed products.[495]

Section 1321 establishes a title in United States trade legislation entitled 'Prevention of Circumvention of Anti-Dumping and Countervailing Duty Orders'.[496] This section contains four separate mechanisms to prevent circumvention of such orders.[497]

(A) Assembly and Finishing in the United States

Addressing the most obvious form of circumvention, namely the export of components to the United States for assembly, the 1988 Act provides the Commerce Department

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[493] Certain Portable Typewriters From Japan, 52 Federal Register 1504 (1987).

[494] Smith Corona v United States, 698 F.Supp. 240 (1988).

[495] See W.J. Clinton & D.L. Porter, "The United States' New Anti-Circumvention Provision and Its Application by the Commerce Department", (1990) 24:3 JWT 101, 103.

[496] Section 781 Tariff Act of 1930, as amended.

[497] It should be noted that subsequent proposed revisions have been made in the U.S. Congress to revise this section to tighten alleged circumvention of anti-dumping and countervailing duty orders; see for example, the proposed amendment tabled by Senator D'Amato on Sept 7, 1992, H.R. 776, 102d Congress, 2d Session 1992. See also, N. Komuro, "United States Anti-Circumvention Measures and GATT Rules", (1994) 28:3 JWT 5, 15-20.

with authority to include within the scope of a countervailing or anti-dumping order components imported into the United States for assembly into finished products.[498]

Two conditions are specified for the extension of such orders:

(a) the parts and components must be imported from a country that is the subject of an order; and
(b) the difference in the value of the finished merchandise sold in the United States and the value of the imported parts and components must be 'small'.[499]

The first case in which the Department of Commerce ruled on the application of this section provided an insight into how the Department would tackle the many issues left unanswered by the terms of the section.

In February 1990, the ITA issued the final negative determination in its circumvention investigation into forklift trucks from Japan.[500] Among the problems that the investigators had to resolve were the relationship between the original anti-dumping investigation and the subsequent anti-circumvention inquiry, the period which should be selected to examine the amount of value added, the process involved in the measurement of the value of the merchandise sold in the United States and the

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[498] Section 781(a) Tariff Act of 1930, as amended by Section 1321 of the Omnibus Trade and Competitiveness Act of 1988.

[499] Ibid.

[500] Internal Combustion Industrial Forklift Trucks From Japan, 55 Federal Register 6028 (Feb. 1990). See also, Internal Combustion Industrial Forklift Trucks From Japan [Preliminary determination], 54 Federal Register 11,953 (June 1989).

valuation of imported parts.[501]

The original anti-dumping investigation was considered significant in defining the product that was the subject of the anti-circumvention inquiry which was complete forklift trucks. In other words, the anti-circumvention investigation did not extend to less complete parts of forklift trucks, such as frames or engines. In this respect, the decision complied with the requirements of both Codes that investigations must be confined to 'like products'.

However, this was a self-imposed limitation. There was no statutory requirement mandating the ITA to refrain from selecting a broader range of products. Since this was a self-imposed restriction, naturally the ITA is at liberty to withdraw it at its will and without warning. Further, it is unlikely that the decision on this point would have been upheld after judicial scrutiny from the Court of International Trade in light of the lack of statutory support.

Another omission in the statute is the failure to designate a specific period for the review and the ITA probably has absolute discretion to decide what period should be adopted. In the Forklifts Case, the review period was eighteen months. However, it is unlikely that this period was sufficient realistically to assess the behaviour of a particular company, particularly when large sums of investment are concerned. The assumption in this case was clearly that the diversification would occur immediately after the anti-dumping duties were imposed and no analysis of prior plans to engage in foreign investment appears from the decision to have been made.

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[501] See also, Brass Sheet and Strip From Korea, Inv. No. TA-580-603 (1989).

Computation of values for United States prices was relatively straight-forward in this case. Simply the value of the completed product sold in the United States must be less than the value of the final product when constructed from the components for an anti-circumvention order to apply. The value of the goods was calculated on a monthly weight-averaged ex factory selling price. Ex factory price was determined by deducting the costs of freight from the quoted price.

Valuation of the imported parts proved more difficult due to the fact that the buyer and seller in an anti-circumvention investigation are generally related companies such as parent and subsidiary. It is more than likely that, in the vast majority of cases, the transfer price of the components is not their true price. The invoice price of the components in the Forklift Case was ignored by the Commerce Department which valued the parts of the basis of the price paid by an unrelated customer for the same component part, at the same level of trade, in the country of origin, in this case Japan.[502]

After comparison, the Department of Commerce determined that the difference between the finished product and the component parts was not small, ranging from between 25-40%. However, the Department was clearly uncomfortable with having to develop guidelines in this area. In subsequent cases, the levels of difference required have been clarified. Thus, in Granular

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[502] In the absence of such sales, the Commerce Department indicated that it would price the goods on the basis of one of the following methods of valuation:

(a) the price that the related company in the United States would pay to an unrelated supplier in the United States, or a third country, for an identical component; or
(b) the constructed cost of the part.

Polytetrafluoroethylene From Italy[503] and Brass Sheet and Strip from Canada[504], differences of 10-20% and 15% respectively were considered adequate for the application of the section.

A number of other issues raised in the application of this part of the anti-circumvention legislation remain unresolved even after this initial case. The Commerce Department is still required to resolve the following matters:

(a) what processes constitute completion and assembly for the purposes of this provision?
(b) how are the related concepts of 'parts' and 'components' to be defined?
(c) what is to be considered small variations in the price?
(d) what factors should be taken into consideration to identify relevant patterns of trade?

Doubtlessly, these concepts will be more fully developed in later cases.[505]

(B) Assembly and Finishing in Third Countries

The provisions relating to the circumvention of countervailing and anti-dumping orders by assembling components in third countries that are not the subject

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[503] 58 Federal Register 28,100 (1993).

[504] 58 Federal Register 33,610 (1993).

[505] See generally, "The United States New Anti-Circumvention Provision and Its Application by the Commerce Department", (1990) 24:3 JWT 101.

of any such order are slightly more complex.[506] In essence, two separate situations are covered:

(a) the assembly of component parts into finished products in third countries prior to the importation of the finished merchandise into the United States; and
(b) the diversion of a product subject to an order to a third country for the purposes of making it into a further stage product prior to exporting the final product to the United States.

The difference between these two situations is simply that, in the first case, it is the product that is finished in the third country that would otherwise be subject to the order whereas in the second case it is the product that is diverted for further stage processing that is the subject of the order.

The conditions required for the extension of an existing order under the anti-circumvention provisions of the 1988 product to these cases require the application of approximately the same two tests as before, namely that the value added in the third country must be 'small' and that the merchandise - whether components or finished products - must originate from the country that is the subject of the order. Similarly, the factors that are considered in making the determination as to origin are the same as in the previous case.

(C) Minor Alterations

Imported products that have undergone only minor changes

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[506] Section 781(b) Tariff Act of 1930, as amended.

from products that are subject to anti-dumping or countervailing duty orders cannot evade the relevant orders if they have undergone only minor alterations in either form or appearance.[507] This provision extends to both industrial and agricultural products.

There are few statutory guidelines to assist the ITA in the application of this rule. The only significant express rule is that the fact that altered merchandise falls into a different tariff classification than the merchandise already covered by the order is not sufficient to prevent it being considered having gone through only minor alteration.[508]

Other than this, it is difficult to ascertain what changes in the character of a product are required before it will be taken to have undergone more than mere minor alteration. For example, it is relatively clear that dilution of a product with water would be a case where a good has undergone merely minor alteration. Similarly, repackaging of a product would not suffice as a major alteration. But, other than these obvious cases, it is difficult to discern any general rules for the application of this principle.[509]

The Department of Commerce has in fact recently began to apply this provision in practice. The first

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[507] Section 781(c), ibid.

[508] This rule contrasts with that under the Canada-United States Free Trade Agreement, Article 1402, which provides that goods that have changed customs classification through processing in one country are to be considered as originating in that country for the purpose of the rules of origin.

[509] See Brass Sheet and Strip From the Federal Republic of Germany, Inv. No. 428-602 (1990); and Certain Electrical Conductor Redrawn Rod From Venezuela, Inv. No. 307-701/307-702 (1990).

investigation was Electrical Conductor Aluminium Redraw Rod from Venezuela[510] where the issue was whether wire of a diameter of 0.375 inches was the same product when drawn to 0.250 inches. Not surprisingly the answered was affirmative. In the second case, Brass Sheet and Strip from West Germany[511], the addition of small quantities of manganese to brass was considered too great a change for the application of the minor adjustment provision. This was due to the different applications for the two products and the expectations of consumers.

In both cases, a rigorous investigation was conducted by the ITA which focused on five factors: (a) physical characteristics of the products; (b) the use of the merchandise; (c) the expectations of the ultimate consumer; (d) the channels of marketing; and (e) the costs of modifications relative to value. The legitimate application of these criteria probably does give an objective evaluation of the situation.[512]

(D) Later-Developed Products

The ITA is empowered to include merchandise developed after the initiation of an investigation within the scope of any final order resulting from that investigation if the following conditions are met:

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[510] 55 Federal Register 3,434 (19900 [preliminary determination]; 56 Federal Register 42,310 (1991) [final determination].

[511] 55 Federal Register 32,655 (1990) [preliminary determination]; and 56 Federal Register 65,887 (1991) [final determination].

[512] In general, see G. Kleinfeld & D. Gaylor, "Circumvention of Anti-Dumping and Countervailing Duty Orders through Minor Alternations in Merchandise: Where to Draw the Line?", (1994) 28:1 JWT 77.

(a) the later-developed products are essentially the same as the original merchandise subject to the order insofar as general physical characteristics are concerned;
(b) the expectations of the ultimate purchasers of the later-developed products are the same as for the earlier products;
(c) the ultimate use of the earlier product and the later-developed merchandise are the same;
(d) the later-developed merchandise is sold through the same trade channels as the earlier product; and
(e) the later-developed merchandise is advertised and displayed in a manner similar to the earlier product.[513]

The ITA must seek the advice of the ITC on whether or not the later-developed product falls within the scope of the order.

(E) General Observations

The anti-circumvention provisions of the 1988 Act are certainly comprehensive in their coverage of activities that might be construed as designed to evade the application of anti-dumping or countervailing duties. Both the breaking down of products and the movement of assembly operations to third countries, the two activities most frequently associated with anti-circumvention, are vigorously addressed in the legislation. The measures regarding minor alterations and later-developed products take the idea of anti-circumvention slightly further.

[513] Section 781(d), ibid.

One of the major effects of this legislation has been to expand the scope of anti-dumping and countervailing duty orders from particular goods from a specific country to include related, though by no means similar or identical, goods as well as goods from countries to which the original order did not apply. This is a disturbing development when it is considered that the only nexus between the goods to which the original order applies and the products that are the subject of the anti-circumvention investigation is the nature of the products themselves. Both the country of origin and, in the case of assembly operations, the component products may alter and yet remain subject to the scope of the earlier order.

This raises the question whether the statutory provisions established for anti-circumvention purposes are consistent with the GATT or both the 1979 Codes. As we have seen, the main inconsistency in the European Community 'screwdriver regulation' was its incompatibility with Article III of the GATT.[514] The anti-circumvention duties were deemed to be internal charges and therefore regulated by Article III. Since products of domestic origin were not subject to the possibility of such charges, the regulation discriminated in favour of domestic goods contrary to Article III of the GATT.[515]

Drawing from the logic of this precedent, it is difficult to see any major distinction between the European and the United States anti-circumvention legislation other than that the American laws are considerably more comprehensive. Certainly anti-

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[514] See text supra, pp.189-192.

[515] European Community Anti-Circumvention Measures, reproduced at [1990] 2 CMLR 639; (1990) 2:3 WTM 5.

circumvention duties under the 1988 Act are no more likely to be considered anti-dumping duties, as opposed to internal charges, than the European measures.[516]

The application of the anti-circumvention laws also raises difficult questions regarding rules of origin for determining the country where the goods were actually manufactured. For example, if a Japanese manufacture exports components worth 60% of the final value of the completed goods to Taiwan for assembly, where 40% of the cost of the final goods is labour costs, which country is the country of origin in the event that the goods are subject to a countervailing order in the United States?

The U.S. Customs Department has developed a series of rules for determining the origin of goods, mainly based on the principle 'substantial transformation'. Thus, in the past, U.S. Customs had ruled that assembly and testing operations in a particular country conferred origin on the country in which these were conducted.[517] Nevertheless, the Commerce Department has held that it has exclusive jurisdiction to establish rules of origin in anti-dumping and countervailing investigations.[518] Furthermore, the rules of origin applied by the ITA vary significantly from those applied by the Customs Service.

In the Forklift Case, the ITA held that the 'substantial transformation' test was only relevant to changes in products occurring outside the United States.[519]

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[516] See the arguments made by the United States government to distinguish the 1988 measures from the Community legislation, ibid.

[517] Palmeter, supra note 447, 7.

[518] See 3.5" Microdisks and Coated Media Thereof From Japan, 54 Federal Register 6433 (1989).

[519] Forklifts, supra note 500, 6031.

Furthermore, the ITA claimed that the application of this standard in anti-dumping investigations would generally understate the value of the components from the foreign country. However, in this case the ITA did not have to address the issue of origin since the goods were imported directly from Japan for assembly in the United States. Nevertheless, the ITA appears to be determined to develop independent rules of origin for anti-dumping and countervailing cases.

This raises the question of whether two separate rules will be developed, one for determination of origin for customs purpose and another for anti-dumping investigations. It is likely that such a development would be contrary to Articles I and III of the GATT.

**(11) Limitations on Judicial Review and Appeal**

Exclusive jurisdiction to review the decisions of the ITA and the ITC is conferred upon the United States Court of International Trade (CIT).[520] Appeals from the CIT are heard by the Court of Appeals for the Federal Circuit.

Only parties to the proceedings may request judicial review of an ITA or ITC decision on factual or legal grounds.[521] Parties to the proceedings include any interested party under Section 771(9) of the Tariff Act of 1930, as amended, as well as any foreign or U.S. importer that actively participates, through written submissions of factual information or arguments in the

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[520] Customs Court Act of 1980.

[521] See W.D. Hunter & J.D. McInerney, "What Happens When the Court Reverses a Dumping or Anti-dumping Duty Case?", (1988) 3 Florida Int'l Law Journal 151.

initial investigation or subsequent administrative review. Decisions by the ITA or the ITC relating to refusal to initiate an investigation, a declaration that a case is extraordinarily complicated, refusal to review an agreement with an exporter and negative determinations of subsidisation, dumping or material injury, may be appealed.[522]

The main limitation of this procedure for a foreign exporter's point of view is that only final affirmative orders imposing duties and determinations made in connection with the suspension of investigations are subject to judicial review. Review of preliminary determinations is not possible.[523]

Judicial review can only be conducted on two limited grounds:

(1) on the basis of allegations that the decision in question is not in accordance with the law, or are arbitrary, capricious or an abuse of discretion;
(2) on the ground that the decision was rendered without being supported by substantial evidence on the record of the proceedings, or otherwise not in accordance with the law.[524]

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[522] See generally, T.J. Schoenbaum & D.S. Arnold, "Judicial Review of International Trade Law Decisions: A Comparative Analysis", in M. Hilf & E-U. Petersmann (eds), National Constitutions and International Economic Law (1993), 475.

[523] See J.K. Horgan, "The Impact of Interlocutory Judicial Decisions Upon Anti-dumping and Countervailing Duty Proceedings", (1988) 3 Florida Int'l Law Journal 187.

[524] Section 516A of the Tariff Act of 1930, as amended by Section 1001 of the Trade Agreements Act of 1979.

Appeal from the Court of International Trade to the Court of Appeal for the Federal Circuit is competent but only on the same grounds and thereafter to the Supreme Court.[525]

**(12) Observations**

The administration and application of anti-dumping and countervailing duties are inherently biased in favour or domestic industries and against the interests of foreign producers; this asymmetry is particularly evident in the nature of the procedural rights conferred on these two groups. To a certain extent, this procedural asymmetry is permitted under the two international Codes but the question is, to what extent has the United States exacerbated this problem by refusing to comply with the international standards.

The answer to this question is that the international rules yet again have little normative impact on the activities of the United States in this context. The international rules have not been of sufficient detail to prevent abusive behaviour when administering the procedural rules for the application of anti-dumping and countervailing duties. Nor have they been a limiting influence to rectify the asymmetry which exists between the rights of domestic industries and the rights of foreign manufacturers and exporters.

Even from the initiation of an investigation, United States producers have the procedural upper hand. They are only required to lodge the complaint and thereafter

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[525] See D.W. Layton, "Interlocutory Appeal of Remand Orders by the Court of International Trade", (1988) 3 Florida Int'l Law Journal 167.

it is the ITA and the ITC Commission which conduct the investigation. The powers and public funded resources of the ITA Commission are pitted against the limited financial resources of companies accused of dumping or receiving countervailable subsidies. This governmental intervention creates a gross disproportion in the amount of expenditure which must be disbursed by foreign producers relative to domestic industries. This situation contrasts unfavourably with proceedings before a court or tribunal where adversaries compete on a level basis at least from a financial perspective.

The liberal standing requirements of both anti-dumping and countervailing duty actions add to this imbalance. Standing requirements to initiate proceedings under Section 303 are extremely lax and those under Sections 701(a) and 731(a) do not act as an effective filter for malicious or harassing complaints. This fact has even been recognised by Congress which deliberately extended the concept of interested parties in agricultural commodity investigations until this requirement is challenged by action by an aggrieved trading partner at the international level. Equally, the requirement that a complaint represents a domestic industry has been progressively diluted firstly by not requiring a complaint to prove this requirement is satisfied and secondly by manipulating the method of establishing the relevant domestic industry.

The more novel variants of anti-dumping and countervailing duty actions introduced by the 1988 Act have even less rigorous requirements for establishing standing. This is so despite the fact that these are analogous procedures and should be subject to the conditions set out in the 1979 Codes for achieving standing. This is a violation of the terms of the Codes but such provisions remain valid in U.S. domestic law

until challenged.

The evidential requirements for complaints are also dangerously low. The reasonable indication standard set by the ITA for accepting complaints is the direct cause of permitting some unsubstantiated complaints proceeding to investigations with the damaging consequences which follow. In addition, the burdens imposed on foreign producers and exporters during investigations prejudice their operations to such an extent that often producers refuse to co-operate in investigations instead preferring to suffer the consequences of such failure. If this course of action is chosen - even for legitimate business reasons - the information submitted by the complainants assumes a degree of authenticity which is simply not justified due to the so-called best information rule.

It is the need to protect business information which places foreign producers in this situation. Quite clearly, foreign producers are reluctant to place their trust in the procedures established to prevent abusive disclosure of confidential information. Administrative protection orders do not adequately protect the interests of foreign producers and even the prospect of disclosing sensitive information to counsels acting for trade rivals may discourage co-operation on the part of foreign producers. In addition, even when producers not immediately involved in the investigation assist the authorities, such as third country producers in a foreign market enquiry, they run the risk of subsequent proceedings being initiated against them even although sensitive business information is disclosed on a confidential basis.

Another disconcerting feature of United States law is the innovative forms of investigation which have

recently evolved in anti-dumping and countervailing duty procedures. Downstream product monitoring systems and short life cycle product investigations border on illegal measures and the fact that proceedings have not been brought at the international level to challenge these measures stems merely from the fact that neither provision has been used with any great degree of enthusiasm by the administering authorities. However, the potential of these measures, especially downstream product monitoring systems, is disconcerting and the fact that these systems have been developed also gives cause to believe that the United States pays little heed to its international obligations.

Comments have already been made on the legality of United States anti-circumvention measures.[526] Unfortunately, a complaint to the GATT which would have reviewed the legality of these measures was settled at the consultations stage and therefore there is no direct ruling on the point. It is sufficient, however, to note that even the United States government has reservations concerning the legality of these measures otherwise it is highly unlikely that the United States would have settled this matter so abruptly.

Finally, the inability of foreign producers effectively to challenge countervailing duty or anti-dumping measures in the United States courts against international standards also prejudices their position. It is notoriously difficult of producers to convince their governments to bring an international claim in the GATT against a country as economically powerful as the United States. Broader economic and political rationales are often invoked to justify such non-action. Without the support of their governments, attempts by foreign

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[526] See text, supra pp.734-737.

producers to defend their positions in such proceedings are emasculated. The inevitable result is that the position of foreign producers becomes irretrievably prejudiced.

Ultimately, responsibility for the laxity and bias in both anti-dumping and countervailing duty proceedings stems from the fact that Congress and the International Trade Agency have both succumbed to internal domestic pressures from industries and other pressure groups to mould the law into this shape. In addition, the international rules themselves contain a degree of asymmetry which creates bias in favour of domestic producers in the course of such investigations. Together, both these factors combine to the disadvantage of foreign producers in terms of procedural rights.

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Faculty of Law and Financial Studies

The Impact of International Law
on the Trading Policies of
the United States and the European Union
with Special Reference to the Regulation of
Subsidies, Dumping and Countervailing Measures

## Volume III

A Thesis Submitted for the
Degree of Doctor of Philosophy

by

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## 10 Abuse of Commercial Defence Instruments by the European Union

The European Union is obliged under international law to respect obligations entered into with third states. It is also a fundamental principle that states must ensure that internal laws do not conflict with their obligations[527] and this is equally applicable to the European Union as an international organisation contracting with third states on behalf of its Member States.

Both principles apply equally to obligations assumed by the European Union in relation to its commercial defence measures. The European Union is responsible for acts, measures or practices which contravene international obligations assumed in relation to the operation of these measures, particularly under the General Agreement and the 1979 Anti-Dumping Code. The purpose of this chapter is to establish whether the European Union ignored its international commitments in connection with these measures during the period under investigation, ie. prior to 1995.

Again, no attempt has been made to examine the compatibility of the European Union's new anti-dumping or anti-subsidy legislation with the obligations contained in the Uruguay Round Agreements. This thesis deals with the pre-1995 EU legislation and the period of administrative activity prior to this date. There is no intention to demonstrate how the new EU legislation has implemented the Anti-Dumping Agreement 1994.

Despite the near parallel growth in the use of measures of administered protectionism by both the European Union

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[527] See UN Headquarters Agreement Case (1988) ICJ Rep 3.

and the United States the two did not share a common philosophy towards the role of anti-dumping measures. The United States viewed anti-dumping proceedings as an extension of the commercial rights of private industries against foreign competitors engaging in unfair trading practices. In contrast, the European Union's policy towards anti-dumping was an integral part of its own overall commercial trade policy and consequently a balance was struck between measures to protect European Union industries from dumped foreign products and a variety of other commercial interests.[528]

This difference in policy approach is critically important and marks the primary point of divergence between the two cognate systems. It also explains many of the unusual features of European Union anti-dumping law, for example, the permeation of Community (now Union) interests throughout many of the commercial defence mechanisms of the European Union.

Another significant point is that the European Union relied virtually exclusively on its anti-dumping legislation as its principal weapon of 'commercial defence'.[529] Hence, its profile in the use of measures of commercial defence was significantly different from that of the United States. While the European Union relied heavily on its anti-dumping laws to protect domestic industries, few other measures were invoked. In particular, the European Union used its anti-subsidy and safeguard measures legislation relatively infrequently. This explains why, in this part of the work,

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[528] See generally on this point, E.A. Vermulst, "Dumping in the United States and the European Community: A Comparative Analysis", (1984) 10:2 LIEI 103.

[529] See L.R. Le Lievre & G. Houben, "European Community Versus Japan: The Community's Legal Weapons", (1987) 24 CMLR 427.

considerably less discussion has been given to these devices than in the earlier analysis of the United States laws.

While the European Union's practice as regards this type of measure was deliberately circumspect, it is still worthwhile examining some of the principal features of this mechanism to determine if abuse occurred in any form during the period of investigation presently being scrutinised.

**(1) The Evolution and Development of the European Union's Anti-Dumping Policy as the Principal Commercial Defence Measure**

Protection of European Union industries from dumped and subsidised products is expressly recognised as an objective to be pursued through the Common Commercial Policy.[530] The legal basis for the basic regulations authorising protection against dumped and subsidised imports from non-European Union countries is Article 113 of the EC Treaty.[531] Matters relating to both these forms of commercial defence fall within the exclusive competence of the European Union and this competence is internally exercised by both the Commission and the Council of Ministers.

The basic anti-dumping regulation broadly follows Article VI of the GATT by requiring that, before anti-dumping duties can be imposed, it must be established

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[530] Article 113, EC Treaty. Note this provision has been slightly modified by Title II, Article G28 of the Treaty on European Union. The purpose of this modification is essentially to remove references to transitional periods.

[531] See Recital 1, Council Regulation (EEC) 2423/88, O.J. L209/1 (1988).

that dumping has taken place which has caused, or threatens to cause, material injury to a European Union industry. In addition, the European Union has inserted an additional requirement, namely that the imposition of such duties would be in the 'European Union interest'.[532]

(A) Some Policy Aspects of the European Union Anti-Dumping Legal Regime

Commission officials have frequently voiced the opinion that the European Union's anti-dumping policy is fair and objective, particularly when compared to the systems of other countries. For example, in 1988, then Commissioner for External Relations, Willy de Clercq made the following assertion:

> 'The European Union's policy in anti-dumping differs from those of other countries in one fundamental respect, that is it is incontestably by far the most liberal.'[533]

Similarly, the former Director-General of the Anti-Dumping Unit at the Commission, Hans Beseler, has stated

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[532] See generally, I.V. Bael & J-F Bellis, Anti-dumping and Other Trade Protection Laws of the EEC (Second edition, 1990), 178 et seq; H. Beseler & A.N. Williams, Anti-dumping and Anti-Subsidy Law: The European Communities (1986), 173-205; D.J. Gijlstra, "Anti-Dumping Policy of the EEC in Practice", in J.H.J. Bourgeois (ed), Protectionism and the European Community (1983), 147-179; J.F. Bellis, "The EEC Anti-Dumping System", in J.H. Jackson & E.A. Vermulst (eds), Anti-Dumping Law and Practice (1990), 41-98; E. Creally, Judicial Review of the Anti-Dumping and Other Safeguard Measures in the European Community (1992); and I.V. Bael, "EEC Anti-dumping Laws and Procedures Revisited", (1990) 24:2 JWT 5, 17 et seq.

[533] Financial Times, November 21, 1988.

to the present writer that the European Union's policy on anti-dumping is merely the elimination of injury to domestic industries on the basis of an objective and consistent policy.

Despite these exhortations, questions have been raised, and will continue to be raised throughout this part of the work, as to the extent to which these statements can be justified. This is particularly so as regards the claim that the European Union's policy objectives are fair and equitable. Fair and equitable in this context can be measured against the international standards as a legal point of reference.

In any event, it is convenient at this point to make two preliminary remarks as regards the statistical profile of the anti-dumping measures adopted by the European Union.

First, the profile against particular states quite clearly demonstrates that certain countries are more susceptible to anti-dumping measures than others. At different times, certain states have been singled out for severe treatment at the hands of the European Union. For example, in 1987, Japan was subject to seven separate investigations which amounted to just slightly less than 20% of the total number of investigations opened by the Commission.[534] By 1991, investigations against Japanese companies had climbed to 25% of the total number of investigations opened.[535]

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[534] European Commission, Eighth Annual Report of the Commission on the Community's Anti-Dumping and Anti-Subsidy Activities, SEC (91) 92 Final (1991).

[535] European Commission, Tenth Annual Report of the Commission on the Community's Anti-Dumping and Anti-Subsidy Activities, SEC (92) 716 Final (1992).

True, the issue of European Union-Japan trade relations is one of remarkable sensitivity and the anti-dumping issue cannot be divorced from the complete picture. Again the main source of friction is the perceived trade imbalance between the European Union and Japan which, in 1986, lead the European Commission of comment:

> 'The sense of responsibility and strong leadership evidenced by the present government in Tokyo have not done away with the multilateral structural imbalance which threatens the foundations of post-war co-operation and represents a veritable time-bomb within the international trading system.'[536]

Quite clearly, the aggressive use of anti-dumping measures is seen as one way of combatting the trade deficit and indeed the European Parliament has even blatantly called on the European Commission to 'use all the legal resources at its disposal to restrict imports from Japan'.[537] In light of these pressures, it is understandable that the European Commission has targeted Japan for rough treatment. Nevertheless, the question remains whether or not granting relief in this form is legal in terms of international law.[538]

Other countries have also been subjected to the rigorous attentions of the Commission's anti-dumping unit.[539] In

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[536] European Commission, European Community - Japan Relations, COM (86) 60 Final 6 (1986)

[537] European Parliament, Report on Trade and Economic Relations Between the European Community and Japan (Rapporteur J. Moorhouse), P.E. Doc. A 2-86/86 (1986).

[538] See generally, A. Bell, "Anti-dumping Practices of the EEC: The Japanese Dimension", (1987) 13:2 Legal Issues of European Integration 1.

[539] See P.K.M. Tharakan, "The Sector-Country Incidence of Anti-Dumping and Countervailing Duty Cases in the European Communities", in L.B.M. Mennes & J. Kol

1990, the number of cases admitted against Korea and China by the Commission accounted for 12% and 10% of the total number of cases respectively while in 1991 and 1992, Chinese exports accounted for 20% of these totals in both years. The proportion of the total number of investigations for these two states has remained high into the earlier part of this decade.[540]

In contrast, the proportion of investigations opened into goods originating from other countries, particularly the United States, Canada and the other European countries has remained noticeably low. The notable exception to this general principle has been the increase in investigations into goods originating from the states of the former Eastern block. The explanation for this phenomenon is that the European Union wishes to isolate itself from the potential influx of cheaper consumer goods from these states since their conversion to market-driven economies.

Second, statistically, in the last twelve years, an average of between approximately forty anti-dumping investigations have been opened annually.[541] While only in a minority of cases are definitive measures imposed after investigations by the European Union agencies, this statistic disguises the fact that, until 1990, most complaints were terminated with the acceptance of price undertakings. If undertakings are equated to definitive measures, the incidence of measures to the opening of

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(eds), European Trade Policies and the Developing World (1988), 126.

[540] These statistics are taken from European Commission, Eleventh Annual Report of the Commission on the Community's Anti-Dumping and Anti-Subsidy Activities, COM (93) 516 Final (1993), Annex G.

[541] On the 1981-1984 statistics, see H.J. Dielman, "Anti-Dumping and Anti-Subsidy Measures: The Practice of the European Communities", (1985) 22 CML Rev 697.

investigations is extremely high.[542]

Both these indicators strongly suggest that the European Union policy towards anti-dumping is not as objective as its administrators would like to believe. They also suggest that the European Union has been targeting particular states for special treatment under the anti-dumping procedures. The important question is to what degree is this policy, and the anti-dumping laws in general, consistent with the European Union's international obligations?

(B) Legislative History and A Brief Overview of the Present Anti-Dumping System

The European Community was a signatory to the 1967 Anti-Dumping Code and the obligations contained in that agreement were incorporated into European Community law by Council Regulation (EEC) 459/68.[543] This regime was amended three times prior to the negotiation of the 1979 Anti-Dumping Code for the purposes of strengthening the role of the European Community institutions in the process[544], to deal with the transfer of authority from acceding Member States to the European Community[545] and to clarify rules for dealing with sales made at a loss, dumping by state trading countries and the rules for the

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[542] See H.J. Deilmann, "Anti-Dumping and Anti-Subsidy Measures: The Practice of the European Communities", (1985) 22 CML Rev 697.

[543] O.J. L93/12 (1968).

[544] Council Regulation (EEC) 2011/73, O.J. L206/3 (1973).

[545] Council Regulation (EEC) 1411/77, O.J. L160/4 (1977).

calculation of export prices.[546] However, the pre-1979 rules have been altered to such an extent that they are of little more than historical significance in the context of the present study.[547]

Two separate instruments were required to incorporate the 1979 Anti-dumping and Subsidies Codes since authority to enter into international commitments in these areas is split between the EC Treaty and the ECSC Treaty.[548] In enacting this legislation, the European Union took into account two major principles.[549] The first was the terms of the Codes themselves.[550] The other was the precedent set by the United States which was one of the first signatories to incorporate the obligations of the Code into its domestic law.[551]

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[546] Council Regulation (EEC) 1681/79, O.J. L196/1 (1979).

[547] For a review of these rules, see, I.V. Bael, "Ten Years of EEC Anti-Dumping Enforcement", (1979) 12 JWTL 395.

[548] Council Regulation (EEC) 3017/79, O.J. L339/1 (1979); Commission Recommendation 3018/79/ECSC, O.J. L339/15 (1979).

[549] On this legislation, see generally, I. Stanbrook & J Cunnane, Dumping and Subsidies (1983); and I.S. Forrester & C. Norall, "Recent Developments in EEC Trade Law", in D. Campbell & C. Rohwer, Legal Aspects of International Business Transactions, Vol. II, 11-26; and C. Norall, "The New Amendments to the EC's Basic Anti-Dumping Regulation", (1989) 26 CMLR 83.

[550] J.F. Beseler & A.N. Williams, Anti-Dumping and Anti-Subsidy Law of the European Communities (1986), 25-27.

[551] See P. Didier, "EEC Anti-Dumping Rules and Practices", (1980) 17 CML Rev 349; D.J. Gijlstra, "Anti-Dumping Policy of the EEC in Practice", in J.H.J. Bourgeois (ed), Protectionism and the European Community (1983), 147-179. See also W.J. Davey, "An Analysis of EC Legislation and Practices Relating to Anti-Dumping and Countervailing Duties", in B. Hawk, Antitrust and Trade Policy in International Trade (1984), 39-128.

The original implementing legislation was subsequently amended and then consolidated in 1984.[552] After later amendments[553], a complete revision of the anti-dumping legislation was completed in 1988.[554] Council Regulation (EEC) 2423/88 [hereinafter 'the Basic Regulation'] remained the fundamental measure until Council Regulation 3283/94 was enacted in December 1994.[555]

Given that no international agreements were negotiated at the GATT level between 1979 and 1988 the amendments made to the regulation enacted in 1979 must be justified as matters either not regulated in the Code or compatible with its terms. Therefore, the nature of the subsequent amendments to the 1979 basic regulation must be treated with a certain degree of scepticism as regards their consistency with the GATT rules.

It is also interesting to reflect for a moment on the views of the European Commission when enacting the Basic Regulation. In proposing the measure which eventually became Council Regulation 2324/88, the Commission stated:

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[552] Council Regulation (EEC)1580/82, O.J. L178/9 (1982); Commission Recommendation 3025/82/ECSC, O.J. L317/17 (1982); Council Regulation (EEC) 2176/84, O.J. L201/1 (1984); and Commission Decision 2177/84/ECSC, O.J. L201/17 (1984). See generally, H.J. Dielmann, "Anti-Dumping and Anti-Subsidy Measures: The Practice of the European Communities", (1985) 22 CML Rev 697.

[553] Council Regulation (EEC) 1761/87, O.J. L167/9 (1987).

[554] Council Regulation (EEC) 2423/88, O.J. L209/1 (1988).

[555] In passing, it is interesting to note that the dates of revision of the European trade remedy laws bear an unusual degree of similarity with the legislative amendments made by the United States. In fact, closer examination reveals that many of the amendments concern similar subjects particularly as regards procedure and anti-circumvention measures.

> 'It should be emphasized that the proposed amendments would not change the general orientation of the Community's anti-dumping policy which is based on Article VI of the GATT and the GATT Anti-Dumping Code. Furthermore, all the proposed modifications are essentially a codification of the consistent practice and approach of the Commission and Council in their application and interpretation of the present legislation and, as such, are essentially technical in nature.'[556]

Neither of these two statements confirm that the 1988 Basic Regulation is GATT-consistent. While the measure may be consistent with European Union practice, quite simply if an illegal practice is codified in an internal measure, it does not absolve responsibility for illegal behaviour. Second, new elements and concepts were introduced by the 1988 regulation many of which were clearly not of a technical nature, for example, the anti-circumvention and anti-absorption measures.[557]

Some of these amendments do deal with providing supplementary detail in the application of rules which are stated at a more general or abstract level in the Code. Others do not and in fact some are deliberately more vague. In the final analysis, this revision was primarily to exploit loopholes in the Code as an excuse for enacting more malleable rules than would have been the case if these matters had been dealt with taking into account the spirit and purpose of the Code.

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[556] European Commission, Proposal for a Council Regulation Amending Council Regulation (EEC) 2176/84, COM (88) 112 Final, 3 (1988).

[557] See J.F. Bellis et al., "Further Changes to the EEC Anti-Dumping Regulation: A Codification of Controversial Methodologies", (1989) 23:2 JWT 21.

As part of the WTO obligations assumed by the European Union, a new basic regulation has now been introduced to regulate anti-dumping investigations and proceedings, namely Council Regulation (EC) 3283/94.[558] For the first time, a separate regulation has also been enacted to regulate anti-subsidy proceedings, this measure being Council Regulation (EC) 3284/94[559] Neither of these regulations are considered in any detail in the following text because the 1988 Basic Regulation and its predecessors provide the necessary evidence of EU practice in these areas and since the WTO Anti-Dumping Agreement and Second Subsidies Code are not the primary subjects of this investigation such devotion seems unwarranted.

**(2) Anti-Dumping Measures in European Union Law**

The Basic Regulation states, without further elaboration, that:

> 'A product shall be considered to have been dumped if its export price to the [European Union] is less than the normal value of the like product'[560]

The procedure for determining the existence of dumping in European Union law involves four basic steps: (a) determination of 'export price'; (b) determination of

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[558] O.J. L349/1 (1994). See generally, E. Vermulst & P. Waer, "The Post Uruguay Round EC Anti-Dumping Regulation - After a Pit Stop, Back in the Race", (1995) 29:2 JWT 53; P. Waer & E. Vermulst, "EC Anti-Dumping Law and Practice after the Uruguay Round: A New lease of Life", (1994) 28:2 JWT 5.

[559] O.J. L349/22 (1994).

[560] Article 2(2), Council Regulation 2423/88.

'normal value'; (c) a comparison of normal value to export price after making required adjustments; and (d) calculation of the margin of dumping. While this process is, prima facie, consistent with Article VI of the GATT and the terms of the Anti-Dumping Code 1979, in fact, only a part the process is congruous with the legal obligations of the European Union.

Each of the four steps involve administrative judgments which are imbued with an extensive degree of latitude and discretion for the creative application of anti-dumping policy. In fact, the whole process is so arbitrary that there is general recognition that the European Commission can manufacture artificial dumping margins without straying from the express terms of the Basic Regulation.[561] This produces an anomalous situation; the Commission can engage in GATT-inconsistent practices without actually falling foul of European Union law itself.

This situation has been caused mainly by the failure of the European Court to conduct effective judicial review of the administrative practices of the Commission. The Court has traditionally hesitated to intervene in the discretion exercised by the Commission in administering EU anti-dumping policy. This predicament has been compounded by depriving private individuals of the right to challenge anti-dumping measures against the standards contained in the international treaties negotiated within the GATT. The Court has passively acquiesced to the effective autonomy of the European Commission (and

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[561] B. Hindley, "Anti-Dumping Action and the European Community: a Wider Perspective", in M. Hilf & E-U Petersmann (eds), National Constitutions and International Economic Law (1993), 371-390; I. V. Bael, "EEC Anti-Dumping Enforcement: An Overview of Current Problems", (1990) 1:2 European Journal of Int'l Law 118; and J.T. Kuznik, "A Community Export Price Offset", (1988) 25 CML rev. 317.

to a lesser extent the Council of Ministers) in this area of policy and must bear its share of responsibility for the deviation between EU anti-dumping policy and the international standards.

The reasons why this degree of deviation has occurred, and the evidence to support this proposition, will be set out in this section. Here, an analysis of the process for imposing anti-dumping measures will be made with a view to explaining the degree of deviation. This will require extensive consideration of the minutiae of European Union anti-dumping law. The most effective method of doing so is to follow the broad outline of the investigative process to discover the most flagrant abberations from the international standards.

(A) Export Price

The export price of goods is the price at which the goods are sold for export to arm's length customers inside the territory of the European Union. It is ascertained as either the actual price paid or, in certain circumstances, a price artificially constructed as the price which would have been paid had an arm's length purchaser bought goods from the foreign manufacturer.[562]

(1) Actual export price

The general rule for the determination of the export price is that it is 'the price actually paid or payable

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[562] In the second case, the existence of a related undertaking, a subsidiary or other circumstances, has eliminated the arm's length purchaser from being the first purchaser of the goods from which an actual price can be calculated.

for the product sold for export to the [European Union].[563] Where a foreign exporter sells goods directly to an independent purchaser inside the European Union, the starting point for the determination of the actual export price is the invoice price of the goods.

To arrive at the true export price, deductions are made to the invoice price for expenses incurred in relation to all taxes, discounts and rebates actually granted and directly related to the sales under investigation. The greater these deductions, the lower the actual export price and the higher the potential margin of dumping.

The European Commission requires extensive deductions to be made to the actual export price to arrive back an the adjusted export price which, in turn, stimulates artificial margins of dumping.[564] For example, in Canon Inc v EC Council[565], the European Court upheld the right of the European Commission to deduct from the actual selling price the costs and assumed profits of a sales agency controlled by a manufacturer but functioning at a pre-import stage.

In the event that no actual export price can be found, an export price is constructed. Four circumstances justify the abandonment of the determination of an actual export price in favour of a constructed export price[566]:

(a) no export price exists;
(b) an association exists between the

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[563] Article 2(8)(a), Council Regulation 2423/88.

[564] See Gestener v EC Council and EC Commission (No.10 Case C156/87 [199] ECR 781, [1990] 1 CMLR 820.

[565] Case C171/87 [1992] ECR I 1237; [1992] 3 CMLR 30.

[566] Article 2(8)(b), Council Regulation 2423/88.

importers and the exporters;

(c) a compensatory arrangement exists between the exporter and the importer or any third party; or

(d) for other reasons, the price actually paid or payable for the product sold for export to the European Union is unreliable.[567]

If the European Commission determines that any one of these conditions exist - which it does in an extraordinary proportion of investigations - it constructs an export price. Since the construction of prices is a more arbitrary process than calculating the export price from the price actually paid, a greater degree of latitude is conferred on the Commission to find dumping margins when constructed values are used.

(2) Constructed export price

Constructed export prices are based on the price at which the imported goods are first resold to an independent buyer or, alternatively, if the products are not sold to an independent buyer, or not resold in the condition in which they were imported, on 'any reasonable basis'.[568] In other words, the price to the first unrelated importer is worked back to the price at which the goods were first sold for export to the European Union.

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[567] The Basic Regulation is not specific as to the factors or elements which constitute 'other reasons' and since the Anti-Dumping Code does not authorise the creation of such a residual category the inference must be that this aspect of the Regulation conflicts with the terms of the Code.

[568] Ibid.

The Commission frequently constructs export prices[569], a practice which has aroused much controversy, and in fact constructed export prices have been used in some of the European Commission's most important investigations in recent time.[570] Such a calculation is invariably made when either an association or a compensatory arrangement between importers and exporters is found to exist which, by the Commission's own admission[571], is in practice frequently the case.[572]

If it is acknowledged that the degree of discretion exercised by the European Commission in calculating constructed values is immense, consider the degree of discretion exercised if the Commission is allowed to determine export values on 'any reasonable basis' which it is under the terms of the Regulation. At such a point, little normative control would be exercised by the Basic Regulation itself never mind the international standards and obligations imposed on the European Union. Fortunately, determinations on this basis are extremely rare.

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[569] This contracts with the position in the United Statesd were construction of export price is relatively rare especially in contrast to construction of normal value.

[570] See, for example, Serial Impact Printers From Japan [provisional measures] O.J. L177/1 (1988); Dynamic Random Access Memories (DRAMs) From Japan [provisional measures] O.J. L20/5 (1990), [199] 2 CMLR 243; and Erasable Programmable Read Only Memories (EPROMs) From Japan [definitive measures] O.J. L65/1 (1991).

[571] Discussions between the writer and former H. Wenge, Chef d'Unite Adjoint, DG IC2, European Commission, November 17, 1992.

[572] See, among the host of examples, Serial-Impact Dot-Matrix Printers From Japan [definitive measures] O.J. L317/33 (1988); Video Cassette Recorders From Korea and Japan [provisional measures] O.J. L240/5 (1988); and Polyester Yarn From Korea, Mexico, Taiwan and Turkey [provisional measures] O.J. L151/39 (1988).

The first stage in the construction of an export price is the identification of the first sale to an independent purchaser. To arrive at a hypothetical situation where the goods have been sold for export to an independent purchaser, the European Commission makes allowances for 'all costs incurred between importation and resale and for a reasonable profit margin'.[573] In other words, two deductions are made from this price: (a) all costs incurred between importation and resale; and (b) a sum for a reasonable (artificial) profit margin.

The Basic Regulation provides guidance in relation to the deductible costs incurred between importation and resale such as:

> (a) usual transport, insurance, handling, loading and ancillary costs;
> (b) customs duties, any anti-dumping duties and other taxes payable in the importing country by reason of the importation or sale of the goods; and
> (c) a reasonable margin for overheads and profit and/or commission usually paid or agreed.

The Regulation is explicit in ensuring that the costs or expenses to be deducted for the purposes of constructing the export price are not restricted to direct costs. For example, the allowance for overheads is a reference to an indirect cost. Hence, the allowances for the purposes of determining export price include both direct and indirect costs.

A violation of the terms of the Anti-Dumping Code occurs

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[573] Article 2(8)(b), Council Regulation 2423/88.

if both direct and indirect expenses are deducted from the export price while only direct costs may be the subject of an allowance in the determination of normal value. In other words, the deductions from the calculation of export price are designed to decrease the final export price whereas the permissible deductions to the normal value inflate the normal value. The result is the creation of an artificial margin dumping.

This effect is best illustrated by means of an example. A United States manufacturer sells an identical product to its associated sales companies in the United States and the European Union for $100. Both sales companies have costs per unit of $100 consisting of salesmen's salaries ($40), advertising ($30) and overheads ($30). Similarly, both companies sell the products for $300 to independent resellers and therefore have a profit of $100.

In calculating the export price, the European Commission will deduct from the final resale price, all expenses plus profits to arrive at a final export price of $100. However, for the American sales company, the Commission allows only directly related selling expenses - in this case, salesmen's salaries - and will arrive at a normal value of $160. The margin of dumping will be $60. The result of this process is therefore to create an artificial dumping margin and an illegitimate anti-dumping duty.

These flagrant asymmetric deductions have been upheld by the European Court. In Canon Inc v EC Council[574], the Court continued its extensive jurisprudence on refusing

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[574] Case C171/87 [1992] ECR I 1237; [1992] 3 CMLR 30.

to investigate this matter.[575] In rejecting the application on this point, the Court stated:

'the determination of the normal value and determination of the export price are governed by separate rules and therefore selling, administrative and other general expenses need not necessarily be treated in the same way in both cases.'

Again the Court has missed the point. It is not the rules which governed deductions which cause the inconsistency but the fact that the deductions made to the two separate prices do not allow a proper comparison of normal value and export price at the same level of trade as required by the Anti-Dumping Code.

In addition, the Basic Regulation requires that an allowance is built into the constructed export price to account for 'a reasonable margin of profit' for the related sales company.[576] The greater the amount of profit imputed to the subsidiary organisation, the lower the export price once this has been deducted. Therefore, determination of the notional level of profit is critically related to the calculation of the margin of dumping. Yet, the Commission's practice in this area is not consistent and profit margins imputed by the Commission vary enormously among investigations. At least two writers have reported that profit margins imputed to related importers range from 3% to 12%

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[575] See, for example, Toyo v EC Council Case 240/84, [1987] ECR 1809; Nachi Fujikoshi v EC Council, Case 255/84, [1987] ECR 1861; Nippon Seiko v EC Council, Case 258/84 [1987] ECR 1923; and Minebea v EC Council, Case 260/84 [1987] ECR 1975.

[576] Article 2(8)(b), Council Regulation 2423/88.

depending on the circumstances of the case.[577]

(3) Duty as a cost

The notion of duty as a cost is a complex one and begins with the fact that applications may be made for refunds of anti-dumping duties after these have been imposed if an importer can prove that the duty collected exceeds the actual margin of dumping for the goods.[578] In carrying out the refund investigation, the European Commission recalculates the dumping margin for each importer by comparing the true normal value with the true export price over the period immediately occurring before the request for refund.

In implementing this procedure, the Commission recalculates the export price and, if necessary, reconstructs the export price. When reconstructing the export price, any anti-dumping duty paid by an associated importer is treated as an operating cost of that importer which is deducted from the reconstructed export price thus decreasing the export price by the value of the anti-dumping duty.[579] Hence the refund is reduced by the same amount. This rule is known as the 'duty as a cost rule' and is one of the most contentious practices indulged in by the Commission since it quite clearly inflates the dumping margin by counting the anti-dumping duty as a cost.

To avoid the application of the rule, an associated importer is required to double increase the price for

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[577] I.V. Bael & J-F. Bellis, Anti-Dumping and Other Trade Protection Laws of the EEC (Second edition), 83.

[578] Article 16, Council Regulation 2423/88.

[579] See European Commission, Notice Concerning Reimbursement of Anti-Dumping Duties, O.J. C266/3 (1986).

the goods to arm's length customers namely, first, in respect of the dumping margin and, second, in respect of the amount of the duty. The practice therefore penalises related importers since the procedure is not imposed on unrelated importers.[580]

The whole question of the compatibility of this practice with the Anti-Dumping Code was in fact considered by the European Court of Justice in NMB (Deutschland) GmbH and Ors v EC Commission.[581] A Japanese company, Minebea had ball-bearings manufactured by its subsidiary in Singapore and distributed throughout the EU by its German, British, French and Italian subsidiaries. An anti-dumping duty of 33% was imposed on ball-bearings imported into the European Union, the export price being constructed because the importers were associated with the exporter. The importers raised their prices to the first EU independent buyers by the amount of the dumping margin and claimed a refund. This was rejected by the European Commission which insisted that the prices had to be raised not only by the dumping margin but also the amount of the anti-dumping duties paid.

The applicants argued, inter alia, that this practice infringed Article VI of the GATT and Article 8(3) of the Anti-Dumping Code which provides that the amount of the anti-dumping duty must not exceed the dumping margin'. This argument was rejected by the Court on the basis that the Code allows contracting parties to construct export prices 'on the basis of the price at which the imported products are first resold to an independent

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[580] See, Commission Decision (NMB France Sarl), O.J. L185/35 (1992); Commission Decision (NMB Deutschland GmbH), O.J. L185/38 (1992); Commission Decision (NMB UK Ltd), O.J. L185/41 (1992); and Commission Decision (NMB Italia Srl), O.J. L185/44 (1992).

[581] Case C188/88 [1992] ECR I 1689; [1992] 3 CMLR 80.

buyer.'[582] Further, in constructing this price, the Code authorises allowances for costs, 'including duties and taxes', incurred between importation and resale.[583]

It is suggested that the European Court is incorrect in its interpretation of the terms of Article VI and the GATT. The overriding rule is contained in Article VI which prohibits the imposition of dumping duties in excess of the margin of dumping. Regardless of the legal contortions of the Court and the Commission, this prohibited effect unquestionably occurred in this case. In addition, the Court's extensive interpretation of the term 'duties and taxes' is inconsistent with the purpose and the spirit of the Code which could not possibly have countenanced such a draconian interpretation.

The judgment of the Court was subject to an unusual request namely an immediate request for judicial review of its own decision.[584] In addition, the Japanese government has taken this matter to the GATT for settlement and the present writer believes that the Japanese government will be successful in the final panel ruling.[585]

(4) Sampling

The Basic Regulation also permits sampling to determine export prices. Sampling is 'the use of the most

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[582] Article 2(5), Anti-Dumping Code 1979.

[583] Article 2(5), ibid.

[584] NMB (Deutschland) GmbH and Ors v EC Commission (No.2), Case T162/94, Application loged with the Registrar of the Court August 22, 1992.

[585] European Commission, Eleventh Annual Report From the Eureopean Commission to the European Parliament on the Community's Anti-Dumping and Anti-Subsidy Activities, COM(93) 516 Final, 93-94.

frequently occurring or representative prices' and is authorised when a significant volume of transactions is involved.[586] On the whole, Commission practice in this area is based on pragmatic reality. For example, in one case, eight companies were selected as a proportion of all exporters of a particular product because cumulatively they represented 49% of total exports to the European Union.[587]

However, in other investigations other factors have been considered more relevant than the proportion of exports attributable to the sample. For example, in another case, the Commission selected the foreign exporters on the basis of: (a) their volumes of production; (b) their volume of exports; (c) their product ranges; and (d) the volume of their domestic sales.[588] The greater the number of factors taken into account, the larger the Commission's discretion to select companies whose export prices will lead to a substantial margin of dumping.

Further, the sampled export values were applied according to the following principles:

(a) the actual dumping margins found for each company actually selected for verification were applied;
(b) the weighted-average of the margins found were

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[586] Article 2(13), Council Regulation 2423/88.See Plain Paper Photocopiers From Japan [provisional measures] O.J. L239/5 (1986); and Serial-Impact Dot-Matrix Printers From Japan [provisional measures] O.J. L130/12 (1988).

[587] Bicycles From Taiwan and China [provisional measures] O.J. L58/12 (1993).

[588] Cotton Yarn From Brazil, Egypt, Turkey, India and Thailand [provisional measures] O.J. L271/17 (1991). see also Polyester Yarns From Taiwan, Indonesia, India, Turkey and Korea [provisional measures] O.J. L276/7 (1991).

attributed to co-operating companies which were not selected for verification;

(c) best information statistics were used for non-co-operating companies.

While a certain degree of sympathy must be extended to the European Commission's task in such circumstances, was this result consistent with the terms of the Anti-Dumping Code? In particular, should weighted-averages be applied to companies not investigated and should non-co-operating companies be penalised in these circumstances when the overall purpose of anti-dumping duties is compensatory not penal?

(B) Normal Value

The basic definition of 'normal value' has changed throughout the evolution of the European Union's system of anti-dumping. However, according to the present basic Regulation, the normal value is the comparable price for the like product intended for consumption in the exporting country or country of origin.[589]

Again, the actual price paid is prima facie the ground rule for determining normal value. In the absence of circumstances allowing the selection of the actual price as the normal value, two alternative methods are authorised:

(a) the 'third market value', defined as the comparable price for the like product when exported to a third country; and

(b) the 'constructed value', which is calculated on the basis of the costs of production and a reasonable amount for profit.

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[589] Article 2(3)(a), Council Regulation 2423/88.

According to the professed practice and policy of the European Commission, the actual value is to be used whenever possible and only if such a valuation cannot be made are the alternative methods to be employed. In reality, constructed normal values are also a common occurrence in anti-dumping investigations.

(1) Actual value

Actual normal value is the 'price actually paid or payable in the ordinary course of trade for the like product' for sale in the country of origin. Hence, in basing a normal value determination on actual value, three conditions must exist.

First, the normal value is the domestic price actually paid or payable in the home market. Second, the product on which this determination is to be made is the 'like product'. Third, the sales must be made 'in the ordinary course of trade' in the home market. In the event that one of these conditions is not satisfied, the Commission may opt for an alternative method of establishing normal value. Hence, the need to satisfy all these conditions allows the Commission to select alternative methods in a substantial proportion of cases.

The most commonly cited cause of selecting an alternative method of valuation is the existence of an insufficient volume of sales made in the ordinary course of trade.

**Sufficient volume of sales**

The European Commission generally applies the so-called '5% rule' in determining whether there is a sufficient volume of sales to allow a normal value based on actual

sales.[590] A minimum proportion of 5% of the volume of export sales made to the European Union (not total export sales) should be made in the home market on a quantity and model-by-model basis for those sales to be considered a sufficient volume on which to base a determination.[591]

In the event that the 5% rule is satisfied, the domestic sales will be used for comparison with export prices as long as these sales satisfy the other prerequisites for basing normal value on actual sales.[592]

However, in assessing the relevant ratio of domestic sales, sales below cost in the domestic market are eliminated.[593] This rule operates against exporters by removing such sales from the computation of what is, essentially, a quantity calculation.

**Sales not made in the ordinary course of trade**

The most common scenario in which sales will not be considered to be in the ordinary course of trade is when the price at which the products are actually sold are less than the cost of production.[594] Where there are

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[590] The methodology for identifying the existence of representative sales for normal value calculations is set out in European Commission, Anti-Dumping Note 142 (15/6/92).

[591] This practice was upheld by the European Court in Goldstar Co Ltd v EC Council, Case C105/90 [1992] ECR I 677; [1992] 1 CMLR 996.

[592] See Electronic Typewriters From Japan, O.J. L335/43 (1984).

[593] See, for example, Serial Impact Dot Matrix Printers From Japan, O.J. L317/33 (1988).

[594] A special situation in which there will be no sales in the ordinary course of trade is where goods are manufactured in non-market economy countries. In

reasonable grounds for the Commission to believe that the price at which a product is actually sold is less than its cost of production, sales of the product at such prices may be disregarded as sales not in the ordinary course of trade.[595]

To establish whether sales have been made at a loss, the Commission calculates a benchmark price against which other sales can be compared. This benchmark is the average cost of production for the products (type and model) during the investigation period. Once the benchmark price has been fixed, two principles are applied:

(a) When the average price is below the average cost of production, sales have been made at less than the cost of production; and

(b) When the average price is equal to, or higher than, the average cost of production, a determination of sales at less than the cost of production can be made if the proportion of transactions at prices below the costs of production is considered substantial.[596]

In other words, in the second scenario, by manipulating averages sales which are in fact above the cost of production sales in fact above the cost of production

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addition, products are not considered sold in the ordinary course of trade in such circumstances where: (a) the producers are directly or indirectly state-owned; (b) the domestic prices are fixed by the government; or (c) the prices of the products in the domestic market are lower than the export prices because of government intervention; see Cotton Yarn From Brazil, Egypt, Turkey, India and Thailand, O.J. L271/17 (1991).

[595] Article 2(4), Council Regulation 2423/88.

[596] European Commission, Anti-Dumping Note 104 (6/2/89).

can be ignored which has the overall effect of increasing the normal value of the goods.

Other Commission practices in deciding which sales are in the ordinary course of trade can be attacked as inconsistent with the Anti-Dumping Code. For example, the Basic Regulation allows the Commission to consider sales made between interrelated companies by inter-company transfer to be not in the ordinary course of trade. This has the effect of requiring the computation of constructed values as opposed to accepting actual values submitted by the companies under investigation and subjecting these to verification. Such parties are therefore denied an opportunity to prove that the prices in question were made on a basis equivalent to an at arm's length basis.

Where sales not in the ordinary course of trade are found to exist, the Commission has the option of selecting one of four alternative courses of action to calculate the normal value:

(a) on the basis of the remaining sales on the domestic market at a price which is not less than the cost of production (which sales must satisfy the 5% rule);
(b) on the basis of export sales to third countries;
(c) on the basis of constructed values; or
(d) by adjusting the sub-production cost price in order to eliminate loss and to provide for a reasonable profit.

**Adjustment of the normal value for sales to related sales companies**

When a manufacturer distributes products on the domestic

market through related sales companies, the Commission determines normal value at the level of the sale by the subsidiary company to the first independent purchaser. In other words, the manufacturer and the sales company are treated as a single economic unit and therefore the expenses of the sales company are not deducted from the price to arrive at the normal value. Hence the normal value is increased and the margin of dumping inflated.

This controversial methodology was first introduced in Electronic Typewriters From Japan[597] and was a change from the previous practice of constructing the normal value in such circumstances at the level of the parent company.[598] The European Court has upheld this methodology even although it fails to take into account additional expenses incurred by a foreign producer which should be deducted to arrive at an ex factory price. In Canon Inc v EC Council the Court stated:

'the division of production and sales activities within a group made up of legally distinct companies can in no way alter the fact that the group is a single economic entity which organises in that way activities that, in order cases, are carried on by what is in legal terms as well a single entity.'[599]

**Weighting**

The principal rule is that normal values are 'normally'

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[597] [provisional measures] O.J. L335/43 (1985).

[598] See, for example, Electronic Scales From Japan [provisional measures] O.J. L80/9 (1984).

[599] Case C171/87 [1992] 3 CMLR 30. See also Brother v EC Council Case 250/85 [1988] ECR 5683, [1990] 1 CMLR 792.

to be established on a weighted average basis.[600]

**Sampling**

Sampling techniques are authorised for both normal value and export price calculations.[601] It is extremely difficult for a foreign producer to challenge the validity of a regulation imposing anti-dumping duties on the grounds that the sample is not representative relative to the producer or importer. The European Court has held that the only requirement which sampling must satisfy is that it is representative as regards imports of the dumped products 'as a whole'.[602]

**Conversion of normal value to a comparable currency**

The price paid in the domestic market must be converted to a comparable currency to that in which the export price is set in order to allow a comparison. No rules are set out in the Basic Regulation for this process and the normal process is for the Commission to apply the official exchange rates applying at the time of the transactions during the period of investigation.[603]

The Commission has been inflexible when faced with unusual situations involving currency fluctuations. For example, where the Brazilian government froze the exchange rates of that country as part and parcel of a domestic economy reform package, a Brazilian

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[600] Article 2(13), Council Regulation 2423/88.

[601] Article 2(13), Council Regulation 2423/88.

[602] Sermes SA v Directeur Des Services Des Douanes De Strasbourg Case C323/88 [1990] ECR I 3027; [1992] 2 CMLR 632.

[603] See Gerlach & Co BV v Ministry For Economic Affairs, Case 239/84 [1985] ECR 3507; [1986] 3 CMLR 30.

manufacturer claimed that the exchange price should be adjusted to reflect the actual depreciation of the currency in line with the rate of inflation.[604] Such an approach would have decreased the normal value and hence the margin of dumping.

This argument was rejected by the Commission which applied the official exchange rate applied to international commercial transactions. Not even the intervention of the Brazilian authorities in favour of the manufacturer could move the Commission from this position.

The sole concession granted by the Commission to the realities of international exchange rate problems has been to establish normal values on a monthly basis in order to alleviate a situations which it clearly sees caused excessive hardship.[605]

(2) Third country market value

The first alternative method for the determination of normal value is by reference to the price of the goods in a third country. The Basic Regulation permits a determination of normal value based on the comparable price for the like product when exported to any third country.[606] Such a price may be the highest export price but it also must be a representative price.

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[604] Cotton Yarn From Brazil and Turkey, O.J. L82/1 (1992).

[605] See, for example, Semi-Finished Alloyed Steel Products From Turkey and Brazil [definitive measures] O.J. L95/26 (1992); and Silicon Metal From Brazil [provisional measures] O.J. L96/17 (1992).

[606] Article 2(3)(b)(ii), Council Regulation 2423/88.

Determinations on this basis are relatively rare.[607] The Commission officials have stated that the preference for constructed values over third country market values is attributable to the fact that export prices to third countries may also reflect the price of goods dumped in that country.[608] In such a scenario, the margin between the third country price and the price in the European Union would be less than if a constructed value was used in the computation.

(3) Constructed value

There are two separate components in a constructed value calculation: the costs of production; and 'a reasonable margin for profit'.[609] In the determination of both elements, the Commission's practice is inconsistent with the GATT in many respects.

(a) Costs of production

The costs of production are computed on the basis of all costs, in the ordinary course of trade, both fixed and variable, in the country or origin, of materials and manufacture, plus a reasonable amount for selling, administrative and other general expenses.

At the outset, it should be noted that, when constructing normal values, the European Commission until recently accepted that the relevant principles of accounting in the country of origin should be used in

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[607] As far as the present writer is aware, only one case has been based on such a determination; see Saccharin and Saccharine Salts From South Korea [undertaking] O.J. L331/25 (1980).

[608] Discussions between the author and members of DG IC1.

[609] Article 2(3)(b)(ii), Council Regulation 2423/88.

calculating the constructed value. Unfortunately, there has recently been an important deviation from this practice. In DRAMs From Korea[610], in computing the constructed normal value, the Commission adopted a cost allocation formula which differed significantly from the formula normally used under the generally accepted accounting principles in Korea. This is an unfortunately precedent and indicates that the Commission is willing, in certain circumstances, to substitute its own accounting principles for those of other countries.

**Fixed and variable costs**

The relevant costs include the cost of materials, the cost of direct labour, manufacturing overheads (including indirect labour, supervision, depreciation, rent, power, maintenance and repair), financing costs and packaging.[611]

Cost of materials includes the total costs of raw materials, including transportation, duties, and other expenses incurred in obtaining the materials. The cost of such materials is calculated on the basis of expenses incurred by the manufacturer.

Direct labour comprises all the expenses of labour directly associated with production including basic pay, overtime, bonuses and other employee-related expenses including tax.

Manufacturing overheads include all expenses incidental to production such as indirect labour, rent, maintenance and repairs, and depreciation.

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[610] [provisional] O.J. L272/13 (1992).

[611] See the Standard Questionnaire From the Commission to Foreign Exporters.

Originally the European Commission declined to include the economic effects of government subsidies for inputs or components into the constructed cost of the finished product.[612] This policy was reversed in 1991 when the Commission decided to include subsidies for inputs and components in normal value constructed prices. The case in question was Cotton Yarn From Brazil, Egypt, Turkey, India and Thailand[613] where the raw materials for the finished product were subsidised by the Egyptian government.

The Commission substituted a cost for the raw materials calculated by reference to the price of a similar quantity of the product when bought in the ordinary course of trade in the international market. This substitution did avoid the need to quantify the value of the subsidy received as a benefit. However, it also inflated the normal value since the price of the raw materials on the international market was higher than similar domestic products subsidised by the government. In fact, this will be the case in the majority of cases where a similar substitution has been made.

**Reasonable amount for selling, administrative and other general expenses.**

The Basic Regulation expressly states that selling, administrative and general expenses shall be calculated by reference to the expenses incurred by producers or exporters on the profitable sale of like products on the domestic market.[614]

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[612] See, for example, Polyester Yarn From the United States, O.J. L358/91 (1980).

[613] [provisional measures] O.J. L271/17 (1991).

[614] Article 2(3)(b)(ii), Council Regulation 2423/88.

In the event that the calculation cannot be made on this basis because the relevant information is unavailable or unreliable, or is not suitable for use, then the calculation is made by reference to the expenses incurred by other producers or exporters in the country of origin or export on profitable sales of the like product.

If the computation cannot be made on either of these grounds, the expenses incurred are to be calculated by reference to sales made by the exporter or other producers or exporters in the same business sector in the country of origin or export. Failing computation on these grounds, the Commission is authorised to make the assessment on 'any other reasonable basis'. This discretion was added by the 1988 Basic Regulation and allows the Commission to determine the selling, advertising and general expenses of one producer and to apply these figures to calculate the constructed value for another producer.

**Non-Operating Income and Expenses**

A possible GATT-inconsistent practice is the refusal to allow deductions attributable to income from financial investments (non-operating income) even when made to financial commercial operations.[615] This practice is inequitable because the Commission almost invariably included non-operating expenses in its calculation of the costs of production which has the effect of inflating the margin of dumping. Nevertheless, the Commission refuses to allow the normal value to be decreased by the deduction of non-operating income on the basis that:

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[615] See, for example, Large Electrolytic Aluminium Capacitors From Japan [provisional measures] O.J. L152/22 (1992).

'Such profits may be taken into account only if connected with the firm's main production activity and the ensuing sales and only then only to offset financial costs resulting directly from that production and those sales. This net financial profit may in no circumstances be offset against the firm's production costs.'[616]

A double standard is therefore created by ensuring that non-operating expenses are included in a manufacturer's production costs while disallowing non-operation income. This process inflates the margin of dumping by increasing normal value while disallowing adjustments which would reduce that value.

(b) Reasonable margin for profit

The calculation of a profit figure is an acutely contentious aspect of the computation. There are a number of reasons to believe that the European Union's practices in this respect artificially inflate the margin of dumping by over-estimating profit margins, thereby directly increasing normal value.

The Basic Regulation provides that the amount of profit is to be calculated by reference to the profits realised by the producer or exporter on the profitable sales of like products in the domestic market.[617] This provision was dramatically altered in the 1988 revision. Previously the rule had been that, provided that a profit is normally realised on sales of products of the same general category on the domestic market of the country of origin, the addition for profit did not exceed normal profit. The previous terminology followed

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[616] Silicon Metal From Brazil [definitive measures] O.J. L222/1 (1992).

[617] Article 2(3)(b)(ii), Council Regulation 2423/88.

the rule in Article 2(4) of the Anti-Dumping Code 1979 verbatim. The fact that the new rule departs from this terminology raises questions as to why the provision required amendment.

This fundamental change of method of computation has had a significant impact on the profit margins applied in constructed value computations. In the early 1980s, the Commission's typical practice was to select a single profit margin to reflect the profit figures for the relevant industry.[618] The result was that profit margins applied averaged around 5% and very rarely exceeded 10%.

A new methodology was adopted by the Commission in its investigation into electronic typewriters from Japan.[619] The profit margins were calculated by the Commission on the basis of the average profit made on profitable sales in the market, where the exporters had sufficient profitable domestic sales of the relevant products.

For other producers with insufficient profitable domestic sales, profit realised by profitable sales of producers of the same product were used.[620] This new approach was codified into the 1988 amended basic regulation.[621] The effect of the change in methodology has been to substantially raise the figures for profit margins in constructed value calculations.

If profits cannot be determined on the basis of

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[618] For example, see Louvre Doors From Malaysia and Singapore, O.J. L135/33 (1981); and Studded Welded-Link Chain From Sweden, O.J. L231/10 (1980).

[619] Electronic Typewriters From Japan, O.J. L335/48 (1984).

[620] See also Plain Paper Photocopiers From Japan, O.J. L54/12 (1987).

[621] Article 2(3)(b)(ii), Council Regulation 2423/88.

profitable sales, the Commission resorts to 'any other reasonable basis'. This methodology is illustrated in Dynamic Random Access Memories (DRAMs) From Korea[622] in which the Commission deemed that there were insufficient profitable sales and decided that a 13.5% profit was appropriate in light of 'the Commission's experience in the product sector concerned obtained in previous anti-dumping proceedings'. Such an approach has obvious dangers. It implies that the Commission is imputing identical commercial circumstances in one country to production in another country. In effect, this ignores vital aspects of commercial practice, production and comparative advantage for the sake of simplicity.

There also seems little consistency in Commission calculations of profit in constructed value cases. For example, in one case the Commission concluded that a profit margin of six percent was reasonable for each production unit even during the start-up phase of an expansion project when the enterprise involved had clearly counted on making no profits at this stage.[623] The calculation of profits in this particular investigation was made on the profits realised by the parent company as a whole.

In addition, the Commission refuses to use the same levels of profits when calculating a constructed normal value and a constructed export price in the same investigation. To do so would be to cancel out any opportunity to artificially inflate the margin of dumping by manipulating these values. So, in one investigation, the Commission used a profit margin of 18% when calculating normal value and a margin of 6%

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[622] [provisional] O.J. L272/13 (1992).

[623] Ballbearings From Singapore, O.J. L193/2 (1984).

when constructing the export price.[624] In another case, a profit margin of 15% was used for normal value and 5% as the profit figure for export price.[625]

This methodology defies even the most fundamental logical rationales behind the concept of dumping. If a producer is truly dumping goods in a country other than his home market, he is supposed to be maximising his domestic profit and subsidising losses made on the dumped sales with these excessive profits. Yet, the Commission is constructing profit margins which render a higher profit figure for export sales than domestic sales. In other words, the export sales are more profitable than the domestic sales. If this is the case, quite clearly there is a fundamental misconception in the very theory of dumping itself.

Where the actual profit figure is available, the Commission will insert this value into its calculation, ignoring any special circumstances that produced particularly favourable results during the period of investigation. In one case where an undertaking realised profits of approximately 32% of gross sales, the Commission rejected the argument that this profit figure resulted from peculiar and special circumstances that existed for a particular period in the relevant market.[626] The Commission observed that no profit margin can be more reasonable to employ that the actual margin achieved and the use of such a figure 'cannot be challenged on the grounds that the profits made are exceptional, excessive or result from special

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[624] Thermal Paper From Japan [provisional measures] O.J. L270/15 (1991).

[625] 3'5" Microdisks From Japan, Taiwan and China [provisional measures] O.J. L98/5 (1993).

[626] Typewriters From Japan, O.J. L163/1 (1985).

circumstances'.

Objectivity in evaluating profit in constructed cost calculations is important to prevent abuse of the anti-dumping process.[627] While figures for the costs of production may be lifted from production data and statistics, the determination of profit has a greater element of subjectivity. An excessive or unrealistic figure for profit would constitute a protectionist measure.

(C) Adjustments

Article 2(9) of Council Regulation (EEC) 2176/84[628] followed the terms of Article 2(6) of the Anti-Dumping Code 1979 very closely in relation to comparing export prices with normal values at the same level of trade.[629] The Code authorised certain adjustments to normal value and/or export price and the 1984 Regulation mirrored these requirements. Hence the Commission was bound by strict guidelines when making adjustments and, on the whole, its practices were consistent with the terms of the Code.

The 1988 Basic Regulation deleted much of the detail of the 1984 Regulation. In particular, it omitted reference to comparison of the export price and normal value

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[627] Yet the European Court has upheld the Commission's approach: see Goldstar v EC Council, Case C105/90 [1992] 1 CMLR 996; and Nakajima All Precision v EC Council Case C69/89 [1991] ECR I 2069.

[628] O.J. L201/1 (1984).

[629] Article 2(6) of the Code provides that: 'In order to effect a fair comparison between the export price and the domestic price in the exporting country...the two prices shall be compared at the same level of trade, normally at the ex-factory level and in respect of sales made at as nearly as possible the same time'.

'normally...at the same level of trade, preferably at the ex-factory level'. The effect of this amendment is to eliminate the symmetry which operated in arriving at a comparable point in the distribution system to allow a fair and equitable comparison of normal value and export price. Quite simply, after the change, the European Commission has a vastly extended discretion to compare export prices and normal values.

This raises legitimate questions as to the GATT-consistency of adjustments under EU law.[630] In fact, even the European Commission in its own internal administrative guidelines, notes that 'the new Regulation allows greater freedom in choosing the method for adjusting the normal value.'[631] Further, the exercise of this discretion has not always been compatible with the obligations of the European Union.

Article 2(9)(a) of Regulation 2423/88 sets out the basic rule that:

'the normal value...and the export price...shall be compared as nearly as possible at the same time.'

In reality, this rule means nothing. It does not provide a benchmark in the distribution system to allow a comparison, ie ex works.[632] Instead the Regulation

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[630] See C. Norall, "The New Amendments to the European Community's Basic Anti-Dumping Regulation", (1989) 26 CML Rev. 83, 91; and P. Didier, "EEC Anti-Dumping: The Level of Trade Issue After the Definitive CD Player Regulation", (1990) 24:2 JWT 103.

[631] European Commission, Anti-Dumping Note 104 (6/2/89), 4.

[632] In practice, the Commission does sometimes expressly state that he comparable level of trade is the ex works level but its practice is not consistent; see Tunsten Ores and Concentrates From PRC and Hong Kong [provisional measures] O.J. L83/23 (1990).

continues to provide that, to ensure a fair comparison, the Commission is instructed to make due allowance, in the form of adjustments, for differences affecting price comparability. These differences related to :

(a) physical characteristics;
(b) import charges and indirect taxes; and
(c) selling expenses resulting from sales made at different levels of trade, in different quantities and under different conditions and terms of sale.

Detailed guidelines are set out in the Basic Regulation to facilitate the application of these adjustments.

Differences in physical characteristics

The normal value is adjustment by an amount corresponding to a 'reasonable estimate' of the value of the difference in the physical characteristics of the product concerned.[633]

Import charges and indirect taxes

Normal value is also to be reduced by an amount corresponding to any import charges and indirect taxes borne by the like product and by materials physically incorporated therein.[634]

Selling expenses resulting from sales at different levels of trade, in different quantities and under different conditions and terms of sale

Adjustments for differences in levels of trade and

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[633] Article 2(10)(a), Council Regulation 2423/88.

[634] Article 2(10)(b), Council Regulation 2423/88.

different quantities are only granted if they fall within the specific categories of the provision.[635] There are five categories of expenses: (a) transport, insurance, handling, loading and ancillary costs; (b) packing; (c) credit; (d) warranties, guarantees, technical assistance and other after-sales services; and (e) other selling expenses. Expenses in each of these categories may be deducted from the normal value to approximate the normal value to the export price in relation tot he level of trade, quantity and the terms and conditions of sale.

It is a critical point to note that each of these adjustments is made to the normal value only in respect of expenses directly incurred. When the expense is an indirect cost, no adjustment is authorised. Hence, the normal value is inflates by the existence of indirect costs which cannot be subtracted when working back to a stage in the distribution chain which would allow comparison with export price.

This practice also contrasts with the position in relation to the calculation of the net export price where both direct and indirect expenses of this nature are permitted which deflates the export price and inflates the margin of dumping. This phenomenon is known as the 'Export Price Offset'.[636] When this process is considered, the fundamental distortion in the European Union's anti-dumping process is exposed.

If the European Commission constructs a normal value, it will do so by adding the costs of production which

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[635] J.F. Bellis et al., "Further Changes in the EEC Anti-Dumping Regulation: A Codification of Controversial Methodologies", (1989) 23:2 JWT 21, 27.

[636] See J.T. Kuzmek, "A Community Export Price Offset", (1988) 25 CML Rev 317.

include selling, administration and other general expenses and a profit margin. Where the product is marketed in the country of origin through a multi-layered distribution system, the expenses of the running this system will be taken into account. Hence, the selling, administration and other general expenses and profits of related sales companies, subsidiaries, etc will be included in the normal value. These expenses will include both direct and indirect expenses.

However, when the (constructed) normal value is adjusted, only direct expenses are deducted even although both direct and indirect expenses were added to the calculation to arrive at the constructed value.

When adjusting the export value, the European Commission deducts all related expenses (both direct and indirect) incurred between the exportation and the sale to an unrelated arm's length purchaser.[637]

(D) The Margin of Dumping

(1) Comparison of normal value with export price

In the event that the price of the goods in the European Union is the same for all transactions, the dumping margin is calculated by subtracting the export price from the normal value.[638] Dumping margins may also be calculated on one of the following alternative basis: (a) on a transaction-by-transaction basis; (b) by reference to the most frequently occurring prices; (c) on the basis of representative prices; and (d) by reference to weighted average prices.

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[637] Article 2(8)(a), Council Regulation 2423/88.

[638] Article 2(14)(a), Council Regulation 2423/88.

The Commission may select the most appropriate basis of comparison and the exercise of this discretion has been upheld by the European Court.[639] This discretion allows the Commission to select the basis which will yield the highest dumping margin and introduces an element of arbitrariness into this process.

The rule is that 'export prices shall normally be compared with normal value on a transaction-by-transaction basis' except where the use of weighted averages would not materially affect the results of the investigation.[640]

It should also be noted that calculations on a transaction-by-transaction basis eliminates the possibility of 'negative dumping margins' from being taken into account in determining dumping margins. In other words, negative margins are not permitted to affect the possibility of reducing the prospect of a negative finding. The unfairness of this process can be illustrated by an example.

Suppose that over the period of the investigation, three separate prices exist in the domestic market for a particular product, namely $5, $10 and $15. The Commission may reject the price at $% as being below the cost of production which would leave an average of $12.5 as the normal value. On the other side of the equation, suppose than the same prices existed. The Commission would dismiss the price at $15 as being a non-dumped price when compared to its counterpart normal value and substitute a nominal value of $12.5, being the average normal value. The average of all the prices would then

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[639] NTN Toyo Bearing & Others v EC Council and EC Commission, Cases 240/84, 255-257/84 & 260/84 [1987] ECR 1809.

[640] Article 2(13), Council Regulation 2423/88.

be calculated, leaving a value of $9.2. Since the dumping margin is the difference between the normal value and the export price, a dumping margin of $3.3 will be determined.

(2) Conversion of the dumping margin into duties

The Commission also has discretion as to whether the dumping margin should be expressed in percentage terms[641] or a specific amount per unit.[642]

The European Union has not, in the past, been receptive to mitigating anti-dumping duties imposed on foreign producers where evidence has been produced to support the claim that a Union industry has injured itself by engaging in anti-competitive practices. Although the Commission indicated in some cases anti-dumping measures if, after a formal investigation under Article 85 or 86, anti-competitive arrangements were proven, it practice it merely referred foreign producers to the procedures available under EU competition policy.[643]

The European Commission was subsequently rebuked for failing to take into account this factor by the European Court.[644] However, the ratio of the Court's judgment was that the failure related to the determination of material injury to a domestic industry and not to the

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[641] Paracetamol From China, O.J. L348/1 (1988).

[642] See for example, Iron or Steel Coils From Algeria, Mexico and Yugoslavia, O.J. L188/18 (1988).

[643] See Ferro-Silico-Calcium Slicide From Brazil, O.J. L129/5 (1987); and Calcium Metal From PRC and the Soviet Union, O.J. L271/1 (1989).

[644] Extramet v EC Council, Case C358/89 [1992] ECR I 381.

calculation of dumping margins.[645] A-G Jacobs was more critical than the Court in his opinion in the case. He stated that, in assessing duties, consideration should be given to the question whether the imposition of the duties is consistent with EU competition policy. However, it is not clear that the position has changed significantly in this respect.

(E) Input Dumping

For a considerable period, it appeared that the Commission did not act against finished products manufactured with the benefit of inputs or components which had been dumped. This policy was radically altered in 1991 when the Commission decided for the first time to take action to address this form of dumping. In Dihydrostreptomyein From China and Japan[646], a Japanese producer sourced raw materials for the finished chemical at prices which were allegedly below the comparable costs of the only other market economy country producer which happened also to be the complainant. After investigation, the Commission concluded that it was:

'reasonable to adjust the constructed normal value to take account of the fact that the Japanese producers buy these raw materials at a price which is lower than their production cost in a market economy.'

However, neither Article VI or the Anti-Dumping Code specifically authorises action against input dumping. Further, in this particular case, the Commission

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[645] See, G.V. Gerven, "Recent Developments in EEC Anti-Dumping", (1992) 7 Revue de Droit Des Affairs Internationales 857; and Case Note on Extramet [1993] 30:1 CML Rev 155.

[646] [provisional measures] O.J. L187/23 (1991).

effectively punished the foreign producers for having the commercial acumen to buy their raw materials at the cheapest available price. Naturally such procurement would result in a cost saving during the production process.

## (F) Dumping From Non-Market Economy Countries

The European Union has special rules for the assessment of dumping from countries deemed to have non-market economies. An extremely high percentage of anti-dumping proceedings have been brought against such countries especially in the last decade and the treatment afforded to imports from these states is an important aspect of EU anti-dumping policy.

### (1) The identification of countries deemed to have non-market economies

In the early 1980s, a considerable number of countries were deemed to have non-market economies.[647] No definition of non-market economy countries is contained in the Basic Regulation although reference is made to ancillary EU legislation for assistance in this process.[648] For these countries, special rules are applied particularly in relation to determining normal values.

The purpose of this special methodology is ostensibly to

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[647] See G.C. Denton, "The Non-Market Economy Rules of the European Community's Anti-Dumping and Countervailing Duty Legislation", (1987) 36 ICLQ 198.

[648] Council Regulation (EEC) 1765/82, O.J. L195/1 (1982) [on common rules for imports from state-trading countries] and Council Regulation (EEC) 1766/82, O.J. L195/21 (1982) [on common rules for imports from the People's Republic of China].

prevent account being taken of prices and costs in non-market economy countries which are not the result of internal market forces.[649] In reality, the methodology inflates the normal value by allowing the Commission to ignore prices which are charged in the markets of such countries.

Since the events between 1988 and 1993, many of the countries of Eastern Europe have been recognised by the European Union as having adopted to market economies. Recognition of these states as market economies has occurred on an ad hoc basis as the European Union has acknowledged economic reforms have been implemented in these states.[650]

There has, however, been a lack of consistency in this process insofar as different measurement standards have been applied to different countries to assess the necessary degree of reform. Recognition of the necessary degree of reform has also often been extended or denied for political more than economic reasons. Nevertheless, as at September 1994, sixteen states remain subject to this special regime.[651]

Identification as a non-market economy permits the

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[649] Technointorg v EC Commission and EC Council Cases 294/86 & 77/87 [1988] ECR 6077, [1989] 1 CMLR 281.

[650] See, for example, Council Regulation (EEC) 1013/93, O.J. L105/1 (1993), which extended recognition of market economy status to Roumania and Bulgaria.

[651] These are: Mongolia, North Korea, PRC, Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzkstan, Moldavia, Russia, Tajikstan, Turkmenistan, Ukraine, Uzbekistan and Vietnam. The three Baltic states were removed from this category as of December 31, 1992 (Council Regulation (EEC) 848/92, O.J. L89/1 (1992). Poland, Hungary, the Czech Republic and the Slovak Republic have been treated as market economies under the term sof their association agreements with the European Union.

European Commission to subject all imports from that country to the special rules even if a particular industry in a country is subject to market forces.[652]

(2) Special rules for the determination of normal values

The determination of normal value for imports from non-market economies is made on the basis of one of the following criteria:

(a) the price at which the like product of a market economy third country is actually sold either (i) for consumption on the domestic market of that country; or (ii) to other countries including the European Union;

(b) the constructed value of the like product in a market economy third country; or

(c) if neither price nor constructed value as established under (a) or (b) provides an adequate basis, the price actually paid or payable in the European Union for the like product, duly adjusted, if necessary, to include a reasonable profit margin.[653]

Which of these options is selected is subject to the overriding condition that the selection should be made

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[652] Conversely, identification as a non-NME country means that imports from industries which are nationalised or otherwise excluded from the effects of market forces will still be treated as originating from a market economy country.

[653] Article 2(5), Council Regulation 2423/88. See also Pure Silk Typewriter Ribbons From China [provisional measures] O.J. L174/27 (1992).

on 'an appropriate and not unreasonable manner'.[654] In practice, the majority of normal value determinations for products from non-market-economy countries are made on the basis of the price at which the like product is actually sold on the domestic market of the analogue country.[655]

The second method has been relied on for establishing normal value but will not be used if export prices have been influenced by competition from low-cost exports from other countries.[656]

Constructed values have been increasingly used in recent investigations. This causes concern because constructed values are the most common means of inflating normal values. As a general principle, the European Commission used constructed prices in the same circumstances are constructed values in market economy investigations. So, when there are insufficient domestic sales[657], the product is sold at a loss on the domestic market[658] or the domestic prices do not cover all the production costs[659], normal values will be constructed based on data from the analogue countries.

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[654] Ibid.

[655] See, for example, Synthetic Fibres of Polyester From the GDR, O.J. L103/38 (1987); Electric Motors From Bulgaria, O.J. L83/1 (1987); Paint, Distemper, Varnish and Similar Brushes From China, L46/45 (1987).

[656] See, for example, Horticultural Glass From Czechoslovakia, O.J. L224/26 (1984); Upright Pianos From the USSR, O.J. L101/30 (1982); and Ball and Tapered Roller Bearings from China, O.J. L152/11 (181).

[657] Silicon Carbide From China, O.J. L287/25 (1986).

[658] Artificial Corundum From China, O.J. L255/9 (1984).

[659] Unwrought Nickel From the USSR, O.J. L159/43 (1983).

The fourth option - the price actually paid or payable in the European Union duly adjusted - is rarely used by the European Commission in making its assessment of normal value.[660]

The selection of the analogue country is by far the most important and controversial aspect of the whole process of applying anti-dumping measures to non-market economy countries. It is also the process in which the greatest degree of arbitrariness is demonstrated by the European Commission.

In view of the inherent uncertainty in the selection of the analogue country, it is virtually impossible for exporters in non-market countries to decide in advance a pricing strategy which will avoid a finding of dumping. Foreign producers and exporters have little influence over the selection of analogue countries and Community institutions are not obliged to consider reference countries proposed by foreign producers or exporters.

No guidance is provided in the selection of the analogue country.[661] In practice, the complainant and the responding foreign exporters both suggest analogue countries to the European Commission and, not surprisingly, more often than not, these proposals are not compatible. A complainant will normally be arguing for the most economically developed country possible in order to inflate the final normal value and hence the

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[660] This method was expressly rejected in Copper Sulphate From Czechoslovakia, O.J. L235/18 (1987).

[661] The United States legislation contains some guidance insofar as it requires the authorities to base the normal value on the prices or costs in a market economy country at a comparable level of economic development to the non-market economy country.

margin of dumping.[662] Conversely, the foreign exporters will argue for the least developed country possible since, all other factors being equal, the normal price will be lower than in developing countries.[663] The burden is on the party proposing an analogue country to convince the Commission that the proposed country is acceptable.[664]

Several administrative factors also impinge on the selection of the analogue country. For example, the choice of analogue country is influenced by the degree of co-operation from producers in the third country and that of their government. The absence of co-operation from either of these parties will render verification impossible.[665] Similarly, where an investigation is conducted into imports from non-market economy countries and market economy countries, the Commission will use the data from the market economy country as a basis for an analogue.[666]

The relative levels of economic development or GNP per

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[662] For example, in Unwrought Manganese From China, O.J. C15/12 (1992), the EU industry suggested the United States as a surrogate for China. Similalry, in Photo Albums From China, O.J. C120/100 (1992), the EU industry proposed Japan as the surrogate for China. In Refractory Chamottes From China, O.J. C104/8 (1993), the EU industry also suggested the United States as a surrogate for China.

[663] See F.L. Fine, "EEC Anti-Dumping: The Problem of Imports From State-Trading Countries", (1988) 20 Law & Pol'y Int'l Business 91, 94-96.

[664] See, for example, Fibre Building Board From Roumania, O.J. L181/19 (1982).

[665] See Asbestos-Cement Corrugated Sheets From Czechoslovakia, O.J. L259/48 (1984); and Iron Steel Angles, Shapes and Sections From Roumania, O.J. L83/9 (1984).

[666] See Codeine From Czechoslovakia, O.J. L16/26 (1983).

capita plays virtually no role in the selection of analogue countries where this should in fact be a critical factor.

In addition, the nature of the market in the analogue country is, for the most part, ignored even although this will be a decisive factor in establishing normal values. Prices are governed by market forces and the level of competition in the market and this is an important factor which is ignored.[667] In addition, the levels of sales, in terms of volume, is another important factor yet the 5% rule for representative sales in ordinary normal value is not applied in the circumstances of a non-market economy investigation.

The size of the production operations in the analogue reference country relative to the producers in the non-market economy country is a factor which is ignored in selecting the appropriate analogue country. The European Court has acknowledged that this might produce unfair results. In Detlef Nolle v Hauptzollamt Bremen-Freihafen, the Commission selected Sri Lanka as an analogue choice for the export of paint brushes from China even although the total production of such products in Sri Lanka amounted to 750,000 units when the total exports of the products from China amounted to over 60 million units.[668] The alternative proposed by the exporters had been Taiwan although this was rejected by the Commission.

The Court rejected the choice of Sri Lanka as a surrogate country and agreed that Taiwan would have been

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[667] The European Commission has recognised that ignoring this factor may be a potential defect in investigations; see European Commission, Anti-Dumping Note 135 (12/12/92).

[668] Case C16/90, Judgment of October 22, 1991.

a more appropriate selection because of the following factors:

(a) the volume of domestic sales in Taiwan of the like product.
(b) the prices in Taiwan which were established on the basis of sufficient competition.
(c) the characteristics of the Taiwanese industry which were more similar to the characteristics of the Chinese industry in particular with respect to access to raw materials.

These conditions were not established in Sri Lanka because of the market in Sri Lanka for the product was small, only two producers of like products existed in that country and all raw materials in Sri Lanka had to be imported. The fact that the Commission made the assessment on the basis of Sri Lankan prices in the first place is an indictment of the Commission's practices in this respect. All the factors present in the Sri lankan market point to a higher normal market value.

More disconcerting, the Commission has frequently selected as an analogue country a state which protects production and marketing of the products being investigated. Naturally, the existence of state protection, particularly in the case of a sanctioned monopoly, will inflate normal prices. Nevertheless, the Commission has deemed this factor not to be a relevant consideration in its choice.[669]

(3) Determination of export price

Export prices for comparison purposes are determined in

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[669] Fibre Building Board From Roumania, O.J. L181/19 (1982).

the normal manner without distinction whether the country is a non-market economy country or a market economy countries. Adjustments are made on a similar basis.

(4) Adjustments to normal value and export price

The most common adjustments made by the European Commission are to take account of the differences in the physical characteristics of the product and the differences in the conditions of sale. However, the full list of allowances permissable under Article 2(9) of the Basic Regulation are, at least in theory, also extended to imports from non market economy countries.

The Commission has consistently refused to make adjustments for the alleged comparative advantages of a non-market economy producer.[670] For example, in Magnesium Oxide From China[671], the Commission refused to make an allowance for the closer geographical proximity of mines to production facilities in the country of production as compared with the situation of the industry in the analogue country.

(G) The Impact of International Agreements on the Application of Anti-Dumping Measures

The fact that products are subject to quantitative restrictions is irrelevant for the purposes of assessing duties. For example, in one case, where the imports were subject to the quota-regime of the MultiFibre Arrangement (MFA), the Council notes, in its definitive measure regulation, that neither European law or international law prohibited the imposition of anti-

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[670] See Beseler & Williams, supra note 550, 71-72.

[671] O.J. L145/1 (1993).

dumping measures on imports subject to quantitative restrictions.[672] It does, however, seem unduly harsh that foreign producers should be subject to two forms of import-restrictions.

Bilateral quantitative restrictions are also ignored in this process.[673] The Commission justifies this policy on the ground that quantitative restrictions protect the European industry from excessive volumes of imports but do not necessarily eliminate the danger caused by unfair commercial practices such as dumping. However, since in the vast majority of cases the imposition of quotas increases the EU price of goods as higher value goods replace lower value goods in order to reap the economic rents from quotas, it is highly unlikely that this argument can be accepted as a proper justification.

### (3) The Ubiquitous Position of European Union Anti-Subsidy Laws

There is little doubt that anti-subsidy measures did not play as crucial a role in the functioning of the Common Commercial Policy as anti-dumping measures.[674] Only thirteen anti-subsidy investigations were ever conducted

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[672] Synthetic Fibres of Polyester From Mexico, Romania, Taiwan, Turkey, United States and Yugoslavia, O.J. L348/49 (1988).

[673] See Polyester Yarns From Taiwan, Indonesia, India, Turkey and Korea [provisional measures] O.J. L276/7 (1991).

[674] Anti-subsidy measures should be distinguished from 'countervailing charges' which are imposed on agricultural products entering the Community from third countries. These relate to the entry price of goods and are not concerned with the anti-subsidy procedure of the Community; see, for example, Countervailing Charges on Tomatoes from Poland, O.J. L230/18 (1992).

by the Commission and between 1990 and 1992[675], no anti-subsidy investigations were initiated[676] and there was only one instance of anti-subsidy duties being imposed.[677] Of these investigations, the majority took place under the authority of the ECSC Treaty and not the EC Treaty, as part of the European Union's attempt to protect its steel industry in the early part of the 1980s.

These statistics, of course, contrast starkly with those for countervailing duty investigations conducted by the United States over the same periods. The United States authorities have made roughly equal use of both the anti-dumping and anti-subsidy procedures. As we shall see later, this disparity can be explained only in terms of the European Union's overall trade policy objectives.

The European Union's anti-subsidy measures therefore remained very much in their infancy, not only in terms of the volume of cases that were conducted but also as regards the rules developed in practice for their administration. These measures displayed none of the sophisticated techniques developed to tackle particular issues in more mature systems such as that of the United States or even in the EU's own anti-dumping system. In

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[675] European Commission, Ninth Annual Report on the Community's Anti-Dumping and Anti-Subsidy Activities, SEC(91) 974 Final (1991) and Tenth Annual Report on the Community's Anti-Dumping and Anti-Subsidy Activities, SEC(92) 716 Final (1992).

[676] However, reviews of existing measures were conducted within this period in these cases: Certain Ball-Bearings From Thailand, O.J. C182/6 (1992) [initiation review]; Binder & Baler Twine From Brazil and Mexico, O.J. L251/28 (1993) [review termination]; and Certain Ball-Bearings From Thailand, O.J. C286/6 (1993) [initiation review].

[677] Polyester Fibres and Yarns From Turkey, [provisional duties], O.J. L137/8 (1991); [definitive duties] O.J. L272/3 (1991).

the absence of aggressive use of this procedure, the Commission was quite simply not required to consider the elaborate and difficult issues which have arisen before the United States authorities in the application of their countervailing laws.

In fact, at the most superficial level, an examination of the basic anti-subsidy legislation which applied during the period of investigation - which was also the principal legislation for the application of anti-dumping duties[678] (until superseded by Council Regulation (EC) 3284/94[679]) - reveals that there were no more than ten rules specifically enacted to govern the application of anti-subsidy duties.[680] The other rules of the regulation, such as those for procedure and establishing material injury, were shared with the anti-dumping procedure. Taking into account the sparseness of the anti-subsidy complaints brought to the attention of the Commission, there is in fact little substantive law to evaluate.

The explanation for this passive policy of restraint, however, reveals a more sinister policy objective on the part of the European Union. Quite simply, the European Union viewed the use of subsidies as a principal tool of social and economic development. The widespread use of anti-subsidy measures could backfire on the European Union and therefore the Union viewed its restraint in this matter as a bargaining chip in the multilateral trade negotiations on subsidies. The two issues could not in fact be separated without creating a degree of artificiality.

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[678] Council Regulation (EEC) 2423/88 O.J. 209/1 (1988).

[679] O.J. L349/22 (1994).

[680] Article 3, Council Regulation 2423/88.

## (A) The Political and Economic Rationales and Contradictions behind the European Union Anti-Subsidy Policy

The conspicuous absence of the vigourous use by the European Union of anti-subsidy measures should not be mistaken for a benevolent attitude towards the subsidisation of exports by non-European Union states and it would be a fundamental error to believe this to be the case. It was not a measure of the tolerance of the European Union towards such activities. Rather, the European Union's motives for refraining from the liberal use of such measures were far more sinister, reflecting a desire to limit the international application of anti-subsidy/ countervailing measures even at the cost of injury to specific European Union industries which were compelled to compete against subsidised foreign goods.

The dogmatic pursuit of this objective distorted not only the overall structure of the European Union's system of administered protectionism but also was fundamentally inconsistent with its internal state aid policy. It is therefore necessary to consider not only the actual distortion of the European Union system itself but also the conflicts between the European Union's international position and its own attempts to regulate subsidies granted by Member States inside the European Union.

### (1) The Role of Subsidies/Aid in European Union Policies

Inside the European Union, the role of state and Union assistance is a fundamental part in the structure of the

European Union itself.[681] The need to protect the freedom to regulate these matters without external interference explains many of the acrimonious disputes with other states, particularly the United States.

For example, the position of the Common Agricultural Policy within this structure explains the trenchant position adopted by the European Union in the Uruguay Round negotiations.[682] The vagueness of the proposals originally submitted by the European Union and its reluctance to permit concessions reflect the degree to which the CAP has become part of the way of life for European farmers. Concessions and proposed cut-backs in support have immediate repercussions for both the European Union and certain Member States.

The same is true of large sectors of the industrial base. In these sectors it is not inaccurate to describe financial assistance as institutionalised. Thus, assistance is provided at both the European Union and state levels, virtually unquestioned, to the steel industry, the coal industry, the ship-building industry, the synthetic fibre industry and the motor-vehicle industries. To a certain extent these activities are beyond the scope for review of state aids conferred on the Commission under Article 93 of the EC Treaty.[683]

It is generally taken for granted that there is little prospect of these industries surviving in their present shape if government assistance is not provided and these

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[681] See generally, L. Haucher et al., EC State Aids (1993).

[682] See B.J. McDonald, "Agricultural Negotiations in the Uruguay Round", (1990) 13 World Economy, 299, 306-308.

[683] See European Commission, Twenty-First Report on Competition Policy (1992), 134-153.

industries were required to compete unassisted in the international market-place. This is not, of course, to say that there are not socio-economic reasons justifying the institutionalised isolation of these industries. However, the legality of extending permanent and unlimited assistance to these sectors must be considered dubious even if the practice is generally unchallenged at the international level.

Outside these institutionalised sectors, the European Union sanctions a considerable number of policies involving the subsidisation of production. Generally these may be classified according to whether they constitute assistance authorised under European Union policies or state aid. The critical distinction, other than the sources of such assistance, is that EU aid, when provided to industries, benefits domestic industries against non-European Union producers. On the other hand, state aid discriminates between national producers within the Union and is therefore subject to regulation under the EC Treaty.[684]

In those sectors where there is a common policy, such as agriculture and fisheries, the limits for granting national state aids are, to a large extent, determined by the relevant common policy. These set down the conditions and terms, as well as the purposes, for the granting of aid.

Both these forms of aid are, according to the Commission, provided in accordance with the international rules. The Commission has declared that:

'Whilst aids are obviously only one of the barriers

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[684] See generally, H. Papaconstantinou, Free Trade and Competition in the EEC: Law, Policy and Practice (1988).

> to trade, a strict attitude in this field demonstrates the [European Union's] commitment to the international trading system. Consequently, any aids granted in the [European Union] must be in conformity with the GATT rules.[685]

The present writer is extremely sceptical of this commitment. Despite the exhortations of the Commission, the distortion effects of assistance to European Union industries on the international economy is not a factor taken into consideration in the approval of assistance at the European Union level.[686] Nor does the European Union readily approve multilateral agreements reducing levels of subsidisation. In fact, the Commission has even proposed that the primary means of reducing international levels of state assistance is by means of sectoral agreements such as the EC-US Bilateral Agreements on Steel or the OECD negotiations on restricting aid to the ship-building industry.[687]

(2) The Strategy of Minimising Restraints on Subsidisation at the International Level

To preserve its freedom to continue to provide liberal measures of financial assistance, for a variety of socio-economic rationales, the European Union has consistently advocated a liberal approach to the

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[685] European Commission, Third Survey on State Aid in the EC in the Manufacturing and Other Sectors (1992), 1.

[686] The Commission has stated that aid directed to exports outside the Community do not fall within Article 92 unless the necessary effect on inter-state trade is established; see European Commission, First Report on Competition Policy (1972), Point 187; Seventh Report on Competition Policy (1978), Points 242-244.

[687] European Commission, Second Survey on State Aid in the EC in the Manufacturing and Other Sectors (1991), 3.

question of subsidies in international trade. To avoid providing a basis on which its international negotiating position may be undermined, the European Union has applied its anti-subsidy laws in a manner to support this policy position.

However, the Commission has succeeded in tying itself to the rigidity of some quite absurd negotiating positions such as the principle that a charge to the public account is required for an actionable subsidy or that the quantum of subsidies is to be determined by reference to the cost to the government of providing the support. To apply a different rule internally, while maintaining a diametrically opposite international negotiating position would undermine the position of the European Union in negotiations.

A closer examination of the origins and evolution of this last rule provides an interesting insight into the perspective of the European Union on the relationship between its international position on subsidies and countervailing measures and its own anti-subsidy rules.

The origins of the cost to government rule rest in the 1981-1982 European Union-United States steel conflict. During this period, a large number of anti-dumping and countervailing petitions were lodged by American steel producers against EC producers.[688] In fact, over 100 such complaints were received by the United States authorities.

While the dispute itself was eventually settled through the negotiation of a voluntary export restraint

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[688] For background, see J.J. Mangan, "Trade Agreements Act of 1979: A Steel Industry Perspective", (1986) 18 Law & Pol'y Int'l Bus., 241; and F. Benyon & J.H.J. Bourgeois, "The EC-US Steel arrangement", (1984) 21 CMLR 305.

arrangement[689], the quid pro quo for which was the withdrawal of the private complaints, during its discussions and in an attempt to mitigate the prospect of imposing duties, the European Union strenuously argued that the cost to government standard was the appropriate measure of subsidies. If successful, this argument would have had the effect of reducing the final level of countervailing duties.[690]

Although this position was rejected by the United States authorities, the European Union appears to have seen an advantage in maintaining this position in the subsequent multilateral negotiations. Any contradictory internal measures therefore required amendment. Hence, the 1979 basic anti-dumping/anti-subsidy regulation was amended to eliminate rules conflicting with this position.

For example, the 1979 regulation originally provided, inter alia, that the quantification of loan or guarantee subsidies 'shall generally be considered as the difference between interest rates paid or payable by the beneficiary and normal commercial rates effectively payable on comparable loans or guarantees.'[691] Subsidised loans or guarantees were therefore calculated on the basis of the benefit conferred on the recipient and not the cost to the national authorities. Yet, in the 1984 amended basic regulation, this provision was

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[689] On this arrangement, see I. Pogany, "Steel Wars v Star Wars: The Impact of VERs on GATT", in D.L. Perott & I Pogany (eds), Current Issues in International Business Law (1988), 68-88.

[690] See M. Broncker & R. Quick, "What is a Countervailable Subsidy in EEC Law?", (1989) 23:6 JWT 5, 17.

[691] Article 3(4)(d), Council Regulation (EEC) 3017/79, O.J. L339/1 (1979).

deleted.[692] Obviously this amendment was not implemented independently of the fundamental change of policy on the part of the European Union.

The European Union has continued to hold this position at the international level[693], and has in turn refrained from applying its anti-subsidy laws in an manner which might contradict this position. This is a reflection of the importance to the European Union of reducing restraints on the use of subsidies at the international level.

International rules restricting the right of the European Union to engage in these forms of financial assistance are perceived as an impediment to the evolution of certain of the policy objectives of the European Union. Securing freedom to indulge in subsidisation at the international level has been placed above countering foreign subsidised goods through anti-subsidy measures.

### (3) The Internal Effects of this Policy Inside the European Union

There is also evidence that the Commission has actively discouraged private parties from applying for anti-subsidy relief, instead recommending relief under the anti-dumping regulations.[694] This is another indication

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[692] Council Regulation (EEC) 3017/79, O.J. L339/1 (1979).

[693] See text supra, pp.126-127.

[694] See M.C.E.J. Bronckers, "Private Remedies Against Foreign Subsidization: A European View", in J.H.J. Bourgeois (ed), Subsidies in International Trade (1991), 187, 194-195.

of the European Union wishing to downplay the significance of countervailing measures in the international trade system through self-imposed limitations on its own activities.

Further, it is significant the anti-subsidy section of DG IC is considerably smaller than the comparable section for anti-dumping investigations and is unlikely to be able to handle a large volume of complaints. The sheer lack of resources and manpower limits the number of investigations into allegations of subsidies that can be carried out effectively.

This artificial stimulation of anti-dumping complaints is a dangerous development. The provision of relief by means of anti-dumping measures and not anti-subsidy measures is itself a distortion which fails to directly tackle the cause of the problems of a domestic industry. It is highly unlikely that an anti-dumping measure is the appropriate remedy against foreign subsidisation. Further, the legality of this application of anti-dumping measures is suspect.

### (4) Inconsistencies Between the European Union's International Position and Its Own Internal Regulation of State Aid

The EC Treaty contains strict rules concerning state aid, that is assistance by the governments of the Member States to their own industries.[695] The prohibition on

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[695] The general rule stated in Article 92 of the EC Treaty is that 'any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade

state aid contained in Article 92 of the EC Treaty is prohibition is not however absolute; there are two main exceptions.[696] State assistance which is considered compatible with the common market is ipso facto legitimate.[697] Similarly, state assistance which is considered compatible with the common market and which is subject to review by the Commission.[698]

Particularly in recent years, the Commission, has seen its role in the regulation of state aid as a crusade against the distortion of the conditions of competition within the common market. In one of its earliest significant statements of this subject, the Commission declared state aid to be:

> 'a form of protectionism, to benefit national producers, to give them a competitive advantage, to avoid unnecessary structural adaptation: in short, to transfer difficulties on to competitors in other states. In view of the importance of trade in industrial products in the European Union, such aids, however beneficial they may appear in the short-term national point of view, could endanger

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between Member States, be incompatible with the common market'.

[696] See generally, A. Evans & S. Martin, "Socially Acceptable Distortions of Competition: State Aid", (1991) 16:2 EL Rev 79.

[697] This includes aid having a social character granted to individual consumers and aid to rectify damage caused by natural disasters; Article 92(2), EC Treaty.

[698] This includes aid to promote the economic development of areas where the standard of living is abnormally low, to correct serious unemployment, and aid to promote a project to common European interest; Article 93(3), EC Treaty.

and threaten the unity of the common market.'[699]

If these aids have such an effect inside the European Union, it is axiomatic that they can have the same effect outside. Yet the European Union is reluctant to restrict its use of subsidies even although it acknowledges that such practices have such pernicious effects.

The substantive law on state aid strictly defines permissible state aid. For example, in state aid regulation, the concept of aid has itself been defined as being wider than that of a subsidy. As the European Court held, 'an aid is a very similar concept to a subsidy, but it places emphasis on its purpose and seems especially devised for a particular objective which cannot normally be achieved without outside help.'[700] The concept of an aid is therefore wider than that of a subsidy because it embraces not only positive benefits, such as subsidies themselves, but also interventions which, in various forms, mitigate the charges which are normally incurred by producers or manufacturers.[701]

Since the definition of aid is wider than that of subsidy, it is clear that the European Union desires to regulate not only assistance traditionally considered to be subsidies, but a wider category of assistance. This in turn means that a greater, not lesser, scope of assistance programmes is subject to regulation. Yet, at the international level, the European Union has consistently argued for a restricted definition of

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[699] European Commission, Twelfth Report on Competition Policy (1983), Point 158.

[700] Steenkolenmijnen v High Authority, Case 50/59 [1961] ECR 1.

[701] See DEUFIL v EC Commission, Case 310/85 [1987] ECR 901.

subsidy which would imply that less programmes fall to be regulated by the international rules.

Similarly, in state aid policy, aid may come from both private and public sources. As the European Court has held, 'aid need not necessarily be financed from state resources to be classified as state aid'.[702] Thus, there is no distinction between aid granted directly or indirectly by public bodies or private bodies established or appointed to administer aid. This, of course, was not the position of the European Union in the trade negotiations where a charge to the public account was argued to be a sine qua non of a subsidy.

Finally, in the actual computation of aid, it is the benefit to the recipient that is employed as the gauge.[703] Once again, this would be an unacceptable proposition to the European Union negotiators at the international level.

The Commission has deliberately attempted to distance the concept of state aid from that of subsidies at the international level, even although this distinction is at best artificial. Thus, in Soya Meal from Brazil, the Commission considered whether the practices that were the subject of the complaint were subsidies 'as far as international trade is concerned'.[704] This distinction has been created to allow the Commission to argue that there a two separate sets of rules, one for subsidies at the international level and the other for state aid in the European Union.

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[702] EC Commission v France, Case 290/83 [1985] ECR 439; EC Commission v Milchforderungsfonds [1985] 3 CMLR 474.

[703] Italy v EC Commission, Case 173/73 [1974] ECR 709.

[704] Soya Meal from Brazil, O.J. L106/19 (1985), 24.

One cannot help avoiding the conclusion that one set of rules is adequate for internal trade but another, substantially less rigorous, set is more appropriate for trade with the outside world. It is difficult to see why one set of principles is sufficient for the internal use but a radically different set is being propounded for the European Union's trading relationships with third countries.

(B) The Definition of Subsidies in European Union Anti-Subsidy Law

The Basic Regulation provided quite simply that:

> 'A countervailing duty may be imposed for the purpose of offsetting any subsidy bestowed, directly or indirectly, in the country of origin or export, upon the manufacture, production, export or transport of any product the release of which in free circulation within the European Union would cause injury.'[705]

This provision was not an attempt to define the concept of actionable subsidy and only set out to establish the broadest parameters for the imposition of duties. The qualification that anti-subsidy duties 'may' be imposed on subsidies of this description emphasises the enormous degree of discretion conferred on the Commission to formulate the appropriate policy towards actionable subsidies.

In fact, only three significant rules may be derived from this provision relative to the issue of defining subsidies. First, anti-subsidy duties could be imposed

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[705] Article 3(1), Council Regulation 2423/88.

on direct or indirect subsidies. Second, there was no distinction in treatment between subsidies granted by the country of origin or by the country of export. Third, actionable subsidies could be provided at any one of the four stages of manufacture, production, export or transport. However, it will be noticed that none of these rules restricted the power of the Commission to define the scope of actionable subsidies. These were permissive rules rather than restrictions.

Nor did the subsequent provision of the regulation, which stated that subsidies bestowed on exports include, but were not limited to, the practices listed in the Annex to the regulation, assist identify the contents of the category of actionable subsidies. The Annex, which was taken from the Illustrative List of Export Subsidies to the 1979 Subsidies Code, was not exhaustive but merely served to establish that certain practices were definitely export subsidies for the purpose of the anti-subsidy law.

What did the Commission do to define this concept? Again a distinction must be made between the treatment of domestic and export subsidies. However, first some common rules which have been established for both types and these will be considered.

### (1) Three Prerequisite Conditions for Establishing Actionable Domestic/Export Subsidies

The practice of the European Commission demonstrates that certainly not all subsidies are considered actionable.[706] Nevertheless, three characteristics can

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[706] On the difficulties of such an endeavour, see G. Depayre & R. Petriccione, "Definition of Subsidy", in J.H.J. Bourgeois (ed), Subsidies and International Trade: A European Lawyers' Perspective (1991), 67.

be identified, in Commission practice as being present when an actionable subsidy is found:

(a) The need for intervention of a governmental agency or body;
(b) The existence of a charge to public funds; and
(c) The bestowal of a benefit to the recipient of the assistance.[707]

These three conditions are applicable to both countervailable export and domestic subsidies.[708]

(a) Government intervention

There is no express requirement in either the GATT or the 1979 Subsidies Code that a subsidy must involve the intervention of a governmental agency to provide, or remit or grant the financial assistance. Nevertheless, in the majority of cases, the Commission has required that such intervention is a necessary element of a subsidy.

In a number of cases, the Commission has terminated investigations because it has discovered that, despite the presence of financial assistance, the support originated from private or quasi-private sources and could not be attributed to any act of governmental intervention.[709] But, in practice, this element probably does not act as a significant limiting factor in anti-subsidy investigations simply because the vast majority

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[707] See generally, K. Adamantopoulos, "Subsidies in External Trade Law of the EEC: Towards a Stricter Legal Discipline", (1990) EL Rev. 427, 434, et seq.

[708] Fediol v EC Commission [Fediol II], Case 187/85 [1988] ECR 4155.

[709] See Soya Meal From Brazil, O.J. 106/19 (1985); Soya Meal From Argentina, O.J. L108/ (1985).

of subsidies provided involve government, as opposed to private industry, intervention.

(b) Charge to the public account

A more significant limiting factor is the requirement that financial assistance will only be considered a subsidy if it involves a charge to public funds.

The Commission has on a number of occasions held that such a charge is required because the Annex to the Basic Regulation states, in item (l) that 'any other charge to the public account' may be considered an export subsidy. This implies, according to the Commission, that this element is a prerequisite to all forms of actionable subsidy, whether domestic or export. The Commission also points out that a number of the other practices in the list necessarily involve such a charge in their formulation.

This perverse interpretation has been not been rejected by the European Court which has observed in Fediol v EC Commission[710], that the nature of many of the subsidies on the illustrative list of export subsidies implies that a charge is required.[711]

A charge to the public revenue can be either a direct expense on public expenditure incurred to support a

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[710] Fediol v EC Commission [Fediol II], Case 187/85 [1988] ECR 4155.

[711] The Advocate-General in this case, A-G Mancini, did not share the same justification for reaching this conclusion. In his view, the grant of a subsidy involved two sides to an equation; a sacrifice by the state and a benefit to the recipient. Since the assistance was provided in the public interest, this should be its measure and not its impact on market forces despite the amount of distortion caused to the natural forces of competition within that market.

programme or lost revenues not collected in order to allow remission of payment such as tax breaks. In other words, there are two possible permutations to a charge to the public account:

(1) Any financial benefit which involves budgetary expenditure; and
(2) Any benefit which represents a loss, or a failure to contribute to, public revenue.[712]

But, this interpretation has its justification in policy and not legal logic.[713] The Commission's stance on this matter is derived from its perceived need to support its international position on this point. Certainly, there are compelling legal arguments against this interpretation, none of which have been taken seriously by either the Commission or the Court.

Firstly, the list contained in the Annex is illustrative, not exhaustive, and there is no reason why Article 3(1) of the basic regulation should be construed restrictively in light of this list. In fact, the Annex provides guidance only on export subsidies and not domestic subsidies and therefore there is no compelling reason why the characteristics of export subsidies should be imposed on domestic subsidies before these are made actionable.

Secondly, in the case of services, the Commission has accepted that it is the commercial impact of government assistance that is the relevant measure of the benefit and not the cost on public revenues. For example, in the Hyundai Merchant Marine Case, after examining certain commercial advantages provided by the Korean government

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[712] See Soya Meal from Brazil, O.J. L106/19 (1985).

[713] See text, supra pp.809-811.

to Hyundai, the Commission imposed a redressive duty calculated not on the basis of the cost to the government but on the difference between the freight rate charged by the company and that charged by its competitors.[714]

Third, the cost to government standard ignores commercial reality. The injury caused to an industry is due to the nature of the competitive benefit provided to the foreign producer. The measurement of this benefit is a microeconomic matter relating to the commercial business affairs of producers.[715]

Finally , as we have seen, this approach is at variance with the Commission's approach in state aid investigations which are conducted on the basis of the net benefit conferred on the recipient.[716]

The main problem here is that defining actionable subsidies involves a trade-off between economic and social matters. The main question is what economic philosophy should the European Union's anti-subsidy law follow? Should it be a purely economic process, or should it be a process which takes into account social and other externalities? In the final analysis, it is difficult to disagree with the argument that the Commission's purpose in establishing this rule is policy-oriented rather than the result of legal reasoning.

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[714] Containerized Cargo Transported by Liner Service by Hyundai Merchant Marine Co, O.J. L4/1 (1989).

[715] This is the position of the International Chamber of Commerce; see ICC, Subsidies Subject to Countervailing Duties, Doc. No. 130/120 (19/9/88).

[716] See M.C.E.J. Broncker, "Comment", in J.H.J. Bourgeois, Subsidies in International Trade (1991), 75.

(c) Benefit to the recipient

The last prerequisite of an actionable subsidy is that it confers a benefit on an identifiable recipient.

The benefit must also accrue directly to the producer of the goods under investigation. Thus, for example, in one case the Commission declined to impose duties for a law exempting dividends transferred to a foreign parent company from tax liability, normally paid by domestic producers, because it did not constitute a 'direct benefit' to the subsidiary but rather the parent company.[717]

(2) Export Subsidies

Export subsidies are defined by reference to the types of financial assistance specified in the Annex to the basic regulation but these are not exhaustive. In practice, the Commission has not experienced investigations into each of these forms of export subsidies. The only real experience of the Commission with any of these has been with the following types of export subsidies:

(a) The supply by governments or their agencies of products or services for use in the production of exported goods. For example, the provision of rebates on electricity charges has amounted to an export subsidy under this classification.[718]

(b) The exemption, remission or deferral of direct taxes. The full or partial exemption,

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[717] Ballbearings from Thailand, O.J L184/1 (1990).

[718] Ballbearings from Thailand, O.J. L152/59 (1990).

remission or deferral of direct taxes, such as income tax, or other charges constitutes an export subsidy when the allowance is related to exports.[719] It is irrelevant whether the payment has been made or is payable at a future date.

(c) The allowance of special deductions for direct taxes such as corporation tax when related to export performance.[720]

(d) The exemption or remission of indirect taxes. For example, tax rebates on turnover taxes.[721] Further, customs duties and indirect tax exemptions on imports of machinery and material for production of goods fall within this category as do rebates on indirect taxes on domestically purchased input products.[722]

(e) The provision by governments of export credit guarantee facilities.[723]

(f) The grant of export credit at below commercial rates.[724]

It should be noted that these practices are treated as export subsidies only when the benefit provided is

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[719] Soya Meal from Brazil, O.J. L106/19 (1985).

[720] Ball-bearings from Thailand, supra note 717.

[721] See Seamless Tubes of Non-Alloy Steel From Spain, O.J. C264/2 (1979).

[722] Ballbearings from Thailand, O.J. L152/59 (1990).

[723] See Steel Sheets and Plates from Brazil, O.J. L45/11 (1983).

[724] See Polyester Fibres and Yarn from Turkey, O.J. L272/3 (1991).

contingent on the export of goods. However, there is no need to establish any degree of specificity in the case of export subsidies. A sufficient degree of specificity is presumed by virtue of their character as export stimulation programmes.

(3) Domestic Subsidies

(a) Forms of actionable domestic subsidies

In the past, the Commission has investigated few cases alleging the existence of actionable domestic subsidies. Instead, it has reserved its main efforts, such as they are, to tackling the issue of export subsidies.

In the leading case on this subject, Polyester Yarns and Fibres from Turkey[725], the Commission identified four separate forms of actionable domestic subsidies which may serve to provide guidance to the types of domestic subsidies which may be countervailed in the future.

First, a utilisation support programme which provided a cash premium, calculated on the amount of credit used for total investment and the amount of natural resources used in production. This was considered a form of grant from the government in proportion to the total fixed investments made by producers. Second, a tax deduction to investors granted as a percentage of total fixed investment. Third, a customs duty exemption granted on imports of machinery and equipment used by qualifying investors. Fourth, low interest credit/loan facilities during operational phases of production.[726]

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[725] O.J. L137/8 (1991).

[726] This was considered an actionable domestic subsidy, but not countervailed, since its effect was negligible.

(b) The specificity test

Again the basic regulation fails to provide any reference to the degree of specificity required for an actionable subsidy.[727] This differs from the United States legislation which expressly requires the application of a specificity standard. Nevertheless, it is Commission policy to apply such a test in the case of domestic or production subsidies.[728] The justification for this approach has been stated by the Commission in the following terms:

> 'The effects of measures of a general nature on international trade are difficult or even impossible to determine since they tend to be mitigated or counter-balanced by other macro-economic factors....In any case, any attempt to call a measure of a general nature a subsidy would be absurd because, by ignoring the fact that the policies of all modern states imply, to varying degrees, some financial intervention by the government,. it would make countervailable large sections of social and economic policy.'[729]

From this statement, it can be deduced that the Commission's policy rests on two justifications. First, there is the 'effects doctrine' which justifies the distinction on treatment on the economic impact of the different measures, domestic subsidies generally being

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[727] This is also true for earlier regulations concerning anti-subsidy investigations: see Council Regulation (EEC) 3017/79, O.J. L339/1 (1979); and Council Regulation (EEC) 2176/84, O.J. L201/1 (1984).

[728] See generally, C. Lehmann, "Domestic Subsidies under European Community Countervailing Law; An Emerging Standard After the ECJ Soya Cases", (1988) World Competition 31.

[729] Soya Meal from Brazil, O.J. L106/19 (1985).

considered as having a less severe effect. Second, there is the 'practicality doctrine' which dictates that actionable subsidies must be restricted to specific subsidies because it is impossible in practice to countervail measures of a general nature.

While the motives for treating both types of subsidies separately are relatively clear - following both economic theory and the practices of other states - the Commission has not been as succinct in its elaboration of the degree of specificity required for a domestic subsidy to be countervailable.

There are four identifiable groups of recipients which are relevant when considering degree of specificity, namely:

(a) a specific producer or enterprise;
(b) an identifiable group of producers or enterprises;
(c) an industrial or agricultural sectors; and
(d) an identifiable geographical territory or region.

As one moves down this list, it is clear that we are moving away from identifiable recipients and towards general categories.

At least at present, there is probably an insufficient number of decisions on this point to accurately determine at which stage in this list of recipients a domestic subsidy becomes sufficiently specific to be actionable. It does not seem, however, that subsidies provided to individual producers have been deemed specific by the Commission and this is the most obvious category. Similarly, an identifiable group of producers

may be considered sufficiently distinguishable to allow for the application of duties.

In Polyester Fibres and Polyester Yarns from Turkey, the Commission considered whether assistance given to a number of eligible industries could be considered specific if the programme declared other industrial sectors to be ineligible for aid.[730] The Commission concluded that there was reason to believe that the allocation of the subsidies in question was not being carried out on the basis of neutral and objective criteria. The effect of applying these criteria was to separate eligible sectors from those which were not eligible. Hence, if a subsidy is provided to one or more identifiable industrial sectors, and other sectors are excluded, the Commission is likely to treat the subsidy as specific.

On the other hand, there is the issue of subsidies made available to all sectors of the economy. Some indication of the European Union's policy in this regard was provided in the Soya Cases. Here the Commission found that a domestic subsidy for which twenty seven agricultural sectors were eligible was not sufficiently specific.[731] However, in arriving at this conclusion the Commission observed that while not all agricultural commodity production was eligible for the support, those products for which the subsidy was intended to serve - in this case preparation and storage aids - were all eligible for assistance without discrimination among separate agricultural sectors.

This decision appears to support the proposition that a benefit made available to the entire agricultural or

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[730] O.J. L272/3 (1991).

[731] Soya Meal from Brazil, O.J. L106/19 (1985).

industrial sector of the economy of a state would not be considered adequately specific. But, at the same time, the Commission did emphasis in this decision that the nature of the programme was also relevant as well as the general nature of the programme in defining specificity.

As regards regional programmes, the general policy of the Commission is to consider such domestic subsidies not to be countervailable in the event that the producer is located in a specially designated assistance zone.[732] A stricter approach is taken when a regional assistance programme is intended not to aid a disadvantaged region, but rather to stimulate economic activity in an already prosperous, industrialised and efficient region.[733] This policy applies even when the objective of this discrimination was to promote efficiency.

(c) De jure and de facto specificity

The Commission was originally reluctant to move towards elaborating the distinction between de jure and de facto specificity. In the Soya Case, the Commission was unwilling to declare the programme specific even although, while technically the assistance was available to 27 producers, the production of soya beans represented over 30% of total agricultural production and accounted for a similar percentage of the financing.

The Commission eventually endorsed the concept of de facto specificity in Polyester Fibres and Yarns from Turkey which concerned, inter alia, a programme

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[732] Ballbearings from Thailand, O.J. L184/1 (1990).

[733] Polyester Fibres and Polyester Yarns from Turkey, O.J. L272/3 (1991).

ostensibly generally available to all producers.[734] It considered that the programme was specific because the allocation of resources was not carried out in accordance with 'neutral and objective criteria'. In addition, applications were vetted by the national authorities before funding was provided. This suggests that de facto specificity will be held if the aid is given on non-neutral and subjective criteria and there is not automatic entitlement.

(d) De Minimus

For practical reasons, the Commission has introduced a policy of ignoring subsidies considered to have an insignificant effect on the final production costs of goods. Again this principle has not been well elaborated, but in one case, the Commission considered that a scheme which had a 0.001% effect on the price of the goods was negligible and therefore de minimus.[735]

It is likely that a higher minimum threshold would be acceptable to the Commission and the rate in this particular case should not be considered a binding guideline. It is necessary to await further rulings from the Commission on this point before commenting further on this principle.

(C) Quantification of Subsidies

There are two alternative means of calculating the value of a subsidy: (a) the cost to the granting authority; or (b) the benefit provided to the recipient. Which of these basis is selected has important effects on the

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[734] O.J. L272/1 (1991).

[735] See Polyester Fibres and Yarns from Turkey, O.J. L272/3 (1991).

quantification of the subsidy. The Commission has favoured the cost to government approach.[736] Instead of analyzing the micro-economic factors of individual businesses the Commission is concerned with the effect on governments.

(1) Grants and Forgiveness of Debt

The quantification of a subsidy in the form of a grant is simply the total amount of the grant within the period of investigation. Similarly, where revenue has been forsaken, the quantification of this benefit is simply the value of the revenues that should have accrued to the government had the programme not been in place.

(2) Loans and Loan Guarantees

The Commission has declined to countervail a loan at a commercially preferential rate since this was provided at interest rates higher than the long-term cost to the government of obtaining the funds.[737] This is in conformity with the general rule that the quantification of subsidies is made on the basis of the cost to the government.

However, the Commission has not been consistent in its approach to this matter. In earlier cases, it has assessed the value of loans by subtracting the amount of interest payable during the period of investigation from the amount of interest payable had the loans been granted at the normal commercial rate.[738]

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[736] See Steel Cases, supra note 723.

[737] Ballbearings from Thailand, O.J. L152/59 (1990).

[738] Sheets and Plates of Iron or Steel From Brazil, O.J. L45/11 (1983).

This aberration may be explained by two factors. First, the latter investigation was concluded immediately before the Commission decided to alter its policy in support of the cost to government standard later advocated in international negotiations and subsequently incorporated into the internal legislation. Second, in the particular circumstances of this case, the cost to the government of obtaining short-term finance exceed the cost to the company of obtaining the loan on normal commercial terms. To quantify the subsidy on a cost to government would have enlarged the gross subsidy.

(3) Government Equity Participation

There are as yet no reported instances of the Commission quantifying assistance by the government in the form of equity participation such as the purchase of shares to bolster the viability of an enterprise or industry (although there have been decisions of this nature under the EU's state aid provisions).

(4) Tax Exemptions and Rebates

The quantification of tax exemptions and rebates for exports is made on the basis of the total value of the exports during the relevant period multiplied by the relevant tax concession expressed as a percentage of the value of the exports as adjusted where appropriate.

Thus, in one case, where the subsidy was a tax exemption payable on exports, at the rate of 10.15%, the Commission calculated the value of the subsidy on the basis of the FOB prices, the FOR prices and the EXW prices[739], where the products were being exported by

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[739] These terms refer to the INCOTERMS used in international commercial transactions. FOB stands for 'free on board', FOR stands for 'free on rail' and EXW

ship, rail and road respectively.[740] These three bases were the prices used by the authorities for calculating the rebates payable on the export prices.

Where the exemption or rebate takes the form of a domestic subsidy, then it is quantified on the basis of the relevant concession indices. Thus, if the concession was granted in proportion to turnover, then the quantification of the subsidy would be carried out on the basis of the text concession multiplied by the number of eligible units of production fabricated during the relevant period.

The Commission has been relatively fair in quantifying subsidies made available under tax exemption programmes. It takes into account all the relevant tax consequences of the programme rather than concentrating on the nature of the particular programme itself. Thus, in one case, the Commission took into consideration the fact that income tax was payable on exempt revenue from exports in calculating the subsidy rather than assessing the subsidy merely on the basis of the formal tax concession rate allowed.[741] The benefit assessed was calculated on the basis of the difference between the amount of taxes which would normally be paid by the benefitting companies and the reduced amounts paid under the scheme.

This is in fact an illustration of the application of the cost to government approach. If the European Union based its calculation on the benefit to the recipient, there would have been no need to take into account the

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stands for 'ex works'; see ICC, Incoterms 1990 (1990).

[740] Seamless Tubes of Non-Alloy Steel From Spain, O.J. L196/34 (1980).

[741] Polyester Fibres and Polyester Yarns from Turkey, O.J. L137/8 (1991).

fact that income tax on export income was payable. The Commission would have been justified in treating the export subsidy in isolation in assessing the direct benefit to the recipient. Instead, the quantification was made on the basis of the cost to government which required the Commission to take into account all features of the programme as it affected government revenues.

(5) Provision of Goods and Services at Preferred Rates

There are also few cases on the quantification of benefits in the form of providing subsidised goods and services. In the single case in point, the Commission examined the provision of electricity at lower rates for the production of goods for export.[742] The quantification of the benefit was made on the basis of the rebates received in power bills from the nationalised electricity industry.

(D) Calculation of Net Subsidies and Allocation of Benefits

(1) Calculation of Net Subsidies

In establishing the amount of any countervailable subsidy, the following expenses are deducted from the total subsidy:

(a) any application fee, or other costs necessarily incurred in order to qualify for, or to receive the benefit of, the subsidy; and
(b) any export taxes, duties or other charges levied on the export of the product to the European Union specifically intended to offset

[742] Ballbearings from Thailand, O.J. L152/59 (1990).

the subsidy.[743]

The onus rests with the party claiming the deduction to establish any claim. In one case, the Commission did, however, allow a deduction for commission payable to a European company acting as a sole agent for distribution of the products in Germany.[744]

Where the amount of subsidy paid varies among producers, weighted averages may be used by the Commission. For example, where a subsidy involved a partial rebate of tax liability for export goods based on the incidence of indirect tax assessed in the production of the finished goods, weighted averages were used to apportion the subsidy according to whether producers used inputs components which were raw or semi-finished. This was explained because the levels of indirect tax varied according to whether the inputs were raw or semi-finished and to treatment both as being the same would have distorted the quantification of countervailable subsidies.

(2) Allocation of Benefits

(a) Allocation over time

In assessing the appropriate time basis for allocation of benefits, the Commission has been extremely inconsistent. Occasionally, it has been willing to adopt the normal accounting standards and practices of the country of origin of the goods. Thus, where a subsidy was provided for the purchase of capital goods, the Commission allocated the benefit over a period of four

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[743] Article 3(4)(b), Council Regulation 2423/88.

[744] Seamless Tubes of Non-Alloy Steels From Spain, O.J. L196/34 (1980).

years since that period was the accepted normal period of depreciation in the industry concerned of that country.[745]

But, in other cases, the Commission has declined to apply these local standards. For example, in Ballbearings from Thailand, the Commission refused to apply the normal period of depreciation of assets in the industry concerned instead applying a lesser period on the ground that such periods were applied in both the European Union and Japan.[746] The local period of depreciation was considered excessive.

Since the effect of reducing the period of allocation is to increase the short-term value of the subsidy granted, it is easy to be cynical and claim that the Commission is using this technique to artificially inflate the value of the countervailable subsidy. Further, since the local standards, and not foreign standards, are the ones for the preparation of production and costs budgets, it is unfair to reject the local standards in the absence of proof that these were being abused to artificially lower the value of the subsidy.

Again no guidance is provided in the Basic Regulation for the allocation of benefits over time. In practice, although limited guidance is provided in the published decisions, it appears that the Commission generally opts for the most simple method of allocation namely horizontal allocation.[747] This method involves the allocation of the amount of the subsidy in equal annual

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[745] Polyester Fibres and Polyester Yarns from Turkey, O.J. L137/11 (1991).

[746] O.J. L152/59.

[747] K. Adamantopoulos, "Subsidies in External Trade Law of the EEC: Towards a Stricter Legal Discipline", (1990) EL Rev 427.

parts over a period of time. The relevant period of time is determined in relation to the equipment, machinery or products purchased with the assistance of the subsidy.[748]

Other techniques may be more appropriate in certain circumstances, but there is no evidence of the Commission having considered any of these alternative methods. For example, front loaded allocation may be employed where the benefit of a subsidy does not apply uniformly over a particular period, but in fact the main benefit accrues in the first years. This approach allows the bulk of the subsidy to be allocated over the first few years.

As a general policy, the Commission has tended to avoid taking into account the time value of money at all in its investigations. Thus, in one case, the Commission considered a duty exemption on machinery used for the production of export goods.[749] For the purposes of allocation, the Commission allocated the benefit over a period reflecting the normal period of depreciation of the asset in the relevant industry. The Commission then allocated 10% of the company's total acquisitions of machinery to the investigation period without any justification or explanation in order to quantify the subsidy.

(b) Allocation per unit

The amount of the subsidy is determined per unit of the subsidised product exported to the European Union.[750]

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[748] See Steel Plates and Steel Sheets from Brazil, O.J. L45/11 (1983).

[749] Ballbearings from Thailand, O.J. L152/59 (1990).

[750] Article 3(4)(a), Council Regulation 2423/88.

Where a subsidy is not granted by reference to the quantities manufactured, produced, exported or transported, the amount of the subsidy is determined by allocating the value of the subsidy, as appropriate, over the level of production or exports of the product concerned during a suitable period, which is normally the accounting year of the beneficiary.[751]

If the subsidy is based on the acquisition or future acquisition of fixed assets, the value of the subsidy is calculated by spreading the subsidy across a period which reflects the normal depreciation of such assets in the industry concerned.[752]

(E) Indirect Subsidies

The Basic Regulation clearly provides for the possibility of imposing duties on upstream, downstream or input subsidies by expressly providing that actionable subsidies may be bestowed 'directly or indirectly'.[753] But, unfortunately, no detailed rules have been established to facilitate the operation of this rule. The matter is again one left largely to the discretion of the Commission and therefore involves strong elements of policy.

In assessing the countervailability of indirect subsidies, the Commission draws a distinction between subsidies on inputs physically incorporated into products, ie, energy, and component parts assembled into a finished product. The Commission considers that subsidies (ie. rebates of customs duties, import taxes and domestic sales taxes) provided for materials

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[751] Article 3(4)(c), Council Regulation 2423/88.

[752] Article 3(4)(c), Council Regulation 2423/88.

[753] Article 3(1), Council Regulation 2423/88.

physically incorporaed into finished products cannot be countervailed but subsidised components which are subsequently assembled into finished goods may be countervailed.[754]

Where component products have been subsidised, the finished product will only be countervailable if there is a pass-through of benefits from the producer of the input to the producer of the finished product.[755] At the same time, it is also likely that a test of double-specificity will apply requiring specificity at both the level of the producer of the input and the producer of the finished product.[756]

The distinction in treatment between incorporated inputs and components is difficult to justify. Certainly it has the artificial effect of treating expenses normally considered to be indirect costs, such as energy, as countervailable while treating other expenses considered direct costs, such as raw materials, as non-countervailable. However, any restriction on the policy of the Commission towards countervailing indirect subsidies will be welcomed by foreign producers even if it can be unilaterally withdrawn at a later date.

(F) Anti-Subsidy Measures on Goods From State-Controlled Economy Countries

In the case of imports from non-market economy countries (NMECs), a subsidy is to be ascertained 'in an

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[754] Ballbearings From Thailand, O.J. L152/59 (1990).

[755] Certain Seamless Tubes of Non-Alloy Steel from Spain, O.J. L322/30 (1980).

[756] J-F. Beseler & A.N. Williams, Anti-Dumping and Anti-Subsidy Law of the European Communities (1986), p.125-127.

appropriate and not unreasonable manner', by comparing the export price with the normal value, both as calculated under the anti-dumping law.[757]

Those countries which are considered non-market-economy countries are defined by reference to enacted regulations on imports from state trading countries.[758] Inclusion in these regulations is not definitive for the purpose of applying this rule. Other unspecified factors may be taken into account.

The method for determining the amount of subsidy conferred in such situations is especially controversial. It involves the calculation of an 'export price' and a 'normal value' and, after adjustments have been made, the value of the subsidy is the difference between these figures. This is subject to the nebulous principle that such determinations must be made 'in an appropriate and not unreasonable manner' which seems to allow a substantial degree of discretion.

The practical effect of this process is simply to extend the application of the European Union's anti-dumping laws to cases of alleged subsidisation of production by non-market economy countries and is not a genuine attempt to directly tackle the issue. It is unclear if this approach has been developed to make life easier for the Commission or is a further illustration of discouraging European industries from bringing anti-subsidy complaints if anti-dumping proceedings will have the same result.

To date, there have been no instances of anti-subsidy

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[757] Article 3(4)(d), Council Regulation 2423/88.

[758] Council Regulation (EEC) 1765/82, O.J. L195/1 (1982); Council Regulation (EEC) 1766/82, O.J. L195/21 (1982).

duties being calculated on this basis. But, at a fundamental level, it is difficult to justify such an approach if it is borne in mind that all subsidisation of production in such countries must be of a general nature. In this respect the United States approach is more commendable than that of the European Union which is not at all a reasonable policy.

(G) The Impact of Trade Agreements on the Application of Anti-Subsidy Measures

The Commission is at pains to justify any measures in light of international rules. Thus, in one case, the Commission asserted that the imposition of preliminary duties was consistent with both the GATT and the Additional Protocol to the EEC-Turkey Association Agreement.[759] This suggests that such measures are subject to judicial review not only in light of the GATT inspired rules but also certain applicable bilateral obligations. Naturally, any additional basis for review of measures is an important development in assessing the fairness of the European Union anti-subsidy rules.

In this case, it was argued that the Additional Protocol allowed Turkey to use aids to promote its economic development. In other words, the argument related to whether subsidies which were permissible, or accepted, under a bilateral agreement were exempt from the application of anti-subsidy measures.

The Commission held that this was not the case. The assistance in question violated Article 43(2) of the EEC-Turkey Treaty which provides that aid is only compatible with the agreement to the extent that it does not alter the conditions of trade to an extent

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[759] Polyester Yarns and Fabrics from Turkey, supra note 733.

inconsistent with the national interests of the contracting parties.

In the same case, Turkey also argued that the GATT and the Subsidies Code provide for special and differential treatment for developing countries. Both created exempt assistance programmes for the purposes of assessing anti-subsidy duties. This argument was also rejected by the Commission since the provisions of the Code do not expressly restrict the possibility of a signatory applying duties in the case of a subsidised product from developing countries causing material injury to EU producers.

Naturally, any undertaking made by the European Union to refrain from imposing anti-subsidy duties on goods from a particular country in bilateral agreements would prevent the imposition of such duties. Thus, for example, the prohibitions on the introduction of measures contained in the EC-EFTA European Economic Area Agreement would stop anti-dumping duties on products from EFTA countries.[760]

While the Commission and its staff may claim to assess its measures in light of international standards, it has not yet agreed to the termination of an investigation on the grounds that measures are inconsistent with the European Union's international obligations. Therefore, the truth of this statement can only be assessed once this bridge is crossed.

(H) Application of Anti-Subsidy Duties to Products

The Commission is authorised to impose an anti-subsidy duty to 'offset any subsidy bestowed' in the

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[760] See text supra, pp.324-327.

manufacture, production, etc of any product. This clearly authorises the Commission to impose a duty equal to the amount of countervailable subsidy found to exist. However, the Commission has applied the lesser duty rule to anti-subsidy investigations.

This rule will be considered in more detailed later in the text.[761] At this point it is sufficient to observe that, where a level of duty can be imposed which would neutralise the injury caused to the relevant European Union industry, this amount of duty is imposed by the European Union even if the actual margin of subsidisation is higher. In other words, where the margin of injury requires a lesser duty than would be permitted to offset the margin of subsidisation, the European Union restricts the anti-subsidy duty to the lesser amount.[762] This is a self-imposed rule. The Subsidies Code does not require a signatory to apply this rule and in fact few states do so.

### (3) The Application of the Material Injury Test in Anti-Dumping and Countervailing Duty Investigations by the European Commission

#### (A) The Standard of Material Injury

Both the investigation into the existence of dumping and material injury are conducted by the European Commission; there is no bifurcation in procedure similar to that in the United States or Canada. This procedure has the advantage of allowing the investigating agency

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[761] See text infra, pp.933-934.

[762] See for example Polyester Yarns and Fibres from Turkey, O.J. L272/3 (1991).

to terminate the investigation at the moment negative dumping or injury determinations have been made.[763] On the other hand, concentration of administrative authority into one agency has the disadvantage of eroding any degree of objectivity or impartiality that may result from protectionist pressures which can be more easily countered by two agencies as opposed to one.

The Basic Regulation permits an affirmative determination of injury only if the allegedly dumped imports 'are, through the effects of dumping or subsidisation, causing injury, ie. causing or threatening to cause material injury to an established [Union] industry or are materially retarding the establishment of such an industry'.[764] A sufficient degree of injury may therefore be manifested in any of these three forms: (1) actual material injury; (2) threat of material injury; and (3) material retardation of the establishment of a EU industry.

(1) Actual Material Injury

Material injury has never been specifically defined in any of the anti-dumping regulations but Article 4(2) of the Basic Regulation requires the European Commission to consider a number of factors in making a determination of injury including:

(a) The volume of the dumped or subsidised imports and, in particular, whether there has been a significant increase, either in absolute terms or relative to production or consumption in the European Union.

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[763] See, for example, Ballbearings From Singapore, Japan and Thailand, O.J. L193/1 (1984)

[764] Article 4(1), Council Regulation 2423/88.

(b) The prices of dumped or subsidised imports and, in particular, whether there has been significant price undercutting as compared with the price of the like product in the European Union.

(c) The consequent impact on the industry concerned as indicated by actual or potential trends in relevant economic factors such as, inter alia: production, utilization of capacity, stocks, sales, market share, prices (ie. depression of prices or prevention of price increases which otherwise would have occurred), profits, return on investment, cash flow and employment.

The Commission is instructed to give its attention to each of these factors but clearly does not always do so. At the same time, not all these factors will be relevant in an investigation; some indicators will be more indicative of the presence or absence of injury than others. For example in Plain Paper Photocopiers From Japan[765] no account was taken of the profits made by the EU industry and this was held to be a valid exercise of the European Union institutions' discretion by the European Court.[766]

Naturally, if the Commission is permitted to select which criteria to consider, injury may be found in virtually any investigation. Further, it is not necessary for the Commission to conclude that all of these factors are negative for an affirmative determination of material injury.

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[765] [definitive measures] O.J. L54/12 (1987).

[766] Sharp Corporation v EC Council Case C179/87 [1992] ECR I 1635; [1992] 2 CMLR 415.

(a) Volume of Imports of the Relevant Products

The Regulation instructs the Commission to examine increases in the volume of dumped or subsidised imports in both absolute and relative terms. Absolute increases in dumped imports are rarely cited in Commission or Council anti-dumping regulations as a cause of injury itself. More often, the volume of imports is assessed relative to two factors: production and consumption.

In assessing actual and relative increases in volumes of imports, the European Commission has been arbitrary in selecting the relevant periods for assessing trends in volumes of imports. The importance of selecting a standard period is simply that, if the Commission is allowed to select its own period, this discretion can be abused by extending this examination to time scales where overall increases can be taken into consideration. Consider the following hypothetical situation.

| 1993 | | | 1994 | | |
|---|---|---|---|---|---|
| January to April | May to August | Sept to December | January to April | May to August | Sept to December |
| 1,500 units | 2,500 units | 3,000 units | 2,800 units | 2,900 units | 3,000 units |

If the relevant period of investigation is September 1994 to December 1994, the absolute increase is insignificant. However, if the period of investigation is taken as January 1993 to December 1994, then there is a significant absolute increase in the volume of imports.

Investigation periods for the examination of trends in

the volume of imports have ranged from five months[767] to five years.[768] In between these extremes, other periods have been used without adequate justification for the selection of the duration of the investigation.[769] The arbitrary nature of this selection process gives rise to concerns on the part of foreign exporters.[770]

Despite the fact that the Basic Regulation confirms that injury is to be assessed relative to the volume of 'dumped or subsidised imports', in reality the European Commission rarely distinguishes between dumped and non-dumped sales. No separation is made in the export sales of these companies as far as the measurement of injury is determined in terms of volumes of imports even when different prices are charged.

Another criticism of the Commission's practice in assessing actual levels of imports is that, despite the reference in the Basic Regulation to the 'volume of dumped or subsidised imports', the total volume of imports is used as the relevant statistic for this purpose whether or not dumped or subsidised.[771]

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[767] Welded Iron or Steel Products From Roumania, O.J. L26/5 (1982).

[768] Audio Cassettes From Japan and Korea, O.J. L313/50 (1990) [provisional measure], O.J. L119/35 (1991) [definitive measures].

[769] See, for example, Plywood and Similar Laminated Wood Products From Canada and the United States, O.J. L338/42 (1981) [one year]; and Herbicide From Roumania, O.J. L44/8 (1979) [one year].

[770] A clear example of manipulation of the period of investigation occurred in Calcium Metal From the PRC and the Soviet Union [definitive measures] O.J. L271/1 (1989).

[771] J-F. Bellis, "The EEC Anti-Dumping System", in J.H. Jackson & E.A. Vermulst, Anti-Dumping Law and Practice (1989), 41-97, 89.

In reality, increased volumes of imports are measured in three separate ways: (i) in absolute terms; (ii) relative to EU production; and (iii) relative to EU consumption. The fact that the Commission can select from among these options also widens its discretion to find the existence of injury.

**Increases in absolute terms**

Determinations of absolute increases in volumes of imports sufficient to cause injury have varied widely in terms of both the period of investigation and the percentage increase required to trigger a finding of injury. For example, absolute increase of between 9%[772] and 101%[773] in a one year period have been deemed sufficient to substantiate material injury.

In fact, absolute decreases in levels of imports offer no protection against a finding of injury if the market share of a foreign exporter has increased due to contraction in the demand for a product in a particular market.[774]

**Increases relative to EU production**

The European Commission is authorised to assess increasing volumes of exports relative to production in the European Union but rarely uses this indicator to establish injury instead preferring to determine increased volume relative to consumption/sales.

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[772] Styrene Monomer From the United States, O.J. L154/10 (1981).

[773] Vinyl Acetate Monomer From the United States, O.J. L129/1 (1981).

[774] Clogs From Sweden, O.J. L268/12 (1985); and Rollerchains From the USSR and China, O.J. L217/7 (1985).

The logic of this choice is simple. If increased imports relative to production was taken as the measure, the proportion of EU-produced goods exported outside the European Union be taken into account. This would dilute any finding of increase if export markets were growing and production increased to meet this demand. So, sales within the EU is the indicator used not production.

**Increase relative to EU consumption**

Increases in volumes of imports calculated as a proportion of consumption is the most commonly cited criterion for an affirmative determination of injury on the basis of increased imports. An increase in the absolute volume of imports is not necessary for such a determination. Consider the following illustration.

| 1993 | | | 1994 | | |
|---|---|---|---|---|---|
| January to April | May to August | September to December | January to April | May to August | September to December |
| Volume of imports | | | | | |
| 1,500 units | 2,500 units | 3,000 units | 3,000 units | 2,900 units | 3,000 units |
| Total consumption in EU market | | | | | |
| 6,000 units | 7,000 units | 8,000 units | 8,000 units | 6,500 units | 6,000 units |
| Imports as a percentage of consumption | | | | | |
| 25% | 35% | 37% | 37% | 44% | 50% |

Hence, the use of figures representing relative increases relative to consumption assists establish an artificial increase in imports when in fact absolute increases are declining. The use of this criterion is permitted under both the Anti-Dumping and Subsidies Codes[775] but this does not justify the abusive practices which have been perpetrated by the European Commission.

For example, market share increases as low as 2.47% have been deemed to indicate injury.[776] Market shares of a relatively small proportion which have not significantly increased have been held to justify such a finding.[777]

**Cumulation of the volume of imports**

Cumulation takes two forms: (a) where there are imports into the European Union from several exporters from the same country; and (b) where there are imports from exporters in different states.

The Commission's practice with regard to imports from several exporters in the same country is relatively standard. The Commission invariably cumulates the injury caused by such exporters. Two justifications are given for this practice. First, the possible exclusion of some producers from an investigation would grant these exporters a competitive advantage over those subject to the anti-dumping proceedings. Second, the practice of cumulation is not prohibited by the GATT and is

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[775] Article 3(2), Anti-Dumping Code 1979 and Article 6(2) Subsidies Code 1979.

[776] Mounted Piezo-Electric Quartz Crystal Units, O.J. L162/62 (1980).

[777] See, for example, Asbestos-Cement Corrugated Sheets From Czechoslovakia and the GDR, O.J. L259/48 (1984), where the combined market share rose from 1.4% to 2.3% over the course of three years.

practised by the Union's trading partner particularly the United States.[778]

Neither of these reasons is particularly convincing particularly that the Commission is protecting the commercial positions of exporters in other countries. Cumulation mainly serves administrative convenience. Further, it penalises smaller suppliers which would not have caused injury if their imports had been examined in isolation.

As regards cumulation from different countries, in the absence of an express provision in the Anti-Dumping Code 1979 dealing with this practice, the European Commission claims to have adopted the practice of cumulating the volume of imports when the following factors are present:

(a) the same product is involved;
(b) the market behaviour of the different exporters is similar; and
(c) the volume of imports of the product is not negligible.[779]

The element of market behaviour is the subjective element in this determination. The factors involved in assessing market behaviour include the market share of the exporters, the degree of price undercutting being perpetrated and the margins of dumping, if any,

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[778] Propan-I-ol From the United States, O.J. L106/55 (1984).

[779] Discussions between the author and F.H. Wenig, Chef d'Unite Adjoint, DG1C2, European Commission (15/11/92). See also, Dihydrxostreptomycin From China, O.J. L362/1 (1991); Disposable Lighters From Japan, China, Korea and Thailand, O.J. L326/1 (1991); and Coton Yarn From Brazil, Egypt, Turkey, India and Thailand [provisional measures] O.J. L271/17 (1991).

established. Consider the following illustration

| | PRC | Japan |
|---|---|---|
| Market share | 25% increase | 25% decrease |
| Price undercutting | 30% | 0% |
| Margin of dumping | 60% | 110% |

In this scenario, the European Commission would claim not to cumulate these imports because the market behaviour of the exporters is dissimilar. However, where the respective commercial practices of the parties is assimilated cumulation will take place if the other conditions stated above are satisfied and in fact cumulation is extremely common and can extend to the exporters of a considerable number of countries.[780]

One clear deviation from this purported policy occurred in Audio Cassette Tapes From Japan, Korea and Hong Kong[781] where although the same product was involved, the degree of price undercutting and the margins of dumping differed considerably. For example, the margins of dumping ranged from between 80.20% to 0.43%. Nevertheless, the Commission decided to cumulate these imports on the basis that 'these exporters produced a similar and simultaneous effect on the [European Union] industry which must be assessed jointly'. If this policy

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[780] See, fore example, Artificial Corrundum From the Soviet Union, Hungary, Poland, Czechoslovakia, China, Brazil and Yugoslavia [provisional measures] O.J. L275/27 (1991).

[781] [provisional measures] O.J. L313/50 (1990), [1991] 2 CMLR 138.

prevails, there will effectively be no guidelines to govern cumulation.

One interesting scenario which has not yet occurred is the Commission's practice in the event that an investigation into a particular product from a specific country has been terminated with definitive measures and a subsequent complaint arises for the same product but from a different country. Commission officials have indicated that, in such a case, the Commission would probably not cumulate imports for the purposes of determining injury but this point has not been settled.[782]

**Cross cumulation of the volume of imports**

Cross cumulation occurs when the injury caused by imports of dumped products is assessed along with the injury from imports which have allegedly been subsidised. Since the European Union rarely imposes anti-subsidy measures, there is no body of principles for this practice.

(b) The Effect of Imports on Domestic Prices

The price of dumped imports and in particular any significant price undercutting (or price underselling) is relevant in establishing injury to a European Union industry. In fact, price undercutting is expressly cited in the regulation as an important indicator of injury.[783] A finding of significant price undercutting or underselling usually leads to a positive determination of injury.

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[782] Ibid.

[783] Article 4(2)(b), Council Regulation 2423/88.

Evidence of price undercutting includes cancelled orders, the suppression of prices, the prevention of limited price increases and the presence of cheaper-priced foreign imports.[784] Of these factors, the most important are the suppression of prices and the prevention of price increases. However, the problem of relying on these factors is that the correlation between prices within the European Union and the imports may not be the direct cause of price suppression. For example, prices may be declining because a product has matured or been superseded by improved technology.

The Commission's methodology towards determining price undercutting is not consistent with the Code obligations because the European Commission employs hypothetical prices for European producers as opposed to actual prices. A target price is created in this process on the assumption that the dumped goods have depressed prices. This target price is constructed on the basis of the costs of production and a reasonable margin of profit. Indeed, this methodology has even been upheld by the European Court.[785]

The extent of price cutting also plays a critical role in assessing anti-dumping duties under the lesser duty rule which authorises the Commission to assess duties on the margin of injury in the event that this is lower than the margin of dumping. The figures for price undercutting are used as the basis for calculating the levels of duties which will eventually be imposed or the price undertakings which will be acceptable to the

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[784] See Orthoxylene From the United States and Puerto Rico, O.J. L141/29 (1981); Fluid Cracking Catalysts From the United States, O.J. L11/25 (1982); and Aluminium Foil From Austria, O.J. L339/58 (1982).

[785] See Toyko Electric Co v EC Council, Cases 260/85 & 106/86 [1988] ECR 5855, [1989] 1 CMLR 169.

Commission.[786]

In addition to an amount to compensate for price cutting, in addition the Commission includes in this figure an appropriate amount for a reasonable return for EU producers. For example, in Serial Impact Printers From Japan[787] the Commission constructed a price to eliminate price cutting and calculated in such a manner as to provide the EU producers with a 12% minimum profit. This calculation required the Commission to calculate the duty payable to cover the difference between the actual price of the products and the price required to give the return necessary to achieve a profit margin of 12%. The anti-dumping duties payable by the foreign exporters were then calculated to ensure that their products would enter the European Union at this price which, for the majority of foreign producers, resulted in an anti-dumping duty of 43.2%.

The amount of profit which the Commission deems should be made by the European industries is determined in a completely arbitrary fashion. In one case a profit margin of 18%[788] was deemed justified while in other cases margins of 12%[789] and 6%[790] have been considered sufficient.

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[786] See text, infra pp.924-930.

[787] [provisional measures] O.J. L177/1 (1988).

[788] Thermal Paper From Japan [provisional measures] O.J. L270/15 (1991).

[789] Large Electrolytic Aluminium Capacitors From Japan [provisional measures] O.J. L152/22 (1992).

[790] Ferro-Silicon From Poland and Egypt [provisional measures] O.J. L183/8 (1992).

(c) Impact of imports on domestic production

The impact of the imports on the European Union industry is important both for the purposes of establishing injury and proving the existence of causation.

To assess impact, the Commission examines actual or potential trends in certain economic factors, such as production, utilisation of capacity, stocks, sales, market share, depression of prices or prevention of price increases which would have otherwise occurred, rates of profit, return on investment, cash flows and levels of employment in the industry. The Basic Regulation expressly declares that no single one of these factors will necessarily be decisive and again the Commission and Council have the appropriate discretion in this matter.[791]

**Production**

Where production inside the European Union declines, or productive capacity is not utilised, prima facie injury is indicated. The Commission has not, however, considered this factor to be a primary indicator of injury.

A proper finding of declining production depends on accurate and precise analysis of the relevant data. Whether such an analysis has been is almost impossible to discern in most cases because the regulations terminating investigations rarely, if ever, provide an indication of the calculation of this factor. Production trends are described in such general terms in these regulations that no challenge can ever be mounted

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[791] This discretion has been upheld by the European Court: see Silver Seiko Ltd v EC Council, Cases 273/85 & 107/86 [1988] ECR 5927, [1989] 1 CMLR 249.

against an affirmative determination on this ground.

Where an indication of declining production is provided, this will generally be a general numerical figure. The necessary degree of decline varies considerably[792] and in some cases stagnation of production is considered an adequate indicator.[793]

In some cases, increases in production in the European Union industry have not been considered sufficient to prevent a finding of injury. For example, in Audio-Cassette Tapes From Japan, Korea and Hong Kong[794], the actual productive capacity of the domestic industry rose from 110 million units in 1985 to 154 million units in 1988, an average increase of 40% over three years. Nevertheless, this did not prevent the Commission from finding injury despite an increasing market and a relatively constant level of inventories.
Similarly, in Dynamic Random Access Memories From Korea[795], the total production of the European industry increased by a factor of nine in the period between 1988 and 1990 and yet was considered insufficient to prevent the application of anti-dumping measures.

**Inventories**

Accumulation of unsold stock is another factor taken into consideration when considering the impact of imports on the domestic industry. This factor is often

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[792] For example, a decline of 13% over a three year period was considered adequate in one case; see Phenol From the United States, O.J. L212/2 (1980).

[793] See Standardised Electric Multi-Phase Motors From the USSR, O.J. L153/45 (1980).

[794] [provisional measures] O.J. L313/50 (1990), [1991] 2 CMLR 138.

[795] [provisional measures] O.J. L272/13 (1992).

used to provide corroboration for other more tangible indicators rather than a factor definitively indicating injury.

**Sales and market shares**

Along with price undercutting, trends in market share are a significant indicator of the economic health of a domestic industry.

Indications of injury are the declining market share of a domestic industry, the failure of the sales of a domestic industry to rise in line with increasing demand[796] and domestic suppliers failing to respond to trends in supply and demand.

The degree of decline in market share which can trigger an affirmative indication of injury can be extremely small. For example, in one case an investigation was opened based on allegations that the market share of the relevant European industry had declined from 26% to 25% over a one year period.[797] Similarly, a 4.7% decline in market share was held to be sufficient injury to justify the imposition of provisional duties.[798]

**Levels of Profits**

Information from domestic producers concerning levels of profit is, of course, strictly confidential and therefore the Commission is justified in not explicitly disclosing this information in final measures. However,

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[796] Canon Inc v EC Council, Cases 277 & 300/85 [1988] ECR 5731, [1989] 1 CMLR 915.

[797] Furfural From China, the Dominican Republic and Spain, O.J. C219/3 (1980).

[798] Polyester Yarn From the United States, O.J. L231/5 (1981).

this also prevents foreign producers from challenging measures on the basis of an inaccurate or incorrect determination on levels of profits.[799]

The calculation of declining levels of profit leaves considerable discretion to the European Commission for the determination of injury. Consider the following diagram:

Profit Levels for European Union Industry

| 1988 | 1989 | 1990 | 1991 | 1992 | 1993 |
|---|---|---|---|---|---|
| 30% | 28% | 25% | 23% | 22% | 20% |

The first point is, again, that the period of investigation is critically important for assessing the level of decreased profits. If the period between 1992 and 1993 is selected, the decrease in the level of profit is only 9% but if a five year period is chosen, the decline is 33%

The second point is quite simply what level of profit is acceptable for a particular industry? If profits fall from 30% to 20%, is a 20% profit margin truly an indication of injury since such a profit is, in commercial terms, quite acceptable.

Third, should levels of profit be related to particular areas of commercial activity. For example, a profit level of 5% may be respectable in some sectors but exceptional in others.

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[799] See, for example, Polyester Sheets and Pillow Cases From the United States, O.J. C157/2 (1981).

Finally, should the Commission give consideration to projected loss of profits. For example, if an industry is presently making a profit level of 10% but projects that in five years profit levels will be 25% in the absence of imports but will remain the same if imports are allowed unimpeded access to the market, is there a loss of profit? In other words, is there injury because the potential increased profits have been lost through the effects of allegedly dumped products?

No answers to these questions are provided in the Commission or Council decisions and no challenge has ever been brought in the European Court on calculation of injury based on assessment of lost profits.

**Employment**

Again, employment statistics for the relevant European industry are only used to support other indications of injury.[800]

(d) Other factors

This list of indicators provided in Article 4(2) is expressly declared to be non-exhaustive and hence the Commission may legitimately examine other indicators which may point to injury. This discretion does, however, allow the Commission considerable scope in picking and choosing between indicators which will substantiate a finding of injury.

Factors, other than those expressly identified in the illustrative list, which have been used by the Commission in determinations of injury include the following:

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[800] See, for example, Hydraulic Excavators From Japan, O.J. L58/13 (1985).

(1) The closure of production facilities, whether actual or threatened.[801]

(2) The implementation of a programme for the recovery of an industry from structural over-capacity which is being hampered by imports.[802]

(3) Increased burdens on production aid from European Union sources to a particular sector.[803]

(2) Threat of Material Injury

A determination of a threat of injury can only be made by the European Commission if a particular situation is likely to develop into actual injury.[804]

In making this assessment, the Commission is expressly instructed to take into account three factors:

(a) the rate of increase of the dumped or subsidised exports to the European Union.

(b) the export capacity in the country of origin or export, already in existence or which will be operational in the foreseeable future and the likelihood that the resulting exports will be to the European Union.

(c) in the case of anti-subsidy measures, the

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[801] See, for example, Copper Sulphate From Poland, Bulgaria, Hungary and Spain, O.J. L275/12 (1984); and Potato Granules From Canada, O.J. L116/11 (1981).

[802] Acrylic Fibres From Greece, Japan, Spain, Turkey and the United States, O.J. L114/37 (1980).

[803] Pears in Syrup From Australia, China and South Africa, O.J. L196/22 (1983).

[804] Article 4(3), Council Regulation 2423/88.

> nature of any subsidy and the trade effects likely to arise from that assistance.[805]

The European Commission has rarely made injury determinations based on the threat of material injury and in those cases where the concept has been cited for injury purposes, this has been in tandem with a finding of actual material injury.[806]

The same reluctance does not, however, apply to review proceedings where in a number of cases the European Commission has made an affirmative injury determination based on a finding of a threat of injury in the future.[807]

(3) Material Retardation of the Establishment of a European Union Industry

The Basic Regulation refers to the material retardation of the establishment of a European Union industry without further elaboration. It appears that, in practice, the European Commission rarely makes an affirmative determination on this basis.

Certainly this was the position until recently but, yet again, there has been a change of policy. This occurred

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[805] Ibid.

[806] See Mounted Piezo-Electric Quartz Crystal Units From Japan, South Korea and the United States, O.J. L162/62 (1980); Herbicide From Roumania, O.J. L26/107 (1988), and Methylamine, Dimethylamine and Trimethylamine From GDR and Roumania, O.J. L238/35 (1982).

[807] See, for example, Binder and Baler Twine From Brazil and Mexico, O.J. L34/55 (1987); and Light Sodium Carbonate From Bulgaria, O.J. L131/4 (1989)

in DRAMs From Japan[808] where the Commission relied on the potential retardation in conjunction with that of actual material injury to establish injury. This precedent indicates quite categorically that the Commission will be willing in the future to use this concept to protect hi-tech industries in the European Union which have invested resources in the production of advanced technological products especially electronic and computer based technologies which are suffering as a result of competition from industries outside the European Union.

(B) Definition of European Union Industry

The relevant European Union industry is the producers as a whole of like products to those under investigation or to those of them whose collective output constitutes a major proportion of the total production of the relevant like products.[809]

The European Commission does not conduct a special investigation to determine whether or not a complainant represents all or a major proportion of the producers manufacturing the product. Further, even once scope of the like product has been established as well as the relevant European Union industry, the EU institutions can alter, expand or contract, the scope of the definition even after a provisional ruling has been made.[810]

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[808] [provisional measures] O.J. L20/5 (1990), [1990] 2 CMLR 243.

[809] Article 4(5), Council Regulation 2423/88.

[810] See, for example, Potassium Chloride From Belarus, Russia and the Ukraine [definitive measures] O.J. L308/41 (1992).

(1) Establishing the Relevant Like Product

The determination of the relevant like product is critical to establishing the product range that will be affected by the investigation. A large product range will tend to dilute the effect of any allegedly dumped products by widening the scope of the relevant European Union industry while a narrower range will increase the possibility of establishing injury.[811]

A like product is defined as 'a product which is identical, ie. alike in all respects, to the product under consideration or, in the absence of such a product, another product which has characteristics closely resembling those of the product under consideration'.[812] There is consequently two dimensions to establishing like products:

(a) Identifying the product manufactured in the country of origin of the goods; and
(d) Identifying those products within the European Union which directly compete with the foreign goods.

While the reasoning behind Commission reasoning in like product determinations is often obfuscated, a number of relevant factors can be identified from previous investigations. These include the physical similarities in characteristics, the degree of interchangeability or substitutability, similar purposes, similar technical specifications and similar chemical composition.

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[811] The European Commission has proposed the use of CN Numbers from the Common Customs Nomenclature for establishing like products. The main problem with this approach is that the customs classifications are often larger than the like product definitions would allow.

[812] Article 2(12), Council Regulation 2423/88.

Physical similarities and characteristics

This is an important criterion. As a general rule, products will be considered like products if the differences between the products do not change their basic physical or technical characteristics. For example, car radios, car radios and compact disc players and car radios and audio cassette players constitute a like product because of the basic similarity in features and the technology used.[813]

Interchangeability and substitutability

This factor is dependent on consumer preference. A high degree of commercial interchangeability between the products will be a factor tending to assimilate these into like products.[814]

Similar purposes and functions

The fact that the European Commission requires products to have similar purposes and functions eliminates the possibility that parts and components are considered like products to the finished product.[815] Since the uses of parts differ from the finished products, a general classification is not made.[816] So, for example, raw materials and refined products are generally not considered to be like products if their uses are not

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[813] Radio Broadcast Receivers of a Kind Used in Motor Vehicles From Korea, O.J. L34/8 (1992).

[814] Plain-Paper Photocopiers From Japan, supra note 766.

[815] This practice differs from that of the United States; see text supra Chapter 9.

[816] For example, see Audio Tape in Cassettes From Hong Kong, Japan and South Korea, O.J. L313/5 (1990).

interchangeable.[817]

The exception to this practice is the case of kits and readily assembled products.

Similar technical specifications

A specific product will often have a different range of technical specifications particularly as products are developed through research. Problems therefore arise in distinguishing between different models and types of the relevant products.[818] In assessing whether different models of the same product constitute separate products, the following factors are taken into account:

(a) The requirements of different types of end-users.
(b) The existence of characteristics which allow clear lines of distinction.
(c) The presence or absence of competition between the different classifications of the products.
(d) Whether producers themselves make distinctions between different models, classified into different market segments with regards to production, distribution and acocunting.
(e) The existence of rapid developments and changes in the segmentation between the different models.[819]

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[817] See Potassium Chloride From Belarussia, Russia and the Ukraine [provisional measures] O.J. L110/5 (1992).

[818] See Serial Impact Printers From Japan [definitive measures] O.J. L177/1 (1988).

[819] European Commission, Draft Master Regulation For Injury [internal memorandum] (21/12/92), 6-7.

Factors not taken into account

The European Commission ignores a number of factors when determining like products. These include the following:

(a) The price of the goods is never a factor in like product determinations;
(b) The use of the same production lines is never taken into account in assimilating products.
(c) The quality of a product is rarely used as a like product classification factor.

Observations

The European Court has not yet overruled a Commission or Council determination of either a like product or a European Union industry. This is due to the Court's generally unwillingness to interfere with the margin of discretion enjoyed by both institutions in this process.[820]

(2) Regional Industries Rule

Producers in a regional market may, under special circumstances, qualify as a European Union industry. A regional industry may be found to exist where:

(a) the producers within a market sell all, or almost all, of their production in that market; and
(b) the demand in that market is to any substantial degree supplied by producers of the product located elsewhere in the European

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[820] See Canon Inc v EC Council Case C171/87 [1992] ECR I 1237; [1992] 3 CMLR 30; and Sharp Corporation v EC Council Case C179/87 [1992] ECR I 1635; [1992] 2 CMLR 415.

Union.[821]

This exceptions permits a positive determination of injury even in circumstances in which a certain proportion of the European Union industry in general remains uninjured.

Special conditions exist for establishing injury in a regional market. Injury may be established if:

(a) there is a concentration of dumped imports in the isolated market; and
(b) the dumped products are causing injury to producers in that market.[822]

No specific geographical criteria are specified as relevant to this determination and the Commission has identified regional markets even within individual Member States.[823] Economic, as opposed to geographical, criteria appear the most relevant.[824] There must be a degree of isolation for the particular regional market which cannot be supplied by producers located elsewhere in the European Union.

(3) Related Parties Rule

In certain circumstances, producers in the European Union may be excluded from the scope of the European

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[821] Article 4(5), Council Regulation 2423/88.

[822] See Certain Asbestos Cement Pipes From Turkey [undertakings/termination] O.J. L309/37 (1991).

[823] See for example, Portland Cement From Turkey, Roumania and Tunisia, O.J. C100/4 (1992); and Flat Glass From Turkey, Yugoslavia and Romania, O.J. L51/73 (1986).

[824] Ammonium Nitrate From Belarus, Georgia, Lithuania, Russia, Turkmenistan, Ukraine and Uzbekistan, O.J. C306/2 (1992).

Union industry. The Basic Regulation authorises this restriction in two circumstances:

(a) when producers are related to exporters or importers allegedly engaged in dumping;
(b) when producers are themselves importers of the allegedly dumped products.[825]

These rules, while permitted under the Anti-Dumping Code 1979, are extensively applied by the Commission and are administered in a manner which causes de facto discrimination between the treatment of European companies having foreign subsidiaries and foreign producers having European operations. Naturally, if foreign producers operating in the market are excluded from the scope of the domestic industry the likelihood of establishing injury to the remaining domestic industry increases.

Treatment of European companies with foreign subsidiaries

The treatment extended to European companies with foreign subsidiaries producing goods which are allegedly dumped in the European Union is extremely liberal in order to retain these within the scope of the domestic industry. The general rules are as follows:

(a) EU companies with foreign subsidiaries allegedly engaging in dumping will not be excluded from the scope of the domestic industry unless they have complete control over the general industrial and commercial

[825] Article 4(5), Council Regulation 2423/88.

behaviour of that company.[826]

(b) Producers which do not even manufacture a product wholly within the European Union, will be considered part of the domestic industry if the producer carries out a 'major part' of the total production within the European Union, 'major part' being undefined.[827]

(c) European companies engaging in joint ventures with foreign companies will not be excluded if there is a proportion of EU content in their products.[828]

(d) European companies importing dumped products will not usually be excluded from the scope of the industry.[829]

In fact, the Commission has even disapplied the rule relating to the exclusion of European producers importing allegedly dumped products where the remaining operations of the European producers are considerable.[830] This practice has even been certified by the European Court are permissible in certain circumstances.[831]

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[826] European Commission, Draft Master Regulation For Injury [Internal memorandum] (21/12/92), 3.

[827] European Commission, Draft Master Regulation For Injury [internal Commission memorandum] (21/12/92).

[828] Video Cassette Recorders From Japan and Korea, O.J. L57/5 (1989).

[829] DRAMs From Korea [provisional measures] O.J. L272/13 (1992).

[830] See, for example, Plain-Paper Photocopiers From Japan, O.J. L54/12 (1987); and Capacitors From Japan [definitive measures] O.J. L353/1 (1992).

[831] Tokyo Electric Co v EC Council, Cases 260/85 & 106/86 [1988] ECR 5855, [1989] 1 CMLR 169.

Treatment of foreign producers with European subsidiaries

The European Commission is rigorous in its exclusion of foreign subsidiaries from the scope of the domestic industry and has, in the past, applied the following rules:

(a) Foreign-owned European subsidiaries are excluded absolutely from the scope of the domestic industry.[832]

(b) Parties need not be legally related - such as in a parent/subsidiary relationship - to be excluded.[833]

(c) European companies, whether subsidiaries or not, will be excluded from the scope of the domestic industry if it is shown that they have operated assembly facilities for the purposes of facilitating the importation of the allegedly dumped goods.[834]

The effect of these rules is to exclude any influence of efficient foreign-owned companies which would detract from a possible finding of injury.

The view of the ECJ

Again the European Court will not interfere with the

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[832] See, for example, Ball-Bearings From Japan, O.J. L193/ (1984); and Video Cassette Recorders From Japan and Korea, O.J. L240/11 (1988).

[833] Electronic Scales From Japan, O.J. L80/9 (1984).

[834] Erasable Programmable Read Only Memories (EPROMs) From Japan, O.J. L65/1 (1991); Dynamic Random Access Memories (DRAMs) From Japan, O.J. L193/1 (1990).

institutions' judgments in this determination. As the Court has repeatedly stressed:

'It is for the institutions, in the exercise of their discretion, to determine whether they should exclude from the '[European Union] industry' producers which are related to exporters or importers or are themselves importers of the dumped products. This discretion must be exercised on a case-by-case basis, by reference to all the relevant facts.'[835]

If this policy continues, no challenge will be successful on this basis unless the institution in question has made a manifest error of fact.[836]

(C) Causation

Throughout the Basic Regulation, the need for a causal connection between dumping or subsidisation and injury is emphasized. The Regulation specifically provides that injury caused by other factors such as the volume and prices of imports which are not dumped or subsidised, or contractions in demand which, individually or collectively, also adversely affect the European Union industry, cannot be attributed to the dumped or subsidised imports.[837]

Article 4(1) contains the causation requirement and provides that injury caused by other factors must not be attributed to the dumped or subsidised product. Yet the European Court has agreed with the Commission that it is

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[835] Sharp Corporation v EC Council Case C179/87 [1992] ECR I 1635; [1992] 2 CMLR 415.

[836] See also Gestetner Holdings Plc v EC Council and Commission Case C156/87 [1990] ECR 828, [1990] 1 CMLR 820.

[837] Article 4(1), Council Regulation 2423/88.

possible:

'to attribute to an importer responsibility for injury caused by dumping even if the losses due to dumping are merely part of a more extensive injury attributable to other factors.'[838]

The question is what degree of dumping will constitute 'a part' of the injury? At least at the most basic level, the dumped imports, if taken in isolation, must contribute to the material injury sustained. Yet the Commission and Council often acknowledge other factors have impinged to cause injury without apportioning degrees of injury to particular factors.[839] In fact, it is a rare occasion when the Council or Commission refrain from finding actionable dumping because of a finding that the injury to a European Union industry was caused by extraneous factors.

The four main factors examined by the Commission to establish causation are:

(1) Parallelism - cause and effect are considered simultaneously.
(2) Price elasticity - this requires the identification of the relationship between price changes and increase/decrease in supply.
(3) Transparency of injury.
(4) The existence of price undercutting, if any, attributable due the dumped products.

Another criticism of the Commission's assessment of causation has been the disjointed investigations into

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[838] Canon Inc v EC Council Cases 277 & 300/85 [1988] ECR 5731, Para. 62.

[839] See Asbestos Cement Pipes From Turkey O.J. L309/37 (1991).

dumping and injury. For example, if the period of investigation extends to five years prior to the initiation of the investigation and the investigation into dumping takes into account the one year period prior to the initiation, trends will be taken into account which have not been affected by the alleged dumping. If these two periods are not the same, has injury over the investigation period been caused by the dumping? However, the Commission claims that a longer period is necessary to properly assess injury to the domestic industry.

(E) Concept of Community (European Union) Interest

Before provisional or definitive anti-dumping measures are imposed, the Basic Regulation requires the Commission and the Council to confirm that 'the interests of the [European Union] call for intervention'[840] This factor is taken into account only by the European Union authorities and the Canadian administering agencies and by no other state, including the United States, even although Article 8(1) of the GATT implores the authorities of signatories to consider whether or not to impose anti-dumping duties in the circumstances of each case.

As a general principle, the European Union institutions have equated the concept of European Union interest to that of EU producers. In the majority of affirmative cases (both preliminary and definitive determinations), the requirement of considering EU interest is settled with a brief statement that, in view of the economic situation facing the EU industry, it is in the interest

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[840] Articles 11(1) & 12(1), Council Regulation 2423/88.

of the EU that measures be adopted.[841]

The interests of European producers which are taken into account in making this assessment are numerous and, in the past, have included the following:

(a) The need to maintain a viable European industrial basis for the production of the goods.
(b) The need to safeguard employment in the sector.
(c) The requirement of avoiding a dependency of foreign imports for the production of later-stage products.
(d) The protection of research and development and to maintain technological innovation.

The European Court has protected the discretion of the European Union institutions in making this assessment.[842]

The European institutions effectively ignore a plethora of other factors which are also relevant in assessing whether the true interests of the European Union are best served by the adoption of measures. The following interest groups are also important but effectively considered irrelevant in most cases:

(a) Industrial processors and users of the

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[841] See, for example, Paint, Distemper, Vanish and Similar Brushes From China, O.J. L46/48 (1987); Copper Sulphate From Yugoslavia, O.J. L113/6 (1986); and Clogs From Sweden, O.J. L32/2 (1986).

[842] Canon v EC Council, Cases 277 & 300/85 [1988] ECR 5731, [1989] 1 CMLR 915.

products[843]

(b) Service industries such as distributers, etc.[844]

(c) Consumers[845]

Macro-economic considerations which are also important include[846]: (a) competition policy; (b) balance of trade considerations and balance of payments by sector; (c) monetary policy; (d) industrial policy; (e) foreign policy[847]; and (f) national security considerations. With the exception of competition policy, where the European Court has recently compelled the Commission to take this factor into account in assessing injury[848],

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[843] See, for example, Sensitized paper From japan, O.J. L124/45 (1984); Oxalic Acid From Taiwan and South Korea, O.J. L72/14 (1988); Polyester Yarn From Mexico, South Korea, Taiwan and Turkey, O.J. L151/44 (1988). On exception was DRAMs From Japan, O.J. L193/1 (1990).

[844] Dot-Matrix Printers From Japan, O.J. L130/32 (1988); and Plain-Paper Photocopiers From Japan, O.J. L54/28 (1987).

[845] Typifying the views of the Council and Commission towards the interests of consumers, the Council has stated that 'there can be guarantee that the consumers will continue to benefit from price advantages resulting from unfair competition [and] a possible limited disadvantage to consumers with respect to the higher prices of VCRs caused by the imposition of anti-dumping duties will be outweighed by the benefits of safeguarding employment and maintaining a foothold in this important technological sector.'; Video Cassette Recorders From Japan and Korea, O.J. L240/15 (1988).

[846] European Commission, Anti-Dumping Measures - Public Interest Test - Discussion Paper (Internal Document) (5/12/92).

[847] See, for example, Urea From Austria, Hungary, Malaysia, Roumania, United States and Venezuela, O.J. L235/12 (1988); and Deep Freezers From the USSR, O.J. L6/3 (1987). For an exception to this rule, see Atlantic Salmon From Norway, O.J. L69/32 (1991).

[848] Extramet Industrie SA v EC Council, Case 358/89 [1993] 2 CMLR 619.

these macro-economic considerations are also ignored in assessing European Union interest.

In fact, the requirement of assessing European interest rarely prevents the adoption of measures.[849] This factor has, however, occasionally caused the Council to decide the form which the relief is granted[850] or, very occasionally, to reduce the levels of duties to be imposed.[851]

The concept of European Union interest as applied in anti-subsidy investigations differs slightly from that in anti-dumping cases although the Basic Regulation provides no indication of why this is the case. The main reason for the divergence of approach is probably that in anti-dumping cases, the relevant offending practice is carried out by private parties whereas in anti-subsidy cases governments are directly involved since they provide the relevant assistance. Thus, in anti-dumping investigations, the scope of relevant factors is restricted to the fact and circumstances which bear directly on the period during the investigation. This approach is considered not to be appropriate in anti-subsidy investigations.

The involvement of governments brings an international diplomacy element into the Commission's considerations. For example, justifying its policy of accepting undertakings whenever submitted by governments in anti-

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[849] See the comments in J.H.J. Bourgeois, "European Community Anti-Dumping Enforcement - Second Generation Issues", (1985) Fordham Corporate Law Institute 563.

[850] See Hydraulic Excavators From Japan, O.J. L176/4 (1985); Pentaerythritol From Canada, O.J. L13/3 (1985), corr O.J. L20/46 (1985).

[851] Unwrought Nickel From the USSR, O.J. L159/43 (1983).

subsidy investigations while subjecting private undertakings in anti-dumping investigations to close scrutiny, the Commission has commented that the risk of having a subsidy which has been removed in the course of an investigation subsequently re-introduced is not the same as the subsequent re-appearance of dumping.[852]

In considering the non-political elements in determining the European Union interests in applying such duties, the Commission weighs two opposing sides of an equation against each other.

In favour of intervention are factors such as the degree of injury sustained by the European Union industry, whether the continued viability of the industry is seriously affected by the imports, the importance of the European Union industry as a supplier of materials to other industries, the labour force involved and the effect on research and development expenditure.

Against the imposition of duties are the impact on prices for consumers of the goods and the interests of the European Union industries, if any, which use of the goods as inputs for further finished products.

**(4) Observations**

The lasting impression from an examination of the substantive anti-dumping and anti-subsidy rules of the European Union is one of vagueness and mild astonishment at the degree of discretion exercised by the institutions at all stages of the processes. This discretion has been protected from interference by the European Court which has acted as a willing accomplice

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[852] Soya Meal from Brazil, O.J. L106/91 (1985).

in shielding EU anti-dumping policy from rigorous international scrutiny. This veil has only been pierced by the GATT panel reports which often render a judgment in conflict with many of the substantive rules and administrative practices approved by the European Court.

Hence, the many changes in policy direction which operates against the interests of the foreign manufacturers and producers have remained unscrutinised particularly if the standard against which judicial review occurs is purportedly the applicable international rules.

Despite the exhortations and preachings of the European Commission, there is little doubt that the codifications which occurred in 1984 and 1988 introduced new concepts which fundamentally altered the anti-dumping policy of the European Union. These changes have been complemented by a series of administrative policy switches which have the overall effect of easing the requirements which European Union industries must satisfy in order to obtain relief in the form of anti-dumping duties or undertakings.

The final conclusion is that the anti-dumping policy of the European Union is not, except in the most broad terms, consistent with the obligations contained in the Anti-Dumping Code. At their very heart, these processes are deficient because they allow artificial dumping margins to be created by asymmetrical deductions to export prices and normal values. This is compounded by the fact that these values are very rarely compared at the same level of trade which distorts the size of the dumping margin eventually found.

A review of the anti-dumping law of the European Union

also indicates that this regime is more policy-oriented and ad hoc than the rule-based legalistic approach of the United States authorities. The ample discretion conferred on the institutions is in itself evidence of this phenomenon. The result is a more malleable system than that which operates in the United States. For example, anti-dumping measures can be directed against particular states without any fundamental change in the structure of the system. Thus, between 1985 and 1990, Japan was the target of much of these measures in part due to the trade imbalance maintained by the European Union with this country. Since the late 1980s and into the early 1990, China and Korea have been singled out for heavy handed treatment. For 1992 onwards, the indications are that the states of Eastern Europe and the former Soviet Union will be the subject of the majority of measures. This ability strongly suggests that the European Union is manipulating its anti-dumping laws in a manner inconsistent with both the terms and spirit of the Anti-Dumping Code.

When the actual detail of the European Union anti-dumping law and practice is examined, there is little doubt that international obligations are exerting little or no influence on this aspect of the Union's external trade policy. In the calculation of export price, deviation exists in the form of excessive deductions from actual price, excessive allowances in the construction of export prices, manipulation of levels of profit, the operation of the duty as a cost rule and the practice of sampling. The determination of normal value also reveals abuse in the operation of the 'ordinary course of trade criteria', the sufficient volume threshold and again in constructed values.

However, it is in the adjustments to the normal value and export prices that the degree to which abuse has

proliferated becomes clear. The actual process of comparison is inherently flawed towards the creation of artificial dumping margins.

Other practices exist in the twilight of legality under the GATT regime. In these cases, no black and white answer to the question of abuse can be rendered because it is not the actual practice which constitutes abuse but the excessive implementation of such practices which constitutes illegitimate protectionism contrary to the Anti-Dumping Code. For example, the selection of analogue countries under the special rules for non-market countries became so arbitrary that even the European Court felt bound to break its avowed policy of abstention from intervention to relieve foreign importers from the unfair effects of this practice.

Similarly, the failure to take into account negative margins of dumping may not be a clear cut violation of the terms of the Anti-Dumping Code but its overall effect is invariably to inflate margins of dumping to the detriment of foreign producers. This is an administrative practice which is neither strictly legal or illegal but which at least impinges on the conscious of objectivity and impartiality and is certainly not fair play.

This conclusion leads logically to the question of the degree to which the European Union has abused its anti-dumping laws to erect a Fortress Europe based on the protection of the internal market by a wall of duties (in the form of the Common Customs Tariffs) and specific mechanisms to counter the importation of certain products or the products of particular countries. This is not a new concern. As early as 1988, Brian Hindley, the noted economist, observed:

'The architect's problem is how to construct a Fortress Europe that has high walls and heavy cannons pointing in one direction but not the other. That is the problem solved by the manipulation of anti-dumping measures.'[853]

In the achievement of this overall objective the rules of the Anti-Dumping Code have been subsumed to a higher ideal. International rules have been ignored and practices devised to take advantage of lacuna in the rules. Once the fine detail to anti-dumping law is examined closely, the normative influence of the international rules becomes progressively less easy to identify.

Of course, in their defence the European Union institutions will point to the two jewels of trade liberalism allegedly enshrined in the European Union's anti-dumping policy, namely the lesser duty rule and the European Union interest rule. Few countries, it is true, have adopted these devices in their anti-dumping laws and, at least prima facie, both are evidence of the pro-free trade attitude of the European Union's anti-dumping policy.

The reality is somewhat different. The lesser duty rule may reduce the average levels of duties imposed on foreign imports but traditionally the anti-dumping duties levied by the European Union have been extremely high, in many cases exceeding fifty percent. Even if the duty is restricted to the margin of injury, the final duties imposed (or undertakings required) are a cause of concern. Further, the method by which injury is assessed - through measurement of the degree of price undercutting or underselling - is itself a measure of value. By setting duties at the margin of injury, the

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[853] Financial Times, January 6, 1989.

European Union is constructing a price at which the sale of products will provide a 'reasonable' level of profit to European Union industries. This means of measurement implicitly means that margins of injury will be higher than if other factors were examined such an increasing market shares or production.

The European Union interest rule is also vulnerable to criticisms which reduce its credibility. In barely 5% of investigations is the concept seriously considered and in even less cases are duties not imposed because of this factor. Further, the interests considered are not those of the European Union consumer or users of the product, but political interests (in the case of the EFTA states) and those of European industries. Even the opposition of specific Member States cannot constitute a sufficiently powerful interest to prevent the adoption of measures under the European Union interest rule.

The fact that European Union anti-dumping policy is so inconsistent with the Union's international obligations provokes greater concern when it is remembered that over 95% of the European Union's measures of administered protection take this form. The use of anti-subsidy measures, safeguard measures and measures under the New Commercial Policy Instrument are the exception rather than the rule. At least in the case of anti-subsidy measures, their lack of use by the European Union stems from the perspective of the Union towards the nature of these measures and the consequence of their use on a widespread basis.

While the European Union has not made aggressive use of anti-subsidy measures in the past, there is no guarantee that this policy will not change especially since the Uruguay Final Act contains many rules which the European Union wished to see regulate subsidies at the

international level. In any event, the small number of anti-dumping cases should not be mistaken for a benevolent attitude on the part of the European Union institutions. The primary motivation for this policy was to secure international objectives. Now these have been attained, at least to a considerable degree, a more active role might be conferred on these measures.

From the analysis conducted above of the existing anti-subsidy rules again the impression from a review of the European Union's anti-subsidy laws is that of general vagueness. The institutions have far too much discretion in the application and formulation of the anti-subsidy policy. This discretion is all the more distressing since the substantive rules remain at an unsophisticated level and their lack of use has resulted in a lack of refinement. For example, the specificity test applied by the European Union has not been fully developed and has been applied in a haphazard fashion. The endorsement of the test of de facto specificity does hint at the evolution of sophistication in this perspective. Nevertheless, the rules regulating quantification and allocation of benefits (over both time and units) are both primitive and unrefined.

However, even the present policy of the European Union towards anti-subsidy measures has caused distortion in the overall structure of the European Union's commercial defence system. The greatest distortion must be the spill-over that refraining to use such measures has caused in the anti-dumping regime. Anti-dumping actions are raised when the proper recourse should be to anti-subsidy procedures. This is a dangerous development not least because anti-dumping measures are not the proper form of relief against foreign subsidisation practices. Further, the application of anti-dumping measures in such circumstances must be suspect.

The wisdom of the pursuit of the strategy of minimising the risks to the European Union's own freedom to introduce subsidy programmes at the international level by refraining from anti-subsidy measures must also be called into question. Its state aid policy operates on clearly distinct principles from its international posture. This implies that, while one set of rules is adequate for internal regulation another, completely different set of principles is adequate for the relationships between the European Union and third states.

Both anti-dumping and anti-subsidy measures require, as a prerequisite, the establishment of material injury to a European Union industry although in reality this requirement has only been refined relative to anti-dumping measures in EU practice. The rules and procedures for establishing this element are so obscure that one European Commission official, on an off-the-record basis, stated to the writer that 'injury can be found whenever the European Commission wishes injury to be found'. In effect, the material injury requirement acts as no real restraint in an anti-dumping investigation.

Here, the influence of the international standards is at its weakest. The rules enshrined in the Anti-Dumping Code are far too vague to permit regulation and the process of discovering injury is to complex and obscure that arbitrary behaviour is rife. Policies and practices are developed by the EU institutions for the determination of material injury in a void of international regulation.

Not only can the EU institutions select the most appropriate periods for investigation of injury to a European industry. They can also find injury by relying

on a host of individual factors and indicators. The discretion to pick and choose between volumes of import, the performance of European Union industries and the price of goods in the European Union as indicators of injury gives the institutions and unchallengeable discretion to find injury.

While the European Commission would claim that the process for determining injury is compatible with the terms of the Anti-Dumping Code again it is at the periphery of legality that he greatest abuses are committed. The over-emphasis in investigations on the factors of price undercutting and price underselling, the cumulation practices and the identification of EU industries through application of the related parties rule and the regional industry rule, points to abusive behaviour.

The conclusion to this part of the investigation is therefore self-apparent. The European Union applies its anti-dumping measures with little regard to the international standards and this approach has not been objected to by the European Court. Here, the breakdown of the normative influence of international law on the behaviour of a state, in this case the European Union, is at an apogee.

## 11 European Union - Asymmetry of Procedural Rights in Anti-Dumping and Anti-Subsidy Investigations

As we have seen, the European Union has traditionally made little use of its anti-subsidy measures and in practice anti-dumping measures are by far the most significant instrument in its commercial defence arsenal. Consequently, the emphasis of this chapter will be on the bias in the procedural rights and duties in anti-dumping investigations during the period before 1995. In any event, the procedural similarities between the two are sufficiently close as to allow the private rights of interested parties to be equated.

From a procedural point of view there are significant points of departure from United States practices as regards European Union anti-dumping and anti-subsidy matters. Of course, it cannot be said with any degree of certainty that one system is fairer or more compatible with international obligations than the other. In some instances, European Union procedures offer a greater degree of protection than the counterpart American provisions but in other areas the United States system prevails.

In any event, the process of comparison is not the principal issue presently being discussed. Rather, the main purpose of considering these procedural rules is to ascertain the degree to which the European Union's procedures were compatible with its international obligations imposed prior to the conclusion of the Uruguay Round and whether these rules equitably took into account the need to prevent discrimination between the rights of European Union producers and foreign producers. In other words, the main issue is where the balance between these interests is struck having regard to the international obligations of the European Union.

The relevant principles applied in anti-dumping investigations were also contained in Council Regulation (EEC) 2423/88[854], as interpreted by the Council and the Commission in the administration of anti-dumping policy and, more significantly, by the European Court in the judicial review of the findings of these institutions. Of course this regulation has now been replaced with a new measure in accordance with the terms of the 1994 Anti-Dumping Code[855] but this legislation is not the subject of this analysis since it was enacted outside the period of investigation which is presently being examined. No attempt has been made to evaluate the compatibility of the 1994 Basic Anti-Dumping Regulation with the terms of the 1994 WTO Anti-Dumping Agreement

However, the material sources of European Union anti-dumping procedural law were not exclusively confined to the basic regulation. Not all procedural rights and duties of interested parties, and European Union institutions for that matter, were specified in this legislation. This deficiency was expressly acknowledged by the European Court itself which warned that, for procedural safeguards:

> '[A]ny action taken by the European Union institutions must be all the more scrupulous in view of the fact that, as they stand at present, the rules in question do not provide all the procedural guarantees for the protection of the individual which may exist in certain national

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[854] O.J. L209/1 (1988). Note that for basic iron and steel products the relevant legislation is Commission Decision 2424/88/ECSC, O.J. L209/18 (1988).

[855] Council Regulation (EC) 3283/94, O.J. L349/1 (1994).

legal systems'[856]

Considerable responsibility was therefore imposed by the European Court on the European Commission to develop an appropriate and effective framework for the protection of individual private rights. The evolution of this system was largely been based on the concept of general principles of law.[857] General principles of law have been declared to be 'a fundamental part of the European Union legal order'.[858] In the opinion of the present writer the Commission failed to discharge this obligation effectively.

The unwritten nature of these rights had positive and negative aspects. It provided a degree of flexibility in the process of formulating procedural safeguards but, at the same time, the element of flexibility must be weighed against the uncertainty caused by the failure to state the exact rights of private individuals in any concrete form. This problem is particularly acute if the investigating authorities take advantage of these uncertainties to render arbitrary or capricious rulings.

### (1) The Role of the European Union Institutions in the Anti-Dumping Process

As is the case with the vast majority of powers exercised by the European Union, the Council of Ministers has reserved the majority of important powers

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[856] Al-Jubail Fertilizer Company (Samad) v EC Council, Case 49/88 [1991] 3 CMLR 377.

[857] See, for example, A. Egger, "The Principle of Proportionality in Community Anti-Dumping Law", (1993) 18:5 EL Rev. 367.

[858] Ibid.

to itself in the area of anti-dumping. Summarised, these are as follows:

(1) The Council approves international agreements entered into between the European Union and other states on anti-dumping matters.
(2) The basic regulations defining the European Union's anti-dumping law and procedure are periodically adopted by the Council when amendments are required.
(3) The Council retains exclusive competence to impose definitive measures and to order the collection of provisional duties.[859]

In addition, the Council influences and controls many of the activities of the Commission by techniques such as the use of advisory committees and the delimitation of the Commission's powers in international negotiations by means of strictly defined negotiating mandates.[860] The use of these, and other means of influencing the Commission, ensures that the political content of anti-dumping policy is not neglected.

The actual administration of the basic anti-dumping regulation is handled by the European Commission which also has a certain amount of delegated legislative authority to enforce European Union anti-dumping policy. It is the Commission that is the agency responsible for conducting investigations into allegations of dumping.[861]

In contrast to the position in the United States, one agency has responsibility for all aspects of the

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[859] Article 12(1), Council Regulation 2423/88.

[860] See text, supra pp.435-441.

[861] Article 7, Council Regulation 2423/88.

investigation, namely into dumping, injury, causation and European Union interest.[862] Responsibility for the investigation of anti-dumping complaints places a great deal of authority in the hands of the Commission. Not only does the Commission examine the complaint in detail, but it is also responsible for verifying the facts alleged in the complaint, conducting its own investigation, hearing all interested parties and calculating whether or not dumping or subsidisation exists. The Commission also has extensive legislative powers to impose provisional measures, recommend the acceptance of undertakings[863] and, in certain cases, adopt regulations reviewing measures.

This centralisation of power has given rise to charges

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[862] Throughout the 1980s, the Commission staff engaged in the investigation of anti-dumping complaints has significantly increased. In 1980, the Commission had less than twenty full-time staff engaged in the administration and enforcement of anti-dumping measures which was increased to 26 in 1986; European Commission, Ninth Annual Report of the Community's Anti-Dumping and Anti-Subsidy Activities, SEC(91) 974 Final. By 1990, the number of personnel involved in the administration of anti-dumping policy had risen to 108, a level which has remained consistent throughout the early part of this decade. This contrasts with the position in the United States were approximately 200 staff are employed in the ITA on anti-dumping investigations and a further 500 in the International Trade Commission, although not all the latter staff are engaged exclusively in anti-dumping investigations. The Commission has recently proposed an increase in the number of anti-dumping staff to 146 investigators, a proposal which was accepted by the Council of Ministers, subject to budgetary constraints.

[863] The power of the Commission to accept undertakings from foreign exporters are stated in the Basic Regulation to be wholly within the scope of the Commission's discretion; Article 10, Council Regulation 2423/88. However, where objections are raised by Member States, the Commission submits a proposal to the Council of Ministers for the approval of the undertakings; see Artificial Corrundum From the Soviet Union, Hungary, Poland, Czechoslovakia, China, Brazil and Yugoslavia, O.J. L275/25 (1991).

that the Commission is the de facto judge, jury and prosecutor in anti-dumping investigations.[864] The argument that this centralisation of authority results in the more efficient processing of complaints is more or less irrelevant from the point of view of safeguarding rights and duties in the process. It is more pertinent to determine if this concentration of authority is adequately balanced by an appropriate body of objective administrative procedures and principles.

**(2) Liberal Standing Requirements**

(A) European Union Agencies and Member States

In theory at least, an investigation may be commenced at the instigation of the Commission. There is no express provision in the basic regulation allowing such a right but the fact that the basic regulation allows the Commission to proceed with an investigation even if a private complaint is withdrawn supports the view that a private complaint is not a prerequisite to commencing an investigation.[865] There are however no reported instances of investigations being carried out without a complaint.[866] Naturally, this is not to say that such investigations are precluded in the future.

The Commission has, however, self-initiated reviews of

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[864] See I. V. Bael, "Procedural Aspects of EEC Anti-dumping Enforcement", A Paper Presented at the Annual Conference of the College of Europe, Brugges, September 14, 1989, 9.

[865] Article 5(4), Council Regulation 2423/88.

[866] European Commission, Annual Report on the Community Anti-Dumping and Anti-Subsidy Activities, COM (90) 229 Final (1990), 27.

cases based on facts believed by the Commission to exist. For example, in one case, a review of anti-dumping measures was requested by a European Union industry against producers from one of seven countries involved in an investigation.[867] The complainers made no allegations justifying a review of the position of producers in the other six countries. Nevertheless, the Commission was dissatisfied by the terms of the reference and extended the review to the producers from all the countries involved in the original investigation.[868]

Member States do not need to lodge complaints with the Commission to initiate an investigation. If a Member State is in possession of sufficient evidence of both dumping or subsidisation and injury to a European Union industry, it may communicate this evidence to the Commission as the basis for opening an investigation.[869]

(B) Private Parties

An application for an investigation by the Commission into allegations of dumping or subsidisation may be made by any natural or legal person as long as the applicant is acting on behalf of a European Union industry which considers itself injured or threatened by dumped (or subsidised) imports.[870] The requirements for private

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[867] Ferro-Silicon From the USSR, Iceland, Norway, Sweden, Venezuela, Yugoslavia and Brazil, O.J. C115/2 (1992).

[868] See also Urea From Czechoslovakia and the Former USSR, O.J. C87/7 (1993) [initiation review]; and Potassium Chloride From Belarus, Russia and the Ukraine, O.J. C175/10 (1993) [initiation review].

[869] Article 5(6), Council Regulation 2423/88.

[870] Article 5(1), Council Regulation 2423/88.

complaints are identical for both anti-dumping and anti-subsidy investigations save that the need to supply evidence of subsidies is substituted for that of dumping in anti-subsidy complaints.

Prima facie, it is an essential prerequisite to establish standing that the complainer must make the complaint on behalf of a European Union industry. European Union industry is defined as the producers as a whole of the like product or those of them whose collective output of the products constitutes a major proportion of the total European Union production of the products.[871] The question of standing is therefore decided in relation to two primary factors, first, the economic size of the European Union industry and, second, the combined size of the producers represented in the complaint.

This requirement has not proved to be a significant factor in controlling complaints from groups not truly representative of a Union industry. This is because the requirement may be manipulated when complaints are filed and the Commission has, by and large, condoned such practices. This manipulation stems from the fact that the percentage of the collective share required to constitute a major proportion has not been defined. The Commission has informally set the threshold at around approximately 50% of production.[872] The Commission defends this practice on the basis that the regulation refers only to a 'major proportion' of the European industry which does not necessarily imply a majority

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[871] Article 4(5), Council Regulation 2423/88.

[872] This has not always been the relevant standard and in cases in the early 1980s the Commission initiated investigations after receiving petitions from parties representing considerably less than this proportion of the relevant industry.

share.

Nevertheless, the Commission has, in the recent past, accepted complaints from parties representing less than 50% of the European Union industry. For example, in Bicycles From China[873], after the Commission sent questionnaires to the producers listed in the complaint, which is in conformity with its normal practice, the proportion of the EU producers responding amounted to less than 40% of the total EU production of bicycles. Additional questionnaires were therefore dispatched to other producers in order to widen the scope of the representation which raised the level of representation to 54.3%. Had the Commission not adopted this course of action, the complaint would have been submitted by a minority of European Union producers. Quite clearly the European Commission deliberately facilitated in stimulating support for the complaint in circumstances where such support did not exist.

On the face of it, the requirement would appear to be a significant impediment to the lodging of a complaint by one European Union company, or a small group of companies. But, in fact, there are a number of ways in which single companies, or groups of companies, have circumvented this requirement.

The first technique used by European Union industries to reduce the size of the relevant industry for the purpose of a complaint is to define the relevant product as narrowly as possible. Thus, in one case, a single British company successfully lodged a complaint against nine Japanese producers by defining the relevant product in the complaint to such a degree that the Commission accepted that it was the only European Union producer of

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[873] O.J. L228/1 (1993) [definitive].

that specific product.[874] The company was ultimately successful in procuring the adoption of duties.[875] If by this means a single company, or small group of companies, can establish that they are collectively the main producers of a specific product, this requirement becomes nothing more than a technicality.[876]

In another instance, the Commission permitted the opening of an investigation into allegations raised by a Belgian producer that foreign imports were limiting its sales, thus threatening injury, not in the Belgian market but in the Italian market.[877] The complaint was eventually held to be unfounded both as regards the allegation of threat of injury and the claim that threats of retaliation in the form of price undercutting had been made to the Belgian producer by the Japanese producer.[878] But, the opening of an investigation into an allegation of dumping is an effective harassing tactic used by some European industries. The fact that the investigation proceeded at all in these circumstances and on the most spurious grounds gives rise to concerns.

A further means of circumventing the requirement is the practice of excluding the non-indigenous European producers from the definition of the relevant industry.[879] In other words, a distinction is drawn

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[874] Thermal Paper From Japan, O.J. C16/3 (1991).

[875] Thermal Paper From Japan, O.J. L270/15 (1991).

[876] See also Unwrought Manganese From China, O.J. C15/12 (1992).

[877] Mica From Japan, O.J. C323/3 (1988).

[878] Mica From Japan, O.J. L284/45 (1989).

[879] The basic regulation permits the Commission to exclude related importers/exporters from the scope of the European Union industry for the purposes of

between European Union producers of goods and non-European Union producers of the same goods which are subsidiaries of foreign companies.

This method of establishing the relevant industry was noticeably pernicious in the recent investigation into small screen colour televisions sets.[880] In this investigation the Commission went much further and excluded all non-European Union companies, even if legitimate subsidiaries, producing the relevant product and not only those companies from the country under investigation, but also from other foreign countries, most notably Japan. The eventual result was that the European Union industry was defined on the basis of producers of solely European origin.

On the basis of this distinction, the Commission found that the complainers represented a major proportion of European Union production. In fact, had the Commission made this assessment in terms of true total European Union-origin production - ie. products manufactured in the European Union by both European Union and non-European Union producers - this assessment would have been significantly different and the complainers might have been denied standing.

On the other hand, the Commission will rarely exclude from the scope of the relevant industry a European company which imports allegedly dumped products. For

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investigation. Producers are excluded from the scope of the Community industry where (a) they are related to exporters or importers of the dumped products; and (b) they are themselves importing the dumped products; See Electronic Scales From Japan, O.J. L80/9 (1984).

[880] Small Screen Colour Televisions Sets From Korea, O.J. L314/1 (1989) [provisional]; O.J. L107/56 (1990) [definitive].

example, in Capacitors From Japan[881], the Japanese exporters were unsuccessful in having Phillips, the European electrical giant, excluded from the scope of the relevant industry even although this company had imported dumped products for its own consumption. Hence, the European Union industry will not include subsidiary operations of foreign companies allegedly engaged in dumping but will encompass European companies willingly importing dumped products while at the same time complaining against these practices. At the very least, any injury incurred by such companies should be considered self-induced but the Commission does not take this factor into account in this investigation.

Another common means of restricting the number of representatives of a particular industry required for a complaint is by taking advantage of the regional industry rule. Complainers are permitted to lodge petitions if they can establish that they represent a regional industry. In practice, this exception often permits national industries to lodge complaints. For example, in one case a complaint was accepted by the Commission on behalf of a Spanish organisation of cement producers.[882] The complainers claimed to represent the totality of Spanish producers of cement. The Commission accepted that the producers satisfied all the conditions required for proving the existence of a regional industry, namely:

(a) the producers sell virtually all their production in a single identifiable market, Spain;
(b) the demand for the product in Spain is not

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[881] O.J. L353/1 (1992).

[882] Portland Cement From Turkey, Romania and Tunisia, O.J. C100/4 (1992).

substantially supplied by producers outside the European Union; and

(c) the dumped products were concentrated in that particular market.

This rule confers on national associations or groups of producers capacity to initiate complaints, thereby diluting the requirement that petitioners must satisfy the Commission that they represent a majority of European Union producers. Yet, complaints are frequently made on this basis.[883] In Ammonium Nitrate From Belarus, Georgia, Lithuania, Russia, Turkmenistan, the Ukraine and Uzbekistan[884], the Commission accepted the arguments of a UK producer that the United Kingdom alone could be considered a regional industry. This practice has the effect of allowing complainers to break done the European Union into isolated regional markets based on the demarcation between Member States.

In addition, the three requirements for establishing regional industry are fundamentally inconsistent with the concept of the single internal market. The requirement that the region is not supplied by producers outside the European Union does not exclude the possibility that producers inside the European Union may supply the area under the principle of the free movement of goods. If there is such a flow of goods inside the European Union, there is no logical reason why a particular region should be considered sufficiently isolated to grant it a particular status.

Finally, the Commission has itself contributed this circumvention by reviewing complaints to ensure that the

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[883] See also Portland Cement From Yugoslavia, O.J. L16/34 (1991); and Certain Asbestos Cement Pipes From Turkey, O.J. L309/57 (1991).

[884] O.J. C306/2 (1992).

complainers have identified the correct definition of the relevant product to allow standing. Where a European industry defines a product in terms too broad to allow it standing, the Commission has, on occasion, redefined the scope of the relevant product. To quote one example, in Certain Polyester Yarns From Taiwan, Indonesia, India, Turkey and Korea[885], the complaint defined the relevant product as polyester yarns. After examining the complaint, the Commission excluded sewing thread from the scope of the relevant product because a major proportion of the European Union sewing thread industry was not represented in the complaint. The application was allowed to proceed on the basis of the products redefined in the complaint.

These exceptions make a mockery of restrictions intended in the standing requirement. One possible means of emasculating manipulations of relevant product descriptions would be to require complainers to identify the relevant product by means of the CN Code Number a requirement which has been used by the Commission in a small minority of cases.[886]

### (3) Petition Requirement Thresholds

Investigations are meant to be commenced only if a prima facie case has been made of the existence of dumping and injury. On receipt of a complaint, the first task of the Commission is to verify that the allegations contained in the complaint are supported by factual and

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[885] O.J. L276/7 (1991).

[886] See, for example, Outer Ringers of tapered Roller Bearings From Japan, O.J. L199/8 (1992); Deadburned (Sintered) magnesia From China, O.J. L282/15 (1992); and Electronic Weighing Scales From Singapore and Korea, O.J. L112/20 (1993).

statistical evidence. This initial verification is carried out on very broad terms and, at this stage, only the general terms of the compliant are examined.

A complaint must contain 'sufficient evidence' of the existence of dumping, injury and causation.[887] If a complaint contains sufficient evidence of these factors, the decision on initiating the investigation is mandatory. The Commission has no discretion at this point to terminate the complaint without conducting a formal investigation.

It is difficult to determine how many complaints become investigations after this initial vetting stage. The European Commission will only comment that, at this stage 'a very large number of potential complaints are withdrawn'.[888] The only statistics available in this connection are those provided to the GATT Secretariat as part of the Trade Policy Review Mechanism.[889] These statistics provide the following data:

| | 1985 | 1986 | 1987 | 1988 | 1989 |
|---|---|---|---|---|---|
| Complaints | 62 | 46 | 75 | 57 | 38 |
| Investigations | 36 | 24 | 39 | 40 | 27 |

No reasons are provided for rejecting complaints, for

[887] Article 5(2), Council Regulation 2423/88.

[888] European Commission, Outline of Anti-Dumping Proceedings (1989), 1.

[889] GATT, Trade Policy Review Mechanism EEC (Second Report) (1993), 76.

example, because they are inchoate or not substantiated.[890] Nor is any indication given of the number of complaints withdrawn for other reasons.[891] Thus, there is no means of verifying the evidential standards applied by the European Commission at the preliminary investigative stage.

It is, however, evident that, of those complaints admitted by the Commission, a considerable number of them are successful in procuring preliminary or definitive measures after investigation. Again the Commission claims that this is because of the rigorous vetting procedure which eliminates unjustified or inaccurate claims, but without adequate information, this is also a difficult claim to corroborate.

The European Court of Justice has commented recently on the sufficiency of evidence standard applied by the European Commission.[892] In particular, it has observed that the evidence required in a complaint need not necessarily relate to dumping on the part of all the undertakings under investigation. Thus, the Commission is entitled to open an investigation into dumping even although there is no evidence of dumping from each of the undertakings named in the complaint as long as there is sufficient evidence of dumping of products originating in third countries.

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[890] Alternatively, if 'profound changes' occur in the market place, the EU industry may withdraw the complaint; Certain Merchant Bars and Rods of Alloyed Steel From Turkey [termination] O.J. L35/12 (1992).

[891] In fact, EU industries occasionally withdraw complaints themselves before the investigation has been concluded; see Audio Tapes on Reels From Japan [termination] O.J. 28/25 (1992)

[892] Rima Electrometalurgia SA v EC Council, Case C216/91 [1993] ECR I 6303.

Investigations have in fact been initiated on the basis of the most superficial evidence contained in a complaint. For example, in Furfuraldehyde From China[893], the complaint alleged that dumping had occurred based on a comparison of export prices for Chinese producers with export prices for Argentinean producers. Nevertheless, the European Commission was prepared to accept this evidence as adequate proof of the requirements necessary for initiating a complaint. Similarly, an investigation was opened based on allegations of dumping supported by calculations comparing the basic import price of certain goods to the EU, as published by the Commission, with prices charged by exporters of the product to the EU.[894]

The Commission may also join complaints made by separate organisations at different times.[895] If such a joining of complaints occurs, it must be questioned whether the original complainers truly represented the majority of European Union producers.

Until 1988, the Commission was reluctant to accept complaints directed against specific producers in specific countries, preferring instead to examine all imports produced in the country of origin for the products. This policy had the inherently equitable quality of prohibiting a European Union producer from targeting the activities of a particular foreign producer. Further, since the Anti-Dumping Code requires anti-dumping duties to be imposed against states, and not private companies, the approach yielded results consistent with the Code in that any duties imposed were

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[893] O.J. C208/8 (1993).

[894] Pig Iron From Turkey and the Soviet Union O.J. C246/9 (1991).

[895] See for example, Electronic Weighing Scales From Korea, O.J. C84/14 (1992).

against all exporters of the subject goods from the same country.

A significant departure in this policy occurred in 1988 when the Commission investigated allegations that video cassette recorders from Korea and Japan were being dumped. In the complaint initiating the investigation, the European Union industry alleged that only specific producers in Japan were dumping. The main issue was therefore whether the Commission would investigate only those producers or all Japanese producers exporting to the European Union.

The Commission accepted the selective complaint, justifying its decision on the grounds that:

> 'The Commission is not legally required to always initiate anti-dumping proceedings against all importers in the country concerned. There is nothing in European Union law that requires the Commission to extend the scope of the investigation to all imports from a given country.'[896]

This decision ignores the obligation in the Anti-Dumping Code to apply dumping duties on a country-specific basis, which is probably why the Commission referred only to European Union law and not international law. Clearly selective complaints can be both discriminatory and an abuse of process since they can be used to harass specific foreign producers.

Another abusive practice on the part of some European Union industries and sanctioned by the Commission has been to repeatedly bring complaints if they are unable

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[896] Video Cassette Recorders From Korea and Japan, O.J. L240/5 (1988) [preliminary measures]; O.J. L57/55 (1989) [definitive measures].

to secure protection on their first attempt. Thus, in one case, when the Commission decided that no material injury had occurred by reason of Korean imports of film, the European Union industry filed a virtually identical complaint against a slightly modified product eight days after the decision to terminate, claiming that the similar product was the cause of injury.[897] Obviously, if no injury to the European Union industry has been established in the first investigation, it was highly unlikely to be established in the second. Nevertheless, the Commission allowed the complaint to proceed before again rendering a finding of no injury in the second investigation.[898]

Also a non-confidential copy of the complaint is made available to concerned importers and exporters only after the investigation has been formally notified. This denies the defendants any genuine opportunity to challenge the allegations of sufficient evidence made in the compliant before the investigation has been initiated even although these may be genuine.

Finally, if a European Union industry withdraws a complaint, the Commission can proceed with the investigation if termination of the investigation is not considered to be in the interests of the European Union.[899] In fact, this has occurred on numerous occasions.[900]

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[897] Polyester Film From Korea, O.J. 305/31 (1989) [termination]; O.J. C24/7 (1990) [initiation].

[898] Polyester Film From Korea (No. 2), O.J. L151/89 (1991).

[899] Article 5(4), Council Regulation 2423/88.

[900] See Audio Tapes From Japan and Korea, O.J. L28/25 (1992); Paracetamol From China, O.J. L236/23 (1982); and Portland Cement From GDR, Poland, Yugoslavia and Thailand, O.J. 202/43 (1986).

## (4) Inequitable Conduct of Investigations

### (A) Initial Determinations

Consultations are held with the Member States, in the form of the Anti-dumping Committee, prior to the official announcement of an investigation.[901] While Member States are technically only advised of the possible opening of an investigation, in fact the Commission uses this opportunity to assess the strength of feelings among Member States as to the proceedings.

Once this period of consultations has been concluded, the Commissioner for External Relations has the final decision on whether or not to publish a notice in the Official Journal announcing an investigation. In practice, the Commissioner decides this question under the habilitation procedure which involves consultations with DG III, DG XXI and the Commission Legal Service. It is at this point that the political element is most evident.

### (B) Period of Investigation

The Basic Regulation instructs the European Commission to conduct the investigation into dumping over a time-scale which 'shall normally cover a period of not less than six months immediately prior to the initiation of the proceedings'.[902] Notwithstanding this rule, investigation periods are selected on an ad hoc basis by the Commission which has substantial discretion in

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[901] Article 6(1), Council Regulation 2423/88.

[902] Article 7(1)(c), Council Regulation 2423/88.

choosing a particular period.[903] There is a clear lack of guidance in this respect and, further, explanations for the selection of particular periods are rarely provided in regulations imposing measures. The selection of varying periods hints at arbitrariness in the practice of the Commission.

(C) Penalties for Failing to Provide Adequate Information

In order to verify information submitted in the complaint, the Commission distributes questionnaires to interested parties. The Commission is authorised to seek all information 'necessary' for the investigation and to verify the records of importers, exporters, traders, agents, producers and trade associations.[904]

While questionnaires are sent to all relevant exporters, importers and producers, in practice the questionnaires are mainly used for the calculation of dumping. Tight deadlines are set for the return of these questionnaires and failure to comply with these strict requirements will result in information submitted outside the time limits being excluded from the investigation.

The right of the Commission to require the production of information that it deems relevant to the investigation is extensive. The Commission has traditionally been allowed considerable scope in deciding what information

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[903] Twelve month period of investigation: 3.5" Microdisks From Japan, Taiwan and China, O.J. L95/5 (1993) [provisional]; and Electronic Weighing Scales From Singapore and Korea [definitive] O.J. L112/20 (1993). Fifteen month period: Ferro-silicon From Poland and Egypt [provisional] O.J. L183/8 (1992).

[904] Article 7(2)(a), Council Regulation 2423/88.

is relevant in an investigation.[905] The onus is on the party requested to disclose the information or justify non-disclosure when the party believes that the information is not strictly necessary to the investigation. In one case, the European Commission was not even prepared to discuss whether certain information requested from a company was in fact necessary for the investigation.[906] The Commission powers in this field are virtually absolute and do not appear to be subject to any limiting rule of reason or the principle of proportionality.

Where a foreign producer refuses to allow the Commission to verify information submitted, the Commission is instructed to make its findings on the basis of 'the facts available'.[907] This determination is not made on the 'best' facts available, but merely those facts available. This means that the Commission is not obliged to search for better evidence than that made available by interested parties. While there is a natural tendency for Commission officials to justify this practice on the ground that uncooperative parties should not be rewarded, there still remains the question of whether such a rule is unduly onerous, particularly if the Commission would have little difficulty in discovering the relevant facts.

The Commission has recently adopted a number of practices which are deliberately intended to penalise foreign producers deemed not co-operating in investigations. For example, as a matter of policy, in

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[905] In the area of competition policy, see Samenwerkende Elektriciteits Produktiebedrijven NV v EC Commission Case T-39/90 [1992] 5 CMLR 33.

[906] Compact Disc Players From Japan, O.J. L205/5 (1989).

[907] Article 7(7)(b), Council Regulation 2423/88.

the absence of co-operation, information submitted in the complaint will be used in the investigation to the extent not contradicted. Thus, in one case nine Japanese producers of thermal paper were cited in a complaint as having dumped this product on the European Union market. Only four of the nine producers co-operated in the investigation. Three of the four co-operating companies were found to have been dumping and duties of approximately 10% were imposed.

The Commission based its findings against the other five companies on the 'facts available' rule.[908] These 'facts' were drawn straight from the complaint itself. In particular, the Commission relied on the statement that these non-co-operating producers had significantly higher dumping margins than for those co-operating companies.[909] The possibility that the dumping calculation should have been made on the basis of the information submitted by the other companies was rejected. Eventually a dumping margin almost five times higher than those set for co-operating companies was found and the appropriate duty imposed.[910]

Another illustration of the European Commission trying to discourage non-co-operation occurred in rather bizarre circumstances. In Oxalic Acid From Taiwan and

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[908] Thermal Paper From Japan, Commission Regulation (EEC) 2805/91 (1991) (preliminary determination), O.J. L270/15 (1991).

[909] European Commission, Tenth Annual Report on the Community's Anti-dumping and Anti-subsidy Activities, Sec (92) 716 Final (1992), 9-10.

[910] Similar treatment was given to a Japanese producer which co-operated in the initial stages of an investigation but which withdrew its co-operation in later stages: see Capacitors From Japan, O.J. L353/1 (1992).

South Korea[911], the producers from Taiwan co-operated but those from South Korea declined to do so. Hence, the dumping margin for the Korean industry was calculated on the basis of the information available to the Commission, ie. the allegations of the complainers.

This data resulted in a lower dumping margin for the Korean exporters than the Taiwanese exporters. Not wishing to allow non-co-operating producers to benefit from their policy, the Council imposed the highest duties found for the Taiwanese producers on the South Korean producers as well. The justification offered by the Council for this juxtaposition was that:

> 'the imposition of a lower duty on the South Korea product than that imposed on a product originating in a country which had co-operated with the investigation would reward non-co-operation and make it possible to evade duties'.

Perhaps this is so. Nevertheless, this arbitrary cross-application of duties in clearly a violation of the Anti-Dumping Code in so far as the duties applied exceeded the dumping margin found for the products in question.[912]

The Commission has also recently adopted a strategy of setting residual duties for non-co-operating companies at higher levels than for co-operating producers. Residual duties are levies imposed on goods from producers other than those participating in the investigation.[913] To its credit, this strategy has only

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[911] O.J. L184/1 (1988).

[912] See also Certain Polyester Yarns From Taiwan, Indonesia, India, Turkey and Korea, O.J. L276/7 (1991).

[913] Thermal Paper From Japan, supra note 909.

been used by the Commission where a substantial portion of the foreign producers elect not to co-operate.[914]

While on the one hand this may be seen as an attempt to encourage co-operation, there are serious questions whether it is fair to set duties at a higher level where no data has been received from a producer. Naturally, of course, the Commission can justify the practice by the argument that it gave the producers an opportunity to present its case and this was rejected. Certainly, the Commission will face insurmountable problems in obtaining evidence if none of the accused foreign producers co-operate in the investigation.[915]

Not surprisingly, the European Court has expressed reservations concerning the application of this principle. In one case, the Advocate-General assigned to the case expressed the view that the Commission was required to take into account 'additional information other than that made available by the complainer, when available, if no satisfactory response was received by an exporter.'[916] However, the Advocate-General stopped short of requiring Commission officials to go to 'inordinate lengths' to ascertain the relevant facts where companies are being non-co-operative.

If the Commission believes that an interested party has supplied false or misleading information, it is authorised to disregard such information and disallow

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[914] See Dihydrostretomycin From China, O.J. L362/1 (1991).

[915] See for example, Silicon Metal From China, O.J. L170/1 (1992).

[916] Allied Corporation v EC Council, Case 53/83 [1985] ECR 1621, 1628.

any claim which is supported by the information.[917] The Commission has taken the view that it will only apply this provision where the information submitted is clearly incorrect.[918] But there will obviously be difficulties in applying this rule, particularly to establish whether the false or misleading information was supplied in error or intentionally.

(D) Verification Practices

The Commission is empowered to conduct on-the-spot verification at the premises of complainants, importers and exporters to assess the value of information submitted in questionnaires.[919] No specific procedure is indicated for the conduct of these inspections or the selection of the companies whose premises are to be inspected.

Further, no official record of information provided by the subjects of the investigation is made available to interested parties despite the importance of such disclosure. hence, at subsequent disclosure meetings between investigated companies and the Commission officials, differences of opinion arise between the information gathered by the case-handlers and that contained on company records. No opportunity for correction of inaccurately-gathered information from on-the-spot investigations is therefore provided.

(E) Rights of Interested Parties

Only interested parties have rights to access the file

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[917] Article 7(b), Council Regulation 2423/88.

[918] European Commission, Anti-dumping Practice Note 104, 7 (6/2/89).

[919] Article 7(2)(a)-(b), Council Regulation 2423/88.

maintained for the investigation and to make their views known to the Commission.[920] Interested parties, as a term, is not defined but is generally understood to relate to those parties directly concerned in the investigation namely the complainers, the relevant importers and concerned exporters as well as representatives of the exporting country.[921]

The European Court has been reluctant to extend the concept of interested parties to private parties other than those immediately concerned in the proceedings. In fact, the Court has gone as far as to tie the concept of interested party to that of standing to bring applications to challenge anti-dumping regulations. In other words, interested parties are those individuals who can establish direct and individual concern in the decision imposing anti-dumping measures.[922]

Until recently, the pursuit of this policy by the Court had the practical effect of excluding arm's length traders from the category of interested parties[923] as well as private organisations representing specific interest groups such as consumers.[924]

(1) Access to the file

All interested parties, ie the complainers, importers and exporters, together with the representatives of the

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[920] Article 7(5), Council Regulation 2423/88.

[921] Article 7(4)(a), Council Regulation 2423/88.

[922] See Sermes v EC Commission, Case 279/85 [1987] ECR 3109.

[923] Ibid.

[924] But see now, Bureau Europeen des Unions De Consommateurs v EC Commission, Case 170/89 [1992] 1 CMLR 820.

exporting country may inspect all non-confidential information submitted to the Commission but only to the extent that such information is relevant to the defence of their interests and only provided if the Commission has made use of the information during the investigation. This process is known as 'disclosure'.

The general duty of the Commission in the discharge of its disclosure obligation has been stated as follows:

> 'In performing their duty to provide information, the European Union institutions must act with all due diligence by seeking....to provide the undertaking concerned, as far as is compatible with the obligation not to disclose business secrets, with information relevant to the defence of their interests, choosing, if necessary on their own initiative, the appropriate means of providing such information.[925]

This duty is balanced, to a certain extent, by the requirement that interested parties must make a written request to the Commission indicating the nature of the information required for the defence of their interests.[926] Further, only submissions by parties need be made available. Internal documents prepared by the Commission, other than those for the computation of dumping margins and injury, need not be disclosed.

In providing access to information, the Commission has the difficult task of striking a balance between the duty to supply relevant information to interested parties to enable them to protect their interests and

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[925] Al-Jubail Fertilizer Company (Samad) v EC Council, Case 49/88 [1991] 3 CMLR 377.

[926] Article 7(4)(a), Council Regulation 2423/88.

the duty to protect parties submitting sensitive information from injury caused by insensitive disclosure.

The quality of the information disclosed at these meetings is known to vary greatly depending on the officials involved in the investigation. At one end of the spectrum, detailed calculations may be made available to allow interested parties to discover how dumping margins and injury thresholds were calculated. At the other end, only broad outlines of computations are made available. Again this has the effect of limiting the opportunities to interested parties to challenge the findings of the Commission.

The Commission has also been legitimately criticised for the timing of its disclosure meetings which often are held only after the publication of a preliminary determination. Naturally this practice denies importers and exporters an opportunity to influence the fixing of provisional duties. Even although the Commission does not collect preliminary duties until definitive measures have been decided, this does not diminish the fact that exporters and importers have a legitimate interest in ensuring that duties are set only after the Commission has heard their views on the matter.

(2) Right to receive information and to be informed of findings

Exporters and importers of products subject to investigation and, in the case of anti-subsidy measures, the representatives of the country of origin, may request to be informed of the 'essential facts and considerations' on the basis of which the Commission intends to recommend the imposition of definitive duties or the definitive collection of amounts secured by way

of provisional duties, but not proposals for the imposition of provisional duties.[927] This process is also known as 'disclosure' and the actual provision itself was added to the basic regulation to respond to the views of Advocate-General Warner in NTN Toyo Bearing Co v EC Council[928], who criticised the lack of regard for due process of law in the former anti-dumping procedures.

This provision was interpreted in a recent appeal to the European Court against the imposition of anti-dumping duties on imports of urea from Saudi Arabia.[929] The applicants persuasively argued that the Council and Commission had failed adequately to inform them of the methodology employed for the calculation of the relevant dumping margins. In their defence, the European Union institutions referred to an internal Commission report and summaries of meetings with representatives of the applicants. The Court held that this was insufficient evidence that the European Union institutions had discharged their obligations adequately to supply the applicants with information material to their defence.[930]

(F) Abuse of Confidentiality

The protection of confidential information is an increasingly important aspect of anti-dumping proceedings. The disclosure of sensitive commercial

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[927] Article 7(4)(b), Council Regulation 2423/88.

[928] Case 113/77 [1979] ECR 1185.

[929] Urea From Saudi Arabia, O.J. L137/1 (1987).

[930] Al Jubail Fertiliser Co v EC Council Case 49/88 [1991] 3 CMLR 377. See also Case Comment in (1992) 29:2 CML Rev 380.

information relating to the business activities of a particular company to a rival organisation would be a serious matter in itself. But, the main concern is that a breach of this duty is more likely to place a foreign exporter at a disadvantage that a European Union industry for two reasons.

First, European Union industries have more direct access to Commission officials than foreign companies. Second, the information requested by the Commission from foreign producers is more explicit than that from European Union industries. While the Commission merely seeks information from European Union industries to establish injury, it requires detailed production information from foreign companies to calculate the margin of dumping as well as information on future production and marketing to assess future injury. Hence, the issue of confidentiality is per se one of more relevance to foreign producers than European Union industries.

The Commission is required to assess a request for confidential treatment and the general rule is that information will ordinarily be considered confidential if its disclosure would have a significantly adverse effect upon either the supplier of the information or its source.[931]

If the Commission accepts that the information is confidential, the obligation to protect that information comes into effect. The problem arises when the Commission disagrees that the information is sufficiently sensitive to warrant confidential treatment. If it appears that a request for confidentiality is not justified and if the supplier of the information is unwilling to provide a non-

[931] Article 8(3), Council Regulation 2423/88.

confidential summary of it, the information may be disregarded by the Commission.[932] This rule operates against foreign producers because, in the absence of submissions, the Commission is instructed to use any alternative source available to it.

Where the Commission uses confidential information in its calculation of dumping, interested parties are not entitled automatically to review that information regardless of how critical it is in the determination of duties. Therefore, for example, when the Commission used confidential information to construct a normal value for a foreign exporter's product, the European Court upheld the Commission decision denying the exporter access to related information provided by another party even although this related to establishing prices for the exported goods.[933]

This rule makes the possibility of challenging a measure much more difficult, in particular for exporters since they are the interested parties most likely to be raising proceedings for the review of the Commission measures. Complainers and European Union industries would only initiate proceedings to challenge a decision of the Commission terminating the investigation without measures.

(5) Blatant Disregard of Time Limits

The basic regulation requires that proceedings should be concluded within one year of initiation in the absence

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[932] Article 8(4), Council Regulation 2423.

[933] TEC v EC Council, Cases 260/85, 106/86 [1988] ECR 5855.

of special circumstances.[934] In fact the Commission has had difficulties regularly complying with this time limit even when no special circumstances justified the additional delay. The Commission reported that the average investigation is approximately nine months.[935] But, although the average period may fall within the one year limit set in the regulation and the Anti-dumping Code, often investigations take considerably longer than this period.[936]

The Commission justifies the time taken to conclude cases by reference to the fact that a full and thorough investigation is conducted before preliminary measures are adopted. While this may be true, it implies that the bulk of the investigation is carried out at the preliminary stage before definitive measures are adopted. Hence, there would be little justification for excessive delay between the preliminary finding and the final measure.

There is little doubt that the length of investigations is also caused by other factors. The Commission has complained that it lacks sufficient manpower efficiently to process the average annual caseload and there is also the element of the increasing complexity in investigations.[937] In one investigation the annual value

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[934] Article 7(9)(a), Council Regulation 2423/88.

[935] European Commission, Sixth Annual Report on the Community Anti-Dumping and Anti-Subsidy Activities, COM (89) 106 Final (1989), 7.

[936] For example, in Electronic Weighing Scales From Japan, O.J. L104/4 (1993), the investigation lasted 24 months. In 3'5" Microdisks From Japan, Taiwan and China, O.J. L95/5 (1995) even the provisional duty investigation extended to a 21 months period.

[937] See, European Commission, Fifth Annual Report on the Community Anti-Dumping and Anti-Subsidy Activities, COM (88) Final (1988), 3-4.

of imports affected was more that 1,000 million ECU and approximately one hundred interested parties were involved.[938]

Yet the European Court has not been prepared to support applications contending that the period of investigation is too protracted. In one case, the Court considered that an investigation period of thirty two months was not unreasonable since the peculiar circumstances of the case prevented the Commission from completing its investigation within the prescribed period.[939]

The twelve month limit was considered only to be a 'reasonable period' for the conclusion of an investigation. The Court expressed the view that this was only a guide and was not mandatory and, further, where external factors require consideration, the period may be extended as is reasonable in the circumstances. In this particular case, the thirty two month period was considered justified considering the political events and currency depreciation in the exporting country.

In another case, a protracted period of four years was held not to vitiate a measure.[940] This decision was rendered despite the fact that the 1979 Anti-dumping Code requires that investigations are concluded, in the absence of extraordinary circumstances, within a one year period.

The European Commission recently proposed the introduction of time limits for the conclusion of

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[938] Photocopiers From Japan, O.J. L54/12 (1987).

[939] Continentale Produkten Gesellschaft Erhard-Renken GmbH v Hauptzollamt Munchen-West, Case 246/87 [1991] 1 CMLR 761.

[940] Etaireia v EC Council, Case 122/86 [1989] ECR 3959.

investigations due to the pressure exerted by such criticisms.[941] This proposal was adopted by the Council in part on March 7, 1994, and the following periods have been introduced:

- a maximum one month period from receipt of the complaint to initiation or rejection of the complaint.
- a maximum nine months period between initiation of the investigation and the decision on provisional measures.
- a maximum fifteen months period between initiation of the investigation and the decision on definitive measures.[942]

However, the fifteen months total period envisaged is still longer than the one year period recommended by the Anti-Dumping Code and as practised by the EU's trading partners including the United States.

**(6) Bias in Providing Relief**

(A) Provisional Measures

In the absence of extraordinary circumstances, if the three elements of dumping are found to exist, the Commission will propose the publication of a regulation imposing provisional anti-dumping duties.[943] No actual duties are imposed at this stage. Collection of

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[941] European Commission, Proposal to Improve Procedures and Management of the Community's Instruments of Commercial Defence, Com Doc SEC(92) 1097 Final (1992).

[942] Council Regulation 521/94/EEC amending Council Regulation 2423/88/EEC on the Introduction of Time Limits for Investigation Procedures Carried Out Against Dumped and Subsidised Products.

[943] Article 11(1), Council Regulation 2423/88.

provisional duties only occurs if the definitive determination is affirmative.[944] Preliminary measures are valid for four months although the measures may be extended for an additional two months.[945]

The imposition of definitive anti-dumping duties, in the form of a Council regulation, completely supplants any provisional measures adopted by the Commission. In effect, this means that proceedings cannot be brought to annul a Commission regulation imposing provisional duties.[946]

In the event that such a duty is imposed, the release of the products under investigation into free circulation within the European Union becomes conditional on the provision of security for the amount of provisional duty. Usually, the Commission requires the posting of a bond for the amount of duty assessed under the provisional measure.

When an order for collection is made at the definitive stage for the collection of provisional duties, it comes into effect for all products which have not cleared European Union customs at that point in time. Thus, even if the exports have been despatched by the producer before the date on which the measure came into force, they will be subject to duties if in transit to the European Union but not yet customs cleared.[947] This has

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[944] See European Commission, Fifth Annual Report on the Community Anti-Dumping and Anti-Subsidy Activities, COM (88) 92 Final (1988), 6.

[945] Article 11(5), Council Regulation 2423/88.

[946] Brother Industries v EC Commission, Case 250/85 [1990] 1 CMLR 792.

[947] See Gas Fuelled Non-Refillable Pocket Lighters From Japan, China, Korea and Thailand, O.J. L326/1 (1991).

the effect of imposing the duties on goods which a producer has sent out only in the knowledge that an investigation is in process.

The Commission's argument in support of this policy is two-fold. First, the basic regulation does not allow any exceptions to the rule that anti-dumping duties are to be applied at the moment goods enter into free circulation in the European Union. Second, producers are notified of the proceedings and periodically updated of the stage of the proceedings which has been reached.

The levels of preliminary duties do not always approximate the levels of definitive duties adopted even although the emphasis of the investigation after the preliminary determination is into the question of injury sustained by the European Union industry and not dumping. For example, in one investigation, the levels of preliminary duties were five times higher than the levels of definitive duties.[948] It is extremely difficult to see how such a large variation could have occurred without some error having been made by the Commission, admittedly at either the preliminary determination or definitive stage of the investigation.

(B) Undertakings

It is a noticeable feature that a high percentage of anti-dumping investigations are concluded by the acceptance of undertakings by the Commission from parties found to have engaged in dumping.[949] The primary

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[948] Video Cassettes and Video Tape Reels From Korea and Hong Kong, O.J. L356/47 (1988) [provisional duties]; O.L. L174/1 (1989) [definitive duties].

[949] It is possible that the significance of price undertakings will gradually decrease in the future to be replaced by definitive measures. This is because products under investigation are becoming increasingly

rule is that where, in the course of an investigation, undertakings are offered which the Commission, after consultations, considers acceptable, an investigation may be terminated without the imposition of provisional or definitive duties.[950] The Commission is also authorised to suggest appropriate price undertakings.[951]

Undertakings can be imposed for a retrospective period. Thus, in Seamless Pipes and Tubes of Iron or Non-Alloy Steel From Hungary, Poland and Croatia[952] the Commission published its decision accepting undertakings on May 15 although the measure applied to all shipments released for free circulation in the European Union as from January 1.

In the past, the Commission maintained a relatively liberal policy towards the acceptance of undertakings. This was justified on two grounds. First, anti-dumping and anti-subsidy measures are designed to relieve injury and are not intended to raise revenue or to penalise exporters because of past pricing behaviour. Second, the 1979 Anti-Dumping Code requires administering authorities to explore the possibilities of 'constructive remedies' before applying duties.[953]

The basic regulation does not establish any substantive

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sophisticated. The more complex the product, the more difficult undertakings are to administer.

[950] Article 10(1), Regulation 2423/88.

[951] Article 10(3), Council Regulation 2423/88.

[952] O.J. L120/42 (1993).

[953] Thus, in Certain Acrylic Fibres From Mexico, O.J. L301/1 (1989), the Commission accepted undertakings from the Mexican companies as a 'constructive measure' to take account of the country of origin's position as a developing country.

criteria or conditions to bind the Commission to offer undertakings or to accept or reject undertakings submitted by a company. The Commission's policy towards undertakings revolves around two conditions:

(a) the acceptance of the price undertakings must be administratively feasible in view of the number of importers involved; and
(b) there are grounds for believing that the undertakings will be respected. [954]

Thus, the Commission has declined to accept undertakings which proved administratively cumbersome in terms of the number of exporters involved[955], the number of models of the relevant products exported, the variations in possible features of the products and the frequent renewal of models.[956] The Commission will also refuse undertakings if these would require frequent adjustment to fluctuating prices.[957]

While these two rules form the core of the policy, it cannot be said that these are the only conditions that must be satisfied. For example, the Commission will refuse to accept price undertakings offered by producers which have failed to co-operate during the investigation.[958] Similarly, the Commission has declined

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[954] European Commission, Sixth Annual Report on the Community Anti-Dumping and Anti-Dumping Activities, (89) 106 Final (1989), 5.

[955] Capacitors From Japan [definitive measures] O.J. L353/1 (1992).

[956] Compact Disc Players From Japan and Korea, O.J. L13/21 (1990).

[957] Silicon Metal From Brazil [definitive measures] O.J. L222/1 (1992).

[958] Oxalic Acid From Korea and Taiwan [definitive measures] O.J. L184/1 (1988).

to accept undertakings from Japanese producers due to 'the current state of European Union relations with Japan'.[959] An even more maverick justification for rejecting offers of undertakings from Canadian producers was because Canadian anti-dumping law does not permit the possibility of the Canadian authorities accepting undertakings from European Union producers in such investigations.[960] In light of these rulings, can it be said that Commission policy is impartial?

The Commission has also recently refused to accept undertakings for no express reason and instead applied anti-dumping duties against the exporters.[961] However, the truly arbitrary feature of this policy is exposed if the incidence of the country of origin from which exporters' undertakings are accepted is considered. The occasions in which the Commission has been willing to accept undertakings from Japanese producers has decline sharply in recent years.[962] Further, in circumstances where the European Union maintains a negative trade balance with a state, even over a short period, the incidence of failure to accept undertakings increases as the Commission views undertakings as a softer option than the introduction of duties.[963]

If undertakings are accepted by the Commission, the investigation into injury is nevertheless continued if

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[959] Hydraulic Excavators From Japan, O.J. L101/24 (1988).

[960] Pentaerythritol From Canada, O.J. L13/1 (1985).

[961] Gas Lighters From Thailand, O.J. L267/2; and Corrundum From China, Russia and the Ukraine, O.J. L235/1 (1993).

[962] See P.K.M. Tharakan, "The Political Economy of Anti-Dumping Undertakings in the European Communities", (1991) 35 European Economic Review 134.

[963] Ibid.

the Commission so decides or if such a request is made by exporters representing a significant percentage of the trade involved.[964] In such cases, if the Commission makes a determination of no injury, any undertakings given automatically lapse.

Where an undertaking is withdrawn by the Commission provisional anti-dumping duties may be applied immediately on the basis of the facts established before the undertaking was accepted.[965] A similar result may be achieved when the Commission has reason to believe that undertakings have been violated as long as European Union interests require the adoption of such measures.

The Commission also has considerable discretion to review, and if necessary revoke, an acceptance of price undertakings in the course of later investigations even if no complaint has been made against the company in question or if the review takes place as a result of a complaint against other companies involved in the investigation.[966]

There is no appeal against a refusal by the Commission to accept undertakings until the Council has adopted definitive duties. Even then, the appeal can only be made as part of the general appeal against the definitive measures.[967] This makes judicial review of the Commission's discretion to accept or reject undertakings virtually impossible to appeal and, in

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[964] Article 10(4), Council Regulation 2423/88.

[965] See Potassium Permanganate From Czechoslovakia, O.J. C216/7 (1989); and Non-Refillable Pocket Flint Lighters From Thailand, O.J. L267/2 (1993).

[966] NTN Toyo Bearing Co v EC Council, Case 240/84 [1989] 2 CMLR 76.

[967] Nashua Corp v EC Commission and EC Council, Case 133/87 [1990] 1 CMLR 6.

terms of substantive law, few appeals if any have been successful. For example, in Nachi Fujikoshi v EC Council[968] the European Court rejected outright three potential grounds on which to invalidate a refusal to accept undertakings namely: (a) the request for undertakings was rejected without having had proper individual consideration; (b) the reasoning behind the rejection was defective; and (c) that the substantive legal requirements had not been satisfied. The Court rejected the application because, it claimed, they had:

'not shown that the reasons for refusing the undertakings ...exceeded the margin of discretion conferred upon the institutions'.

Quite clearly the Court was not willing to deviate from a strict and non-teleological construction of the Basic Regulation.[969]

The conclusion reached as regards undertakings is that, even although such measures are permitted under the Anti-Dumping Code, the policy of the European Commission has been arbitrary, discriminatory and inconsistent. Advantage has been taken of the vagueness of the rules for undertakings for trade policy purposes and not as a legitimate alternative to counter dumping.

(C) Definitive Measures

Where dumping, injury and causation have been established, and if European Union interests call for intervention, definitive anti-dumping duties may be

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[968] Case 255/84 [1989] 2 CMLR 76.

[969] See also Minebea v EC Council Case 260/84 [1989] 2 CMLR 76.

imposed by the Council.[970] Regulations imposing definitive duties require only a simple majority in the Council for their adoption, acting on a proposal submitted by the Commission after consultations with the Anti-dumping Committee.[971]

Definitive duties can take a number of forms, but the most common is an ad valorem duty. The European Union has also imposed duties at fixed amounts calculated relative to quantity or volume where special circumstances prevail. For example, in Certain Sheets and Plates of Iron or Steel From Yugoslavia[972], specific duties of 48 ECU/tonne were imposed because of the 'specific circumstances of the market and in order to ensure the effectiveness of the measure'. In fact, specific duties are most commonly encountered in investigations into metal products and chemical products.[973] In other cases, duties are imposed in the form of a mixture of minimum prices and fixed duties[974], or variable duties.[975]

An extremely controversial practice adopted by the Commission with regard to the setting of definitive

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[970] Article 12, Council Regulation 2324/88.

[971] At the General Affairs Council Meeting of December 15, 1993, it was agreed that future decisions on definitive measures in anti-dumping cases would be taken by simple majority voting. Previously voting was by qualified majority which allowed a blocking majority of 23 votes.

[972] O.J. L188/14 (1988).

[973] See also Certain Iron or Steel Coils From Algeria, Mexico and Yugoslavia, O.J. L188/18 (1988).

[974] Dihydrostreptomycin From China, Council Regulation L362/1 (1991).

[975] Video Cassettes From Hong Kong, O.J. L139/1 (1992).

measures is that of setting residual duties for producers not parties to the investigation. In the past, residual duties were previously established at the level of the highest dumping margins found for any producer co-operating in the investigation and these were applied to non-identified or non-cooperating producers also exporting to the European Union.

Nevertheless, residual duties generally penalize importers which may not have any intention of engaging in dumping but which are, coincidentally, producers from the same country of origins and of the same goods as other producers subject to duties. These producers are automatically attributed the highest dumping margins in the investigation. This practice is GATT-illegal because no investigation into dumping or injury has been conducted prior to the imposition of these duties on the new products.

(D) Miscellaneous Forms of Relief

The Basic Regulation specifies only a limited number of means of terminating an investigation and, on the whole, the European Union institutions have complied with this specification. Thus, in very few cases are investigations concluded by means other than termination of proceedings, definitive duties or undertakings.

The most interesting illustration of an exception to this rule occurred in a recent investigation which was fraught with political implications and undertones. In 1990, a complaint was lodged by a European Union industry alleging that Norwegian producers were engaging in dumping in the European Union market.[976] The investigation itself came at an embarrassing time

[976] Fresh Atlantic Salmon from Norway, O.J. C25/6 (1990).

because Norway was one of the EFTA states negotiating the European Economic Area Treaty. One of the articles of this treaty restricted the right of the European Union to impose anti-dumping duties since the competition law of the European Union was to apply inside the new structure.

The investigation revealed a dumping margin of approximately 11.3% and a margin of injury of 29.6%.[977] Nevertheless, no measures were adopted by the European Union because the Norwegian government introduced a series of measures to restrict the volume of salmon reaching the European Union market. The Commission proposed that these measures were sufficient subject to close supervision of imports. This proposal was opposed by the UK and Irish delegates in the Anti-dumping Committee but eventually the proposal to terminate was forwarded to the Council. Since the Council was unable to agree on an amendment to the measure, it was adopted after the one month period specified in the regulation for amendment.

This settlement amounts to an informal voluntary restraint agreement. The Norwegian government imposed measures which were accepted indirectly by the Commission. Yet, there is no provision in the basic regulation for such a resolution and, there is evidence to suggest that political pressure from inside the European Union and outside - the Norwegian government - lead to this settlement.

This form of settlement of an anti-dumping case is not unprecedented. In the so-called steel war of the early 1980s, in exchange for the suspension of duties, most countries exporting steel to the European Union and

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[977] Fresh Atlantic Salmon from Norway, O.J. L69/3 (1991).

whose exports were subject to duties, entered into 'steel arrangements' which were essentially voluntary restraint agreements.[978] Similarly, in certain areas of the electronics industry, voluntary restraint agreements are in operation after anti-dumping investigations. For example, in 1983, anti-dumping proceedings against Japanese imports of VCRs were terminated at an early stage in exchange for a three year unilateral VRA offered by Japan.[979]

**(7) The Lesser Duty Rule**

The amount of the anti-dumping or anti-subsidy duty, whether provisional or final, cannot exceed the dumping margin and 'should be less' if such lesser duty would be adequate to remove the injury.[980] In the event that the injury margin is higher than the dumping margin, the dumping margin applies.[981]

Two commentators have estimated that in approximately 44% of investigations, duties are imposed at the level of injury and not the margin of dumping.[982] However, this statistic disguises two facts. First, where duties are restricted to the margin of injury, the amount of the duties imposed tends to remain extremely high. Second, in the same cases, some producers may have

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[978] See text, supra pp.475-481.

[979] Television Image and Sound Recorders From Japan, O.J. L86/23 (1983).

[980] Article 13(3), Council Regulation 2423/88.

[981] See Dihydrostreptomycin From China, O.J. L187/23 (1991); and Electronic Weighing Scales From Singapore and Korea, O.J. L112/20 (1993).

[982] E. Vermulst & P. Waer, "The Calculation of Injury Margins in EC Anti-Dumping Proceedings", (1991) 25:6 JWT 5.

duties set at the dumping margin and others at levels set at the margin of injury opening the Commission to charges of discrimination when this is practised on a country-wide basis.[983]

### (8) Simultaneous Imposition of Anti-Dumping and Anti-Subsidy Duties

The GATT is quite explicit in its condemnation of the simultaneous imposition of anti-dumping and anti-subsidy duties. This prohibition states that:

> 'No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidisation.'[984]

The Commission has not accepted this prohibition as absolute.[985] Parallel investigations into dumping and subsidisation for the same goods, while not a common occurrence, have in fact taken place. More specifically, the application of anti-dumping or anti-subsidy duties does not preclude a later investigation into allegations of the other practice.

For example, in one case where anti-dumping duties applied, the Commission conducted an investigation into

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[983] See Small Screen Colour TV receivers From Hong Kong and China [definitive measures] O.J. L195/1 (1991).

[984] Article VI(5), General Agreement.

[985] See European Commission, Anti-Dumping Practice Note 30 (5/1/83).

the existence of subsidies for the same products.[986] True, the Commission did not actually impose anti-subsidy duties equivalent to the subsidies found to exist but rather suspended their application in light of the protection already in place for the industry. Nevertheless, conducting both anti-dumping and anti-subsidy investigations into the same product only makes sense if the Commission intends to impose additional duties if certain facts are found to exist.[987]

The Commission has recently indicated that, in certain circumstances, the application of both types of duties may be justified. The general rule, as devised by the Commission, is that simultaneous imposition is permissible to the extent that a subsidy - either export or domestic - has no effect on the amount of the dumping margin.[988]

In Polyester Yarn and Fibres From Turkey[989], anti-dumping duties were imposed after an investigation. Subsequently the Commission conducted an anti-subsidy investigation of the same products and found the existence of export subsidies. These subsidies were held not to have been granted during the earlier anti-dumping investigation and therefore could not have had any impact on the dumping margins found to exist. In the regulation imposing measures, the Council stated that:

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[986] Sheets and Plates of Iron and Steel From Brazil, O.J. L45/11 (1983); and Steel Plates From Brazil, O.J. L205/29 (1983).

[987] See also, Seamless Tubes of Non-Alloy Steel From Spain, O.J. L196/34 (1980); and Binder and Baler Twine From Brazil and Mexico, O.J. L251/28 (1993).

[988] European Commission, Anti-dumping Practice Note 130 (2/4/92).

[989] O.J. L137/1 (1991).

> 'The Council...confirmed that Article 13(9) (of the basic regulation) does not preclude the imposition of countervailing duties in addition to anti-dumping duties against the domestic subsidies found, as well as against export subsides which cannot have influenced the anti-dumping duty since the companies concerned benefitted from them after the anti-dumping duties were imposed.'

In the circumstances, the Commission felt able to apply an additional anti-subsidy duty to countervail the subsidies found to exist.[990]

Justifying the imposition of both types of measures in a later investigation, the Commission provided a more detailed rationale for its practices.[991] First, it pointed out that, where the normal value is constructed, there are two components in this computation - the costs of production and a reasonable profit margin. The effect of the duty under consideration - a duty and tax exemption on imports - was to reduce the cost of production element in the calculation of normal value which subsequently produced a drop in the export price. Consequently, the fall in the export price could not be greater than the reduction in the normal value.

A second subsidy, however, was not considered to have such an equitable impact. The Commission considered that a corporate income tax exemption affected only the export price and consequently the profits on sales to all third countries. Since the element of the constructed value attributed to the reasonable margin of profit element in the normal value calculation had been

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[990] Polyester Yarn and Fibre From Turkey, O.J. L272/92 (1991).

[991] Ballbearings From Thailand, O.J. L152/59 (1990).

calculated on products sold in the country of origin via a first independent customer located in Singapore, it followed that the subsidy affected the reasonable margin of profit element of the component costs by the same amount as the export price.

The Commission therefore concluded that the countervailable subsidies found to exist affected the normal value in the same manner as the export price, The elimination of those subsidies by the imposition of a countervailing duty or by an undertaking would have no effect on the dumping margin found. Consequently the Commission considered that it was appropriate to impose an anti-dumping duty in addition to the anti-subsidy measures already applying.[992]

The Commission has therefore set itself out on a collision course not only with the terms of Article VI of the GATT but also the express terms of its own basic regulation. The term 'the same situation' is being interpreted narrowly to allow a distinction to be drawn between the circumstances of dumping and the fact of granting subsidies. The main question is whether this is a permissible distinction to be drawn. If the GATT allows this interpretation, the prohibition contained in Article VI will become, for all intents and purposes, worthless.

**(9) Innovative Forms of Investigation - Anti-Absorption Duties**

In the mid-1980s, the Commission began suspecting that a number of foreign manufacturers were absorbing the costs of anti-dumping duties imposed on exports and not

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[992] Anti-subsidy measures were imposed in the investigation, Ballbearings From Thailand, O.J. L152/30 (1990).

passing this cost on to the European Union customers. If producers or exporters were prepared to accept the full charge of this duty, the price of the goods entering the European Union would be exactly the same as before the duties were imposed.

The Commission took the view that this practice neutralised the objective of imposing duties in the first place, namely to raise the price of the foreign goods to European Union customers. At the same time, prices would not rise to a sufficient degree to remove the injury found to have been caused where price undercutting was found to be present.

To counter this development, the 1988 basic regulation introduced a new rule to allow for the imposition of so-called anti-absorption duties in such circumstances.[993] In the event that the Commission finds that the duty has been absorbed it may impose an additional duty commensurate with the amount of duty found to have been borne, in whole or part, by the exporter.[994] There is no requirement that the duties originally imposed have been applied on the basis of a definitive measure. The rule applies equally to provisional and definitive duties.[995]

If duties are being allegedly absorbed in this manner, a party 'directly concerned' may submit a complaint to the Commission accompanied by sufficient evidence to show that the duty has been borne by the exporter.[996] A further investigation is conducted by the Commission

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[993] Article 13(11), Council Regulation 2423/88.

[994] See Silicon Metal From China, O.J. C273/20 (1991).

[995] See Silicon Metal From China, O.J. L170/1 (1992).

[996] See, for example, Woven Polythene Bags from China, O.J. C157/5 (1991).

into these allegations. But this investigation is conducted at the instance of a directly concerned party not an interested party. Further, there is no need for the complainer to establish that it represents the relevant European Union industry and that it was a party to the original complaint which resulted in the imposition of the anti-dumping duties in the first place.

While exporters and importers have an opportunity to defend themselves by showing that the absence of any price increase is due to reductions in costs incurred, the onus is on the exporter to prove the existence of these changed circumstances. There is no provision for justifying price maintenance against developments in the European Union market-place. For example, it is not clear that reduced European Union prices, caused for example because research and development expenditure has matured, or if European Union producers have become more efficient, can justify non-increasing foreign export prices.

The standard of evidence submitted for such investigations is also unreasonably low. For example, in one case evidence that the average retail prices in the European Union of goods had neither increased or decreased was considered sufficient by the Commission to initiate an investigation.[997]

The levels of duty imposed can be considerable. In one case the amount of absorption found by the Commission was 178%, although obviously a duty in excess of 100% could not be imposed because this would be over-

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[997] Compact Disc Players From Japan and Korea, O.J. C174/15 (1991).

compensating for the absorption.[998] In another case, the Commission found levels of absorption of duties of 97.6%, expressed as a percentage of the amount of duty paid and, as a result, increased the original duty from 43.4% to 85.7%.[999]

The application of the provision also leaves a number of issues outstanding. First, it is not clear whether complete absorption of the duties is required or whether partial absorption will suffice. Second, the process through which the Commission establishes that the non-movement in prices has been caused by absorption and not other factors such as increased supplies from other countries, competition in the market place, or another form of unrelated factors is far from clear.

In any event, the provision places foreign exporters at a distinct, and even deliberate, disadvantage. The Commission, for its part, has generally recognised that this is the case and has made infrequent use of this provision, more likely to avert controversy rather than out of benevolence.

Nevertheless, the application of the provision has provoked at least once country to protest in the GATT against the continued use of its terms.[1000] Similarly, the use of the measure provoked one exporter to request a European Court judgment which in fact eventually supported the continued use of the measure but only on the grounds of European Union law.[1001]

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[998] Silicon Metal From China, O.J. L170/1 (1992).

[999] Woven Polyolefin Sacks From China, O.J. L215/1 (1993).

[1000] Japan v European Community.

[1001] Cartorobica v Ministero delle Finanze, Case 189/88 [1991] 2 CMLR 782.

Since the complaint to the GATT, the Commission has surreptitiously adopted an alternative strategy. In one case, the Commission changed the terms of an investigation being carried out from an anti-absorption investigation into a full review under Article 14.[1002] This change of strategy allows the Commission to achieve the same objective, ie a review of the duties, through a less controversial procedure.

## (10) The Legality of European Union Anti-Circumvention Measures

Originally, the European Union's anti-circumvention legislation was enacted in June 1987[1003], but this provision was subsequently incorporated into the 1988 basic regulation.[1004] This provision, which has now been superseded by new measures contained in Council Regulation (EC) 3283/94[1005], was enacted because the Commission formed the view:

> 'Experience had shown that for certain products circumvention can be achieved by importing component parts of a product rather than the finished product itself, and assembling the parts within the European Union by what is known as

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[1002] See Compact Disc Players From Japan and Korea, O.J. C334/8 (1991).

[1003] Council Regulation (EEC) 1761/87, O.J. L167/9 (1987).

[1004] Article 13(10), Council Regulation 2423/88.

[1005] Article 13, Council Regulation 3283/94.

'screwdriver operations'.[1006]

The purpose of the legislation, as expressed in the preamble to the basic regulation, was to prevent circumvention of the collection of anti-dumping duties.[1007]

The regulation provided that definitive anti-dumping duties may be imposed on products that were introduced into the commerce of the European Union after having been assembled or produced in the European Union when three conditions were satisfied:

(a) the assembly or production is carried out by a party which is related or associated to any of the manufacturers whose exports of the like product are subject to a definitive anti-dumping duty;
(b) the assembly or production operation was started or substantially increased after the opening of the anti-dumping investigation; and
(c) the value of parts or materials used in the assembly or production operation and originating in the country of exportation of the product subject to the anti-dumping duty exceeds the value of all other parts or materials used by at least 50%.[1008]

In applying the provision, the Commission was instructed to take account of the circumstances of each case and, in particular, the variable costs incurred in the

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[1006] European Commission, Sixth Annual Report on Community Anti-Dumping and Anti-Subsidy Activities, COM (89) 106 Final (1989), 12.

[1007] See generally, P.J. McDermott, "Extending the Reach of Their Anti-Dumping Duties: The EC's Screwdriver Assembly Regulations", (1988) 20 Law & Pol'y Int'l Bus. 315.

[1008] On the rule of origin requirement, see N.A. Zaimis, EC rules of Origin (1992), 108-113.

assembly or production operation and of the research and development carried out and the technology applied within the European Union.[1009]

The rate of anti-circumvention duty to be assessed is the rate applicable to the manufacturer in the country of origin of the like product subject to the anti-dumping duty to which the party in the European Union carrying out the assembly or production is related or associated.[1010] The duty is normally a flat-rate one imposed on each assembled unit.[1011]

Assemblers accused of anti-circumvention are given very limited procedural rights analogous to those contained in the basic regulation itself.[1012] The facts must be established by means of a formal investigation. A complaint from an interested European Union industry must be received in order to initiate an investigation. All interested parties are given an opportunity to defend their interests. Yet, as we have seen a number of the basic procedural safeguards are themselves

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[1009] On this subject in general, see I. V. Bael, "Japanese Investment in the EC: Trojan Horse or Hostage", (1987) Int'l Financial Law Review 10; R. Bierwagen, "Input, Downstream, Upstream, Secondary, Diversionary and Components of Sub-Assembly Dumping", (1988) 22:3 JWT 27; D. Griffith, "Anti-Dumping Duties on Parts in the EEC", in J.H. Jackson & E.A. Vermulst (eds), Anti-Dumping Law and Practice (1989); J. Steenbergen, "Circumvention of Anti-Dumping Duties by Importation of Parts and Materials", (1988) 11 Fordham Int'l Law Journal, 382; and O. Grolig & P. Bogaert, "The Newly-Amended EEC Anti-Dumping Regulations: Black Holes in the Common Market?", (1987) 21 JWTL 79.

[1010] Article 13(10)(c), Regulation 2423/88.

[1011] See Hydraulic Excavators From Japan, O.J. L101/24 (1988).

[1012] See Electronic Weighing Scales From Japan, O.J. L101/1 & 28 (1988) [definitive measures]; O.J. L189/27 (1988) [undertakings].

unreliable which gives no good reason for believing that these rights will protect the interests of assemblers.[1013]

As we have seen, on May 16, 1990, the GATT Council adopted a panel report condemning the use of these provisions and holding that measures imposing anti-dumping duties on products assembled within the European Union was contrary to the terms of the GATT.[1014] In response, the European Union indicated that it will not amend this legislation pending the outcome of the Uruguay Round negotiations but that it is 'unlikely' to apply the provisions in the interim.[1015]

But, the fact that the anti-circumvention provisions of the basic regulation have not been immediately amended raises a number of interesting points, particularly should the matter be brought before the European Court. True, the collection of duties under the authority of this provision has been suspended, but the period for the review of the measures already in force is about to imminently expire. Should the Commission revive the duties in any manner during the review, it is likely that an immediate application would be brought to the European Court.

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[1013] See Electronic Typewriters From Japan, O.J. L 191/4 & 26 (1988) [definitive measures]; L203/1 & 25 (1988) [undertakings].

[1014] On the Community's reaction to this ruling, see Buchan, 'Brussels Attacks Narrow GATT Dumping Ruling', Financial Times, March 30, 1990; Montagnon, 'EC Refuses to Adopt GATT Report on Dumping', Financial Times, April 4, 1990; Dullforce, 'Brussels At Odds with GATT over Judgment', Financial Times, April 4, 1990.

[1015] See Ninth Report on the Community Anti-Dumping and Anti-Subsidy Activities, SEC (91) 974 Final (1991), 24; and Dullforce, 'EC Defers to Screwdriver Ruling', Financial Times, May 17, 1990.

The principal point is that, if the Commission decides to collect these duties and an application is made, which course of action will the Court follow. As far as the present writer is concerned, the Court only has two viable choices. First, the Court can implement the findings of the panel. This would, of course, be an express recognition of the authority of GATT panel rulings over the provisions of the basic regulation.

The alternative is for the Court to decide that the panel decision is irrelevant and to ignore it. This would have a number of consequences. First, from a constitutional point of view, the judicial arm of the European Union would be interfering in matters that are traditionally within the power of the executive, namely by dictating the policy to be followed in the European Union's external relations. The European Union would again find itself before the GATT and would be unable to justify its position because its hands would have been tied by the Court. The Commission and Council would have no alternative but to amend the offending provisions and resolve the matter by legislative intervention which is a course of action that these organs clearly do not want to follow at the moment.

It is unlikely that the Court would opt for such a confrontational position in this matter. The Court has traditionally tried to avert direct conflicts with international obligations.[1016] But, what would be the legal consequences of following this course? At the very minimum, the Court would have recognised that the rules of the GATT are relevant to the review of European Union measures. There is a fine distinction between applying the GATT rules directly and applying them only after a panel has resolved a dispute through application of the

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[1016] Interfood GmbH v Hauptzollamt Hamburg, Case 92/71 [1972] ECR 231.

rules.

In fact, it is more likely that recognizing the validity of GATT panel reports would usurp the constitutional position of the Court more than applying the rules directly since the later course at least allows the Court an opportunity to conduct the judicial review of the matter itself.

Although investigations under the anti-circumvention legislations has been suspended, European Union industries have adjusted to this fact by initiating complaints against the parts being imported for assembly. This strategy has the effect of increasing the costs of parts from foreign sources. Naturally, if a European Union industry can establish the dumping of parts, injury and causation, a duty may be levied on the parts.[1017]

The basic regulation does not expressly deal with the problem of assembling in a third country for the purposes of evading the application of duties. Since anti-dumping duties are both product-specific and country-specific, moving assembly from the true country of origin to a third country may, under certain conditions change the origin of the finished goods and therefore avoid the application of the duties.

The European Union has adopted the view that this is a matter to be determined under the European Union's rules of origin rather than as a matter to be dealt with under

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[1017] See Parts of Gas-Filled Non-Refillable Pocket Lighters From Japan, O.J. C202/4 (1991); Capacitors From Japan, O.J. L353/1 (1992); Outer Rings of Tapered Roller Bearings From Japan, O.J. L199/8 (1992); Small-Screen Colour Televisions From Korea, Turkey, Thailand, Singapore, China and Malaysia, O.J. C307/4 (1992); and Television Camera Systems From Japan, O.J. C67/8 (1993).

the anti-dumping legislation.[1018] The general rule for identifying the country of origin of a particular good can be stated as follows:

> 'A product in the production of which two or more countries were concerned shall be regarded as originating in the country in which the last substantial process or operation that is economically justified was performed, having been carried out in an undertaking equipped for the purpose, and resulting in the manufacture of a new product or representing an important stage of manufacture.'[1019]

These four criteria determine the origin of goods not only for customs purposes but also for the application of the basic anti-dumping regulation.[1020] The general result is that the European Union has a less draconian approach to assembly in third countries than its trading partners such as the United States which has adopted specific measures to combat this practice.[1021]

**(11) Sunset Procedure and Review**

Subject to review by the Commission, anti-dumping measures automatically lapse after the expiry of a

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[1018] See generally, E.A. Vermulst & P. Waer, "EC Rules of Origin as Commercial Policy Instruments", (1990) 24:3 JWT 55.

[1019] Article 5, Council Regulation (EEC) 802/68, O.J. L (1968).

[1020] Article 13(7), Council Regulation 2423/88. See generally, N.A. Zaimis, EC Rules of Origin (1992), 93-119.

[1021] See Brother International GmbH v Hauptzollamt Giessen Case 26/88 [1988] ECR 5655; [1990] 3 CMLR 658.

period of five years from the date that they entered into force or, if a review has been conducted, when they were last modified or confirmed.[1022] Since 1985 almost 25% of measures imposed have been renewed under the review mechanism established by the sunset provision.[1023]

Together, the Council and the Commission have an extensive discretion in considering whether measures should be allowed to lapse or not and often these decisions have been made on ambiguous grounds. For example, in one case, where the market share of the producers under investigation had dropped from 17% to 4% after the imposition of duties, the Council extended the measures not because an actual threat of injury existed, but because the 'threat of injury' persisted.[1024] The proper question to have asked was not whether a threat of injury existed but rather how remote this threat of injury could be assessed.

Further, in the same case, the duties imposed were not assessed on the basis of the dumping margin found to exist, but rather on the basis of the difference between a series of minimum prices and the prices charged by the relevant exporters.

Reviews are conducted at the request of interested parties in the event that 'changed circumstances' are alleged. Changed circumstances include evidence that

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[1022] Article 15, Council Regulation 2423/88.

[1023] Tenth Annual Report on the Community Anti-Dumping and Anti-Subsidy Activities, SEC (92) 716 Final (1992), 15. The longest applied duties lasted from 1977 to 1992; see Nuts of Iron and Steel From Taiwan, O.J. L197/1 (1992).

[1024] Light Sodium Carbonate From Bulgaria, the GDR, Poland and Rumania, O.J. L131/4 (1989).

exports are no longer being made at dumped prices[1025] or that the EU industry no longer manufactures or produces the product.[1026] However, where exports to the European Union have completely ceased after the imposition of duties, the Commission will refuse to review the duties on the absurd rationale that there are no exports on which to base the review and therefore it is impossible to verify the claim of no dumping.[1027]

When conducting a review, the Commission does not feel itself bound by the product definition in the original determination. It has ample discretion to both expand and contract the product scope of the review. For example, in Outboard Motors From Japan, at the request of the European Union industry, the Commission extended the product scope of the review from outboard motors of up to 63 KWs to the complete range of such motors.[1028] This practice is questionably GATT-consistent since the additional products being reviewed are not subject to the full scale rigours of an investigation as required by the Anti-Dumping Code.

There is a procedure in European law for the conduct of newcomer reviews when a foreign producer did not export products at the time when an anti-dumping investigation was undertaken. Such producers may request the European Commission to reconsider the application of definitive measures or undertakings to its activities. However, the

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[1025] Polyester Yarn From Mexico O.J. L275/21 (1991).

[1026] Typewriter Ribbon Fabric From China, O.J. C12/5 (1992).

[1027] See Urea From Venezuela and Trinidad and Tobago, O.J. L272/10 (1991).

[1028] O.J. C204/4 (1992). See also Plain Paper Photocopies From Japan, O.J. C207/16 (1992), where high-speed and more advanced photocopiers were also included in the review.

conditions for eligibility are rigorous. A company must fulfil three conditions:

(a) it must not have exported, either directly or indirectly, the product under investigation into the European Union during the period of investigation;
(b) there must be no 'links' with the companies involved in the original proceedings; and
(c) the company must have the intention to export the products to the European Union or have exported to the European Union after the termination of the investigation period.

The concept of 'links' has been interpreted extremely broadly to deny this right to exporters.[1029]

**(12) Bias in Refund Procedure**

Where an importer can show that a duty collected exceeds the actual dumping margin, consideration being given to the application of weighted averages, the excess amount must be reimbursed.[1030] The procedure for reimbursement has been set out in a Notice published by the Commission in 1986 which must be read in conjunction with the terms of the basic regulation.[1031]

Unfortunately for exporters, refunds are only made if

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[1029] See Monosodium Glutamate From Indonesia and Korea, O.J. L299/1 (1992).

[1030] Article 16(1), Council Regulation 2423/88.

[1031] European Commission, Notice Concerning the Reimbursement of Anti-Dumping Duties, O.J. C266/2 (1986).

the dumping margin is less than the duty imposed.[1032] The fact that the calculation is based on the margin of dumping also means that where the margin of injury is smaller than the margin of dumping, no refund will be permitted if prices of the product exceed the margin of injury but not the margin of dumping.[1033]

Applications for refunds are made to the Commission which is responsible for conducting the review. But, refund claims will only be accepted by the Commission if they have been filed by an importer. Exporters are illegible to make such applications. In the event that exporters do not co-operate in providing information, such as the normal value of the goods in the home market, or prices charged to other customers, claims cannot be supported by sufficient evidence. If, for whatever reason, this co-operation is not forthcoming, the Commission will not authorize the refund.

This amount is calculated in relation to the changes which have occurred in the dumping margin which were established in the original investigation for the shipments to the European Union of the importer's supplier. Often a review reveals that the European Union has grossly overcharged duties. For example, in one investigation, the actual dumping margin on refund review was found to be 5.2%. However, the original definitive measures imposed rates of 32%.[1034] In other words, the rate imposed was approximately 600% of the actual rate found to exist.

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[1032] This has resulted in a complaint being lodged with the GATT by Japan against the Community practice.

[1033] NMB (Deutschland) GmbH v EC Commission, Case 188/88, [1992] 3 CMLR 80.

[1034] Compact Disc Players From Japan, O.J. L298/16 (1991).

While the refund procedure establishes a mechanism to ultimately compensate for such discrepancies, during the period for which the anti-dumping duties are being applied, the foreign producer is unquestionably being penalised by the European Union by having to have its imports suffer a considerable financial penalty.

Refund calculations are made in the same manner as normal calculations of dumping margins. But, no interest is generally paid by the European Union on any levies reimbursed after a refund review. In addition, the processing of refund applications is not subject to any time limit. In the event that the Commission opts to review the matter, a refund application may take several years before finances are received.

Finally, the method of computing refunds in questionable. It is the stated practice for the Commission to deduct anti-dumping duties paid in constructing the export price for associated importers. In other words, the duty is considered as a cost and the effect of the deduction is to reduce the level of refund made available. This practice has been upheld by the European Court as valid[1035], but has provoked Japan into lodging a complaint with the GATT into the practice.

**(13) Judicial Review and Appeal**

Judicial review of anti-dumping measures until recently remained within the exclusive jurisdiction of the Court of Justice. While the proposed original jurisdiction of the Court of First Instance included review of anti-

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[1035] NMB (Deutschland) GmbH v EC Commission Case 188/88 [1992] 3 CMLR 80. See also Case Note [1993] 30:1 CML Rev. 155.

dumping matters[1036], this proposal did not appear in the final statute of the CFI.[1037] However, the CFI has recently assumed jurisdiction in this area.[1038]

It is widely believed that the CFI will be prepared to scrutinise more carefully the measures adopted by the Commission and Council, and some commentators have suggested that this was the reason that the proposal was originally withdrawn.[1039] Certainly this would be a positive development as far as exporters and importers are concerned. But, while the CFI has been meticulous in competition matters, it is no guarantee that it will follow the same policy in anti-dumping reviews.[1040]

(A) Standing to Seek Judicial Review

Regulations imposing anti-dumping duties may be challenged by any natural or legal person who can establish that the measure is a decision which is of direct and individual concern to them.[1041] But, anti-

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[1036] But now see Proposal For A Council Regulation on the Harmonisation and Streamlining of the Anti-Dumping Decision-Making Procedures, O.J. C181/9 (1992).

[1037] Council Decision (EEC) 88/591, corr. O.J. C215/1 (1989); [1989] 3 CMLR 458.

[1038] Council Decision 93/350 Euratom, ECSC, EC, O.J. L144/21 (1993) as amended by Council Decision 94/149/ECSC, EC, O.J. L66/29 (1994).

[1039] See Van Bael, supra note 1009, 12.

[1040] See for example PVC Cartel Case, Case T79, 84-86, 89, 91-92, 94, 96, 98, 102 & 104/89 [1992] 4 CMLR 357.

[1041] Article 173(2), EC Treaty. See generally, A. Arnull, "Challenging Anti-Dumping Regulations: The Problem of Admissibility", (1992) 2 ECLR 73; J.F. Bellis, "Judicial Review of EEC Anti-dumping and Anti-Subsidy Determinations After Fediol: The Emergence of a New Admissibility Test", (1984) 21 CML Rev. 539; and R. Greaves, "Locus Standi under Article 173 EEC When

dumping measures take the form of regulations.[1042] A private party seeking to challenge an anti-dumping measure must therefore satisfy two conditions:

(a) the measure is, in substance, a decision which, for reasons of convenience, has the form of a regulation; and
(b) the measure must be of direct and individual concern to the interested party. [1043]

(a) Regulations and Other Acts of the European Union Institutions as Decisions

Since at least 1979, the European Court has recognised the possibility that an anti-dumping regulation may be 'considered to be a decision...adopted in the guise of a regulation'.[1044]

This in fact leads to a tautology. The basic regulation requires that all anti-dumping measures are given the form of regulations. But, does it not automatically follow that, if the Court finds a measure to be a decision, albeit a conglomeration of decisions, for the purpose of establishing standing, the measure is not a regulation but a decision and therefore ultra vires the powers of the Council or the Commission under the basic regulation? In other words, if the Court holds that an application for review is admissible, is this not an

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Seeking and Annulment of a Regulation", (1986) 11 ELR 119.

[1042] Article 13(1), Council Regulation 2423/88.

[1043] See generally, J. Dinnage, "Locus Standi and Article 173 EEC", (1979) 4 EL Rev 15; and H. Rasmussen, "Why is Article 173 Interpreted Against Private Plaintiffs", (1980) 5 EL Rev 112.

[1044] See NTN Toyo Bearing Co v EC Council, Case 113/77 [1979] ECR 1185.

admission that the measure is in fact a decision and therefore an instrument in an improper form?

The Court has engaged in considerable legal contortions to avoid the obvious.[1045] It has adopted the policy of admitting complaints alleging that regulations are decisions without addressing the fundamental problem. No doubt, this approach has advantages for the applicant. If the Court held that anti-dumping measures were invariably proper regulations and never decisions, judicial review of the merits would be absolutely excluded. Yet, one cannot help by wonder whether the Court has made the proper choice in refusing to acknowledge the contradiction in its own jurisprudence.

(b) Direct and Individual Concern

A measure is of direct concern to a private party if it is the immediate cause of a particular legal effect on that person without the intervention of another party in the application of the measure.[1046] But since national authorities have no discretion in applying a measure the issue of direct concern is rarely an important matter in challenges to anti-dumping measures.

The same is not true of establishing the requirement of individual concern. The onus is on the applicant to prove that, due to certain circumstances or characteristics that are particular to its position, the application of the measure has particular and specific implications to its position. The Court and Commission have both been reluctant to recognise the class of

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[1045] See the opinion of A-G Verlorn van Themaat, in Allied Corporation v EC Commission, Cases 239/82, 275/82 [1984] ECR 1005, 1041.

[1046] See ARPOSOL V EC Council, Case 55/86 [1988] ECR 13.

applicants that may satisfy this requirement.

In the late 1970s, the Court distinguished among the standing of producers, exporters, importers, complainers, traders and other interested parties. The abilities of these parties to establish individual concern has changed over time.

The individual concern of producers and exports in an anti-dumping measure has long been recognised. Since these two groups are frequently expressly identified in anti-dumping regulations they are, in general, individually concerned.[1047] Both of these groups have therefore been granted standing by the Court.[1048]

Partially more difficult to explain, complainers have also been recognised as having an individual concern in anti-dumping measures because they participate in the procedure initiating an investigation under Article 5(1) of the basic regulation.[1049] Is this consistent with the general policy of the Court in other areas of European Union law, for example competition policy? In fact not. While a complaint may be made by a private individual under Articles 85 and 86 EC Treaty, the Commission has absolute discretion whether or not to pursue the matter.[1050]

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[1047] Allied Corporation v EC Commission, Cases 239/82, 275/82 [1984] ECR 1005.

[1048] Continental v Hauptzollamt Munchen-West, Case 246/87 [1989] ECR 1151; [1991] 1 CMLR 761 and SA Sermes v Services des Douanes, Case 323/88 [1992] 2 CMLR 632.

[1049] Fediol v EC Commission (No 1), Case 191/82 [1983] ECR 2913. See also Timex v EC Council and EC Commission, Case 264/84 [1985] ECR 849.

[1050] Groupement Des Industries De Materiels D'Equipment Electrique Industrielle Associee (Gimelee) v EC Commission, Case 315/90, Judgment of November 27,

If private party complainants do not have the right to standing in competition decisions, is it consistent that such parties have access to proceedings in anti-dumping investigations or is this an instance of the Court determining that the interests of the European Union could not allow the denial of European Union industries of this right?

For a number of very dubious reasons, the Court adopted a much stricter attitude towards the admissibility of applications for review by importers using the requirement of individual concern to block such applications. While the Court recognised the individual concern of related importers, ie companies linked to exporters or producers,[1051] it was reluctant to acknowledge the individual concern of unrelated importers. For a long time, this policy was a serious impediment to the judicial review of anti-dumping measures at the instance of such parties.[1052] This was even the case if the importer had participated in the investigation itself.

There are two points raised by this approach that cause unwarranted discrimination against foreign products. First, the failure to allow independent importers to challenge anti-dumping measures impedes imports because it denies parties directly involved in the importing process an opportunity to challenge the validity of

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1991; and Automec SrL v EC Commission, Case T64/89 [1991] 4 CMLR 177.

[1051] Canon Inc v EC Council, Cases 277/85, 300/85 [1989] 1 CMLR 915.

[1052] See, for example, Alusuisse v EC Council and EC Commission, Case 307/81 [1982] ECR 3463.

measures.[1053] Second, it is dubious legal reasoning to draw a distinction between complainers, who are not directly affected by the application of measures and importers who have to bear the cost of increased prices for the goods.[1054] Both these factors work against the interests of foreign producers and the policy itself has been severely criticised.[1055]

The Court has very recently reversed its policy significantly in this respect. In Extramet Industries SA v EC Council[1056], the applicant was an unrelated importer who had participated in the investigation and had been specifically named in the final measure. The Court, supported by the opinion of the Advocate-General[1057], declared the action admissible.

However, much of this policy reversal depended on the fact that the applicant had successfully established that its position could be differentiated from that of the other parties involved. As the Court found:

'The applicant is the largest importer of the

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[1053] See for example, Nuova Cegram SrL v EC Commission, Case 205/87 [1987] ECR 4427; SA Sermes v EC Commission, Case 279/86 [1987] ECR 3109; and R. Frimodt Pedersen AS v EC Commission Case 301/86 [1987] ECR 3123.

[1054] See P.J. Kuyper, "Judicial Protection and Judicial Review in the EEC", in Jackson & Vermulst, supra note 1009, 97.

[1055] See M. Mataraso, "The Independent Importer's Right of Review of Anti-Dumping Regulations Before to Court of Justice of the European Communities", (1989) 12 Fordham Int'l Law Journal 682.

[1056] Para. 17 Case 358/89 [1993] 2 CMLR 691. See also Case Note (1992) 29:2 CMLR 380.

[1057] Advocate-General Jacobs found that the application was inadmissible based on the Court's earlier jurisprudence, but asserted that change was necessary.

> product forming the subject-matter of the anti-dumping measure and, at the same time, the end-user of the product. In addition, its business activities depend to a very large extent on those imports and are very seriously affected by the contested regulation in view of the limited number of manufacturers of the product concerned and of the difficulties which it encounters in obtaining supplies from the sole Community producer, which, moreover, is its main competitor for the processed product.'

There is little doubt that these circumstances were very specific and that the future business activities of the applicant were directly affected by the measure. But direct effect is not the same as direct concern as defined in earlier decisions. Hopefully, this decision signals a move away from the strict formal requirements set by the Court in earlier decisions. Recognition of the injustice caused by the rigorous approach to the issue of direct concern is welcomed if the Court is prepared to move towards assessing how a measure affects a party as opposed to individually concerns that party stricto sensu.

As it stands this judgment is not completely satisfactory. It does not mean that all other unrelated importers will be equally as successful in future cases. In fact, this is unlikely. Only those unrelated importers in a similar position, which the Court itself acknowledged was unusual, will be guaranteed standing.

(B) Standards for Review

Applications to the Court are also hindered by the fact that in many measures, both the facts and the methodology applied by the Court, are stated extremely

briefly. There is consequently often insufficient detail to allow a successful challenge to be made on a final measure.

In any event, the policy of the European Court has been to focus on the legal issues involved and to avoid review of disputed factual matters. For example, in NTN Toyo Bearing Co. Ltd v EC Council, the Court extended the policy applied in the review of competition cases to anti-dumping cases and stated that it would only engage in limited factual review of cases.[1058]

The approach of the Court contrasts unfavourably with that of its Advocates-General in a number of cases. For example, A-G Verloren van Themaat conducted an extremely precise and detailed analysis of one case in particular including consideration of the economic implications of dumping, price alignment and Community interest.[1059] Nevertheless, the Court did not follow this approach and contented itself with following only one point raised by the Advocate-General as a justification for annulling the measure. Similarly, A-G Mancini also carried out a detailed legal analysis of an anti-dumping regulation while avoiding the more economic implications of the case.[1060] However, in this case the Court followed the logic of his submissions without delving too deep into these aspects.

The result of this approach is that, statistically at least, the European Court rarely finds in favour of a

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[1058] The competition case cited in support of this proposition was Remia BV & Verenigde Bedrijven Nutricia v EC Commission Case 42/84 [1985] ECR 2545.

[1059] Allied Corporation Demufert & Transcontinental v EC Commission (Allied II) Case 53/83 [1985] ECR 1621.

[1060] NTN Toyo Bearing Corporation v EC Council, Cases 240, 255-256, 258 and 260/84 [1987] ECR 1809.

foreign manufacturer or exporter seeking to review a particular measure.

(C) Suspension of Measures Pending Review

The European Court has been noticeably reluctant to grant interim relief to foreign producers subject to anti-dumping measures pending judicial review of the findings of the Commission.[1061]
Foreign exporters have also experienced considerable difficulty in obtaining damages from the European Union for the wrongful application of anti-dumping measures.[1062] Further, the conditions established for obtaining such relief are generally recognised as being quite onerous.[1063]

Applications for interim review are most often made by European Union importers of the product subject to duty. Thus in Extramet Industrie SA v EC Council, a French importer of calcium metal requested the Court to suspend the application of an anti-dumping regulation pending the outcome of the review.[1064] The application was rejected because the petitioner had not demonstrated the necessary degree of urgency in its application.

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[1061] Technointorg v EC Council, Cases 294/86, 72/87 [1987] ECR 1793; [1989] 1 CMLR 281; Nakajima v EC Council, Case 69/89 [1989] ECR 1689; and Extramet v EC Council, Case 358/89 [1990] ECR 431.

[1062] See Epikhirisecon Metalleftikon Viomikhamikon Kai Navtiliakon AE v EC Commission and EC Council, Cases 121-2/86, Order of June 27, 1986 [1986] ECR 2063, no decision yet on the merits.

[1063] See Technointorg v EC Council, Case 72/87 [1987] ECR 1793; and Brother Industries v EC Council, Case 229/86 [1985] ECR 3459.

[1064] Cases 133/87, 150/87, Order of February 14, 1990, not yet reported.

(D) Consequences of a Successful Challenge

A successful challenge to an anti-dumping regulation has the effect of nullifying the measure. In practice, the European Commission also issues a measure formally repealing the nullified measure.[1065] However a decision in favour of an applicant does not prevent the Commission from opening a new investigation into the same subject-matter with a view to reimposing recalculated duties.[1066]

But, as regards provisional or definitive duties which have already been collected, importers are required to request refunds from the various national customs authorities in accordance with their respective national customs rules.[1067] Naturally, this process involves considerable delay while the necessary customs formalities are settled.

No interest is payable on such sums even although duties may be held in such circumstances for periods of more than one year since the provisional measures were introduced.

**(13) Observations**

Procedural rights and duties in anti-dumping and anti-subsidy investigations are not dealt comprehensively by

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[1065] See, for example, Urea From Saudi Arabia, O.J. L334/1 (1991); and Paint, Distemper, Varnish and Similar Brushes From China, O.J. C332/5 (1991).

[1066] See, for example, Calcium Metal From China and Russia, O.J. C298/3 (1992).

[1067] Paint, Distemper, Varnish and Similar Brushes From China, O.J. C322/5 (1991).

either the 1979 Anti-Dumping Code or the 1979 Subsidies Code. Hence, states have some latitude to decide which protections private individuals will be entitled during investigations. However, even this latitude fails to account for the immense disparity between the letter and spirit of these two agreements on the one hand and the practice of the European Union on the other hand. In few other areas so far examined has behaviour deviated to such a substantial degree from the prescribed rules and, where no relevant rules exist, the European Union has taken advantage of such lacuna to erect a protectionist mantle.

Much of the breakdown in normative efficacy of the Code provisions relating to procedural safeguards can be attributed to the pivotal role played by a single agency in the process. The European Commission is responsible for the conduct of investigations, for applying provisional measures, for negotiating undertakings and for proposing definitive measures to the Council of Ministers. It is therefore hard to refute the claim that the European Commission is the judge, jury and prosecutor in anti-dumping investigations. While the Council of Ministers is responsible for certain violations of the terms of the Code, such as enacting anti-circumvention legislation and anti-absorption procedures, the European Commission has been the source of much of the abuse mainly when conducting investigations.

The European Court, despite its own acknowledgment of the dangers presented by abuse of procedural rights, has failed to check or balance many of the abuses perpetrated by the Commission and, to a lesser extent, by the Council. The margin of appreciation enjoyed by the European Commission in appraising the rights of interested parties is substantial and the Court has been

unwilling adversely to interfere with the exercise of this discretion.

The prospect of review by the Court of First Instance has excited some commentators into speculating that the CFI may reverse this policy and assume a more interventionist approach based on its experience in the area of competition law. Certainly in the area of competition law the Tribunal has rolled back the discretion enjoyed by the European Commission in conducting competition investigations but this is no guarantee that the CFI will do the same in the case of anti-dumping investigations.

The authority exercised by the European Commission will also grow organically as the Commission has eroded the authority of the Council by successfully proposing to the Council the diluting of the qualified majority voting requirement for the adoption of definitive measures. With this new voting requirement in place, the Council of Ministers will become little more than a rubber stamp for the adoption of proposals for definitive measures advanced by the Commission. A proposed measures would have to be extremely controversial before eight Member States would block its adoption.

Turning to a comparison between European Commission practices in this field and the terms of the 1979 Code, the simple conclusion is that the incidence of deviation is high illustrating the extremely low degree of normative influence exercised by the international provisions. This can be attributed for the most part to the failure of the European Union institutions to enshrine a complete statement of procedural rights in

the Basic Regulation.[1068] Instead, the law relating to procedure is a complex amalgam of a few specific rules contained in the Basic Regulation and general principles of law (ie. the principle of proportionality).

The liberal standing requirements practised by the European Commission for admitting anti-dumping complaints is one obvious area of apparent deviation. Scrutiny of complaints for prima facie compliance with the essential requirements for an anti-dumping complaint is a critical safety valve to prevent an explosion of unjustified claims for relief. If the standing requirements are too lax, unfounded complaints may be accepted and measures adopted without proper investigation. Such a flaw would strike at the very heart of attempts to achieve international regulation.

The most obvious Code violations committed by the European Commission in this area involve the techniques approved by the Commission to decrease the economic base for the identification of the relevant EU industry. The Commission facilitates the admission of complaints through the application of the related parties rule and the regional industries rule, both of which are sanctioned by the 1979 Codes but neither of which should be abused to alleviate the requirements for standing. Taken to extreme, the standing requirement can be manipulated to such an extent that a single producer can be considered representative of an EU industry.

In conjunction with the loose standing requirements, the standards for assessing petitions are also suspect. The most superficial evidence of dumping and injury has been

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[1068] This differs significantly from EU competition policy where the Basic Regulation (Council Regulation (EEC) 17/62 (1962)) is supplemented by another measure setting out the procedural rights of interested parties in detail; Commission (EEC) Regulation 99/63 (1963).

accepted by the Commission as grounds for initiating an investigation. However, the most dangerous change of policy is the recent practice of permitting selective complaints, first allowed in Video Cassette Recorders From Korea and Japan, and now standard practice on the part of the European Commission. The Anti-Dumping Code clearly specifies that anti-dumping investigations are to be conducted against specific countries and not particular manufacturers or producers.

Many aspects of the actual conduct of the Commission in investigations are inequitable and entail infringements of the 1979 Code. For example, the Commission has turned the 'best information available' rule contained in the Code into a mechanism for penalising foreign producers who fail to co-operate during the proceedings. Failure to co-operate will result in more extensive duties even in those situations where such measures cannot be objectively justified. For example, the Oxalic Acid From Taiwan and South Korea case illustrates that the Commission believes higher duties than those actually found are justified in order to prevent foreign producers from being rewarded for non-co-operation.

Another area of controversy has been the European Commission's blatant disregard of time limits for investigations. During a period of investigation, quite clearly market conditions are subjected to a degree of uncertainly which will compromise the commercial interests of manufacturers. The greater the period of uncertainly, the more extensive the damage to these interests. Hence, a period of three years until the conclusion of an investigation will have substantial commercial ramifications for a producer. Nevertheless, many investigations pursued by the Commission have not been concluded within the one year period recommended under the 1979 Anti-Dumping Code but have extended for

periods of up to four years. Again, this appears to be a prima facie violation of the Code when it occurs on a regular and recurring basis.

The method of granting relief after an affirmative determination is also a controversial matter. It is the arbitrary fashion in which relief is decided which is the source of dispute as to whether the Commission's practices in this area are compatible with the terms of the Code. For example, the policy regulating the acceptance of undertakings is unstable despite the exhortations of Commission officials. Increasingly, undertakings are rejected for political reasons when offered by producers from certain countries. Similarly, the Commission's willingness to accept undertakings has declined in recent years as such mechanisms have become increasingly difficult to administer.

The setting of residual duties is also difficult to reconcile with the terms of the Anti-Dumping Code. These duties are set at the highest dumping margin found and are applied to producers or exporters not yet in the process of exporting goods to the European Union. These producers are automatically attributed the highest dumping margin even although no full investigation into dumping has been made with respect to the new producers.

The sunset procedure has also been abused to allow the continued extension of measures and to provide quasi-institutionalised protection to some sectors. Since 1986, approximately 25% of measures have been renewed under the review mechanism which has been allowed because of the extensive discretion of the Commission and Council to grant extensions in situations involving changed circumstances. Substitution of the threat of material injury for actual material injury for example allows renewal of measures on different substantive

grounds from those on which the original determination was made. Similarly, the power of the Commission to extend the scope of the relevant product in reviews also is questionably GATT-consistent since additional products falling within the scope of the review are not subject to the full rigours of an investigation as required by the Anti-Dumping Code.

The most flagrant violation of the Code is, however, the simultaneous imposition of anti-dumping and anti-subsidy duties despite the express terms of Article VI of the GATT. Here the European Commission is explicitly infringing the international obligations of the European Union and has done so with relative impunity. At this point the limitation of influence of the GATT and the 1979 Codes is most evident. If the European Commission is unwilling to respect the most fundamental principles of the international obligations regulating this area of activity, there is little prospect of peripheral obligations having adequate normative influence unless the European Commission deemed compliance to be expedient.

These are examples of inconsistencies between the express terms of the GATT and the 1979 Codes. Two mechanisms exist in the twilight areas of regulation, namely anti-absorption and anti-circumvention measures.

Anti-absorption measures appear to infringe the 1979 Code on a number of technical grounds. First, the scope of the group entitled to initiate such proceedings is not confined to an interested party but rather extends to a 'directly concerned party' which has been interpreted as a more extensive category. Second, there is no need for a directly concerned party to establish that it is part of the relevant EU industry. Third, the standards of evidence required for such investigations

are unreasonably low. Finally, in reality, the size of duties found to have been absorbed is extremely high, in some cases exceeding 100%. Whether or not anti-absorption measures are consistent with the terms of the GATT and the Anti-Dumping Code will ultimately be resolved once the findings of the panel requested by Japan at the GATT are made public.

The anti-circumvention procedures operated by the European Union have already been found to be inconsistent with the terms of Article VI although this finding was on extreme technical grounds rather than on a clear-cut violation of the GATT. Although the European Commission has refrained from initiating investigations under the authority of Article 13(10) of the Basic Regulation, it has now done so under the authority of the new 1994 Basic Anti-Dumping Regulation.[1069]

The conclusion to this part of the investigation is therefore that the normative influence of the international legal obligations imposed on the European Union's agencies is insufficient to compel those institutions to behave in a manner compatible with the terms of these obligations. The influence of non-legal factors is too pervasive. Pressure from domestic industries for protection is too great. Hence, when conducting investigations, the European Commission acts independently from the framework of legal obligations within which it ostensibly operates.

The evidence for this conclusion is derived not only from the most inconsistent administrative practices but also from the terms of the Basic Regulation itself which

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[1069] Commission Regulation (EC) 2451/95, initiating an investigation into circumvention of anti-dumping duties on imports of 3.5" microdisks originating from Japan, taiwan and the PRC, O.J. L252/9 (1995).

inadequately protect the rights of foreign exporters in investigations. Supplementing these obligations with general principles has not been a successful process and the European Court has completely failed to protect the rights of interested foreign parties. The result is that an overall asymmetry exists in the procedural rights of EU and foreign interested parties in anti-dumping and anti-subsidy investigations.

# PART E

# CONCLUSIONS

## 12 Conclusions

### (1) General Conclusions

In terms of the specific international rules selected for analysis, namely those governing subsidies, countervailing duties and anti-dumping measures, the institutional and substantive legal framework for the regulation of trade, as organised under the GATT during the period prior to 1995, failed to exercise sufficient normative influence over the relevant aspects of the trade policies of either the United States or the European Union. Both were to a degree impervious to the authority of the prescribed legal norms relating to these activities and which were intended to prescribe the form and content of policies for all states participating in the international field regulated by the GATT.

The ramifications of this conclusion have broader implications for the whole of the international legal system in general. How this situation arose provides insight into the functioning of international rules as a determinant of state behaviour and the shortcomings of the international legal system itself. The findings explain, in part at least, why certain states felt able to disregard or ignore the application of international rules in particular circumstances as well as the pressures exerted by legal and non-legal factors on the decision-making processes inside states.

Unfortunately this study has not yielded definitive answers to resolving the issue of the efficacy of international law and its influence on state behaviour. It has, however, provided indications why these particular rules had such a circumscribed impact on the behaviour of the two particular states in the period of investigation. At least we have arrived at a starting

point which permits general observations to be made on this important phenomenon.

Broadly speaking, the following factors played a crucial role in circumscribing the efficacy of the selected rules on the conduct of the United States and the European Union:

(a) The limited normative efficacy of the international trade legal order itself.

(b) The degree to which the substantive rules themselves embody an adequate consensus in relation to their content.

(c) The extent to which these international rules are compatible with the policy objectives and goals sought to be achieved by states (in this case the United States and the European Union) in terms of commercial policy.

(d) The ability of these rules to permeate the decision-making processes inside states and to prevail over non-legal factors and considerations.

(e) The strength of such rules in terms of their ability to withstand dilution or avoidance when incorporated at national level and the degree of effectiveness exercised by such rules when applied by national (or supranational) agencies.

By categorising each of these factors into separate classifications we do, of course, run the risk of oversimplifying what is undoubtedly a complex picture but, on the other hand, each of these factors also provides, to a greater or lesser degree, a standard by which efficacy can be measured as well as an explanation why, at least in the course of the present study,

international rules have played such an ineffectual function in the determination of state behaviour.

### (1) The Limited Normative Efficacy of the International Trade Legal Order

The root cause of the lack of normative influence exercised by the international trade legal order on the behaviour of the United States and the European Union lies in the structure of the legal order itself. This order was originally conceived by a small group of states in which only a meagre commonality of interest existed as to the shape which the international trade legal order should assume. From this starting point, this consensus dissipated as the economic environment in which the international trading system functions evolved and the legal structure of international trade changed.

International trade is an activity which occurs in the general context of the global economy. Put another way, the international economy can be equated to the societal environment in which trade functions. The shape and content of the international trade legal system is influenced by the totality of economic relationships conducted by states which collectively constitute the international economy. Trade cannot be divorced from economic considerations and the prevailing structure of the economic system as it alters over time.

The GATT, as established in 1947, was inappropriate, even then, to regulate trading relations because it reflected the artificial and transient economic conditions which existed immediately following the Second World War. More significantly, the contracting parties later failed to adopt the system to adjust to fundamental changes in the international economy and the

consequence of this was the undermining of the effectiveness of the organisation in imposing sufficient normative influence on the behaviour of the two more significant participants in the system.

The economic environment which existed immediately after the Second World War had a number of distinctive features, the most obvious of which was the unopposed economic superiority of the United States. This single state exercised sufficient influence in the international economic community to create a trading order which was, for all intents and purposes, an instrument of United States commercial policy. The four fundamental principles of the GATT constitute the classical laissez faire model for international trade which reflected the policy of trade liberalisation promoted by the United States during this period.

While the proposed ITO Charter did contain elaborate institutional provisions, its demise was merely a reflection of the nature of the international economic environment in which it was conceived. The United States no longer wished to participate in such an elaborate and potentially effective organisation and therefore withdrew its consent and consigned the ITO Charter to the international scrap heap. Regulatory mechanisms would hinder the formulation of United States trade policy and therefore were undesirable. The result was an international agreement - the GATT - which promoted general United States trade policy ambitions and yet, at the same time, was sufficiently vague and emasculated to never offer the prospect of impeding the implementation of these objectives.

Within the first decade of the GATT's operations, two landmark events occurred which fundamentally altered the structure of the international economic system in which

the world trading system operates. First, Japan was permitted to accede to the GATT which sent many contracting parties searching for the protection of the opt out clause contained in Article XXXV(1). Second, and in retrospect the most significant event, the European Community was established under the Treaty of Rome. This created the possibility of a departure from the single state centric structure of the international economy and the prospect of a bipolar or even tri-polar paradigm. This transformation has now happened and the power to control the shape of the international economy, and the legal structure which regulates it, has been lost from the grip of the United States.

The international economy has now expanded geographically and horizontally with the industrialisation of those states described loosely as newly industrialised which are able to produce goods more competitively than their developed counterparts. This has caused developed states - particularly the United States and the European Union - to adopt their economic and commercial policies in order to inhibit or limit the degree of import penetration into their markets thereby engendering greater state intervention and distortion in the international economy.

Along with these profound changes in the international economy has come a growing sophistication of the transactions taking place in the economy itself. Trade in goods is no longer the single most significant element in the international economy. Trade in services, investment, interest rates, exchange rates and the protection of intellectual property rights have become prominent issues of the international economy.

The result is that, since 1947, there has been a gradual, yet perceptible, evolution in the shape of the

international economy measured both horizontally (in terms of geographical spread of power) and vertically (in terms of the complexity of the functioning of the system itself).

From an institutional perspective, how did the contracting parties of the GATT responde to these significant changes? Until January 1, 1995, the main plenary organ was the CONTRACTING PARTIES, an unwieldy body with little real power to institute change or to respond to the needs of the international trading system. The Council effectively ceased to operate other than as a forum for the exchange of views among the four main participants of the trade system. The panel process all but lost its credibility as an effective means of resolving disputes.

From a substantive point of view as well, the efforts of the contracting parties to recognise the need for new rules to tackle emerging economic problems such as subsidies, dumping, technical barriers to trade, government procurement, licensing procedures and so on, have been limited to the negotiation of side agreements which represent poor compromises among the interests of the main trading nations.

The contracting parties have also done little to stem the growth of illegal activity being perpetrated by the United States and the European Union. The consequence is that trade in important sectors of the international economy is conducted through bilateral agreements and arrangements. The steel industry, the textile industry, the agricultural sector and the motor vehicle industry are only a few of the areas of economic activity which function de facto outside the control of the GATT. Similarly, the GATT has stood by and watched the undermining of the principle of multilateralism through

the negotiation of free trade areas and other agreements creating preferential trading rights on a bilateral basis.[1070]

The failure to adapt the GATT's institutional structure and substantive rules to the changing international economic environment can be attributed to four critical factors.

First, the soft law regime established in the original General Agreement, and which reflected the interests of the United States, was never transformed into a legalistic system which allowed rights and duties to be fixed, applied and enforced. Ultimately, this lead to a failure to circumscribe the rights of the contracting parties to interfere with patterns of trade. Since the system was, at its heart, a soft law system, attempts to rectify this system by creating black letter side agreements could never succeed without fundamental rectifications to the core of the system.

The same vagueness in international obligations has encouraged states to introduce new notions into international trade law which are more appropriate to the field of competition policy. The unilateral development of such concepts, especially by the United States, has been a pretext for abusive behaviour justified as a means to counter such practices. Ascribing the epithet of 'unfair' to foreign commercial practices, creates artificial concepts without legal justification, certainly in terms of the GATT scheme of legal obigations.[1071]

Second, all trading nations, but in particular the

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[1070] See text, supra pp.37-40.

[1071] See text, supra pp.41-42.

United States and the European Union have demonstrated a traditional reticence to delegate the prerogatives of formulating national economic and commercial policy to an international organisation. As a consequence of the fact that national economic policy remains jealously guarded within the sovereign prerogatives of most states, the international economic system has no coherent or immutable basic policy objectives. The co-ordination in macro-economic policy within the Group of Seven is no surrogate for a stable international economic foundation on which to build trade rules. Similarly, some of the activities of the OECD greatly affect the international economic environment but create a separation of interests between the developed countries and the rest of the international economic community.[1072]

Third, most states, but again notably the United States and the European Union, have been reluctant to enter international obligations which will require a compromise to be reached between the operation of these principles and a host of non-economic factors and national policies which have become increasingly relevant in the national decision-making processes. In the implementation of trade commitments, both the United States and the European Union have been unable to exclude the influence of externalities in the formulation and application of national economic and commercial policy. The clearest example must be that of the Common Agricultural Policy which, for more than thirty years operated outside the rigours of the GATT system and which was justified, inter alia, on the need to protect agricultural communities inside the European Union, mainly on socio-economic grounds. The accommodation of non-economic factors into the

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[1072] See text, supra pp.33-34.

formulation of national economic and commercial policy has become a reality of political life but the fact remains that such considerations limit the normative influence of international trade obligations.[1073]

Those aspects of national policy which interact - or interfere - with a state's willingness to comply with its international obligations are myriad. For example, the pursuit of an industrial policy promoting research and expenditure will necessarily entail a trade-off between industrial policy objectives and international trade obligations. The same applies to measures designed to promote a national environmental protection policy. Other national policy matters which conflict with trade-related obligations include monetary policy, employment policy, protection of infant industries, foreign investment policy and the protection and safety of workers and the consumer. In each of these cases, national officials are required to make trade-offs between these interests and international trade obligations.

A clear instance of the conflict between industrial and economic strategic planning and international obligations occurred in the dispute over subsidies to the Airbus Industrie consortium. The European Union identified the promotion of the aerospace construction industry as a major priority of its industrial planning and chose to allow this programme to receive assistance outside the scope of the Subsidies Code 1979. Notwithstanding the GATT panel report, the dispute was settled by a compromise agreement between the European Union and the United States which effectively disapplied the panel's findings. The fact that the United States agreed to settle the affair in this manner is tantamount

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[1073] See text, supra pp.48-51.

to implicit acknowledgment, even by the United States, that legal principles must bend to the realities of such pressures. In other words, in certain circumstances, legal principles cannot prevail over important strategic non-legal considerations.[1074]

Fourth, the institutional structure of the organisation, once fixed in the form prescribed in 1947, proved impossible to adapt in light of the consensus which would have been required to overhaul the system. To a certain extent, this also explains why, in the final stages of the Uruguay Round negotiations, it was eventually realised that the existing GATT institutional structure would collapse under the administrative needs of implementing the new agreements and that, however reluctantly states might be to concede this point, a new institutional structure would be required.

The need to overhaul the institutional structure of the GATT has existed for more than twenty years without effective action being taken until 1995. If effective rules were to be established to stem deviation by contracting parties from the precepts of the system, the efficacy of the institutional structure required radical improvement in terms of rule-making, rule-identifying and rule-applying mechanisms. An integrated institutional structure for these purposes was always the most obvious alternative. Instead, the horizontal devolution of these functions to committees with limited powers, particularly as regards enforcement, was a second rate compromise which inevitably produced inferior results. The United States and the European Union relied extensively on this fact to evade their international obligations.[1075]

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[1074] See text, supra pp.108-112.

[1075] See text, supra pp.52-59.

A number of factors cumulatively explain this result. The committees were created by codes in which only a limited number of contracting parties participated. The international agreements which they were instructed to enforce were generally the product of excessive compromise during negotiations on their content. The dispute settlement procedure was inherently defective and the absence of a mechanism to facilitate the automatic adoption of panel reports circumscribed any normative influence such reports might have. With few exceptions, the only reports which were implemented were non-contentious and were given effect on the most limited basis possible.[1076]

The impossibility of overhauling the original institutional structure proved to be another significant factor in circumscribing the power and authority of the organisation to exercise adequate normative influence on the behaviour of the United States and the European Union. There was never any permanent mechanism in the organisation to facilitate the creation of new international commitments as and when the need for such disciplines arose. No means of adjudicating disputes between states was ever substituted for the discredited panel process. The only effective method of enforcing adverse decisions required unilateral action in the event of remedial action being refused by a recalcitrant state, despite the absolute incompatibility of unilateral action with the principle of multilateralism which stands at the heart of the system.

The enforced debilitation of the GATT legal structure, at the instance of its most influential contracting parties, itself produced changes in the nature of the

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[1076] See for example, text, supra pp.93-99.

international trade system as the United States and the European Union took greater advantage of the inability of the GATT to restrain their behaviour. The main change is the growth in free trade areas sparked by the perception of some states of an inability to achieve policy objectives on a multilateral basis. Even although these arrangements are arguably permitted under Article XXIV of the GATT, they have increasing sophistication in terms of both organisational structure and the scope of their coverage. Many, such as the NAFTA, transcend the traditional conception of a free trade area by encompassing additional fields such as investment, services and intellectual property rights.[1077]

On a less intensive level, but still equally foreboding for the effective regulation of state behaviour, has been the rise of bilateral understandings to limit the exports of one country to another. Whether these are called voluntary export restraint agreements, voluntary restraint agreements or orderly marketing arrangements, their effect is the same; to create illegitimate, but almost generally accepted, restraints on trade. Their existence is an anathema to the GATT-system for a number of reasons but mainly because they fundamentally undermine the operation of the principle of multilateralism. Not surprisingly, it has been the United States and the European Union which have had most frequent resort to such measures.[1078]

The United States and the European Union have been able to evade their international trade commitments because of these limiting factors which operate to circumscribe the normative influence of the GATT rules. If the system for the application and enforcement of obligations is

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[1077] See text, supra pp.39-40.

[1078] See text, supra pp.38-39.

out-of-step with the environment in which it operates, unable to respond to change and unable to prevail over the host of competing interests influencing the decision-making, it will always be inherently ineffective. This situation has been compounded by an insipid institutional structure which has been unable to contain the pressures exerted by the competition of interests among the major players.[1079]

It is therefore a valid conclusion that the fact that the United States and the European Union often formulate trade policy divorced from international legal commitments can be attributed to the limited normative efficacy of the international trade legal order itself.

**(2) The Degree to Which the Rules Embody an Adequate International Consensus**

The formulation of international rules requires a compromise to be struck between the rights of states to regulate their own domestic economic and commercial policies, subject to the rules of international law, and the legitimate interests of other states to mitigate or limit injury which might be sustained as a consequence of other states exercising their right to formulate such policies. These conflicting interests are best reconciled by negotiating principles and rules which delimit these respective interests.

The key to successfully striking this balance is to create principles based on a genuine consensus among the participating states. Indeed, rules of law must be based on a minimum degree of consensus and if negotiating states are unable to arrive at such an accommodation,

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[1079] See text, supra pp.52-54.

the outcome will be inefficacious rules. Behind this consensus is implicit acknowledgement that compliance with the terms of a rule is in the long-term strategic interests of the participating states. This self-interest provides the primary motivation for abiding by the terms of the rule.

Further, international rules increase in normative efficacy in proportion to the degree of consensus underpinning their content. Conversely, international agreements which incorporate too many compromises during their negotiation embody a limited degree of consensus and as a result their obligatory content will have a circumscribed normative effect. The rules themselves will be vague and may contain unworkable formula; in the worst case scenario, these rules will be inchoate and underdeveloped. Such agreements are rarely accompanied by mechanisms or processed which facilitate rectification of these short-comings which, in reality, ultimately contribute to their demise.

Of the agreements considered in this study, the most graphic illustration of an agreement embodying an inadequate consensus is the Subsidies Code 1979. This agreement substituted compromise as a surrogate for genuine consensus among the parties. The United States and the European Union settled for a set of rules which both knew did not represent a statement of their consolidated mutual policy interests. The United States desired rules which could be mustered to attack the subsidisation policies of specific states, most notably the European Union, in the event that their policies did not converge with the United States' perception of appropriate financial contributions. The primary objective of the European Union in the negotiations was to dilute the prospect of other states attacking its subsidisation policies. In these circumstances, the

prospect of consensus between these parties was virtually non-existent and this failure permeated the whole of the agreement. The inevitable consequence was that, within a few years, the 1979 Code rules fragmented and became unworkable.[1080]

The difficulties of reaching the necessary degree of consensus may be attributed to the reality that the negotiating positions of states are essentially extensions of their domestic policies and are therefore stigmatised with self-interest. When this element is prevalent, the negotiating positions of states become increasingly intractable and the prospect of compromise, on which a consensus may be constructed, diminishes. Negotiating positions serve to achieve political objectives and, in the absence of common objectives, the creation of effective rules is rare.

In the field of international trade, these interests, and the traditional prerogatives of states to conduct national economic and commercial policy, have largely contributed to the general reluctance of states to agree to rules which will interfere with the exercise of sovereign rights. This reluctance has had two consequences. First, this has resulted in the perpetration of weak rules to regulate international behaviour. Second, there has been a general reticence to confer on international bodies the necessary jurisdiction to interfere with the exercise of these sovereign rights. For example, the United States took extensive advantage of the protocol of Provisional Application to grandfather its laws, especially its countervailing and anti-dumping laws. The failure to acquiesce to the application of the material injury test created a serious imbalance in the global application of

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[1080] See text, supra pp.112-116.

this standard as other nations gradually amended their laws to comply with the rigours of Article VI. The United States then used this non-compliance as a bargaining counter at the Tokyo Round MTNs to achieve more precise rules governing the perceived misuse of subsidies by other states.[1081]

Another attribute of rules based on an effective absence of consensus is that they rarely embody any mechanism for compulsion. In such circumstances, it is not surprising that states cannot be relied on to refrain from taking advantage of the vagueness in the rules to avoid their obligations no matter how weak these obligations might be. Vagueness also encourages unilateral interpretation especially in the absence of a centralised body or agency to provide direction and guidance. Experience throughout this study has shown that, given any discretion to unilaterally determine their rights and duties, the United States and the European Union will opt for the interpretation which permits a construction in favour of the policy which they wish to adopt. The same tendency also occurs in relation to any loop-holes which exist in the fabric of international agreements.[1082]

The Subsidies Code is replete with instances of consensual lacunae. At the most basic level, the negotiating parties were even unable to arrive at a consensus on a definition of a subsidy even although failure to reach a workable formula for identifying financial assistance in this form had been recognised as a fundamental flaw in the original Article VI and XVI provisions. The inability of the signatories to agree on the definitive attributes of this concept also

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[1081] See text, supra pp.175-176.

[1082] See text, supra pp.183-187, 207-219.

fundamentally retarded progress on the development of the disciplines contained in the agreement itself.[1083]

The definition agreed at the Uruguay round negotiations is an improvement but still a solid core of convergence in the negotiation positions of the United States and the European Union on this point is absent. Consequently, the definition itself and its related concepts are neither unambiguous or sufficiently precise. The definition, for example, does not address the issue of whether or not a failure to regulate a particular economic sector would constitute a subsidy for the purposes of the Agreement. Equally, is the refusal or failure of a government to impose minimum safety, employment conditions or wage conditions a subsidy? These questions arise simply because of the non-comprehensive nature of the formula agreed which, in the absence of effective international dispute settlement, allow both the United States and the European Union to draw their own conclusions and develop their own principles. The addition of the requirements that a subsidy must involve a financial contribution and must satisfy the specificity standard will not, of themselves, rectify this problem.

The terms of the 1979 Code regulating to the use of domestic subsidies also reflect a total absence of consensus between those signatories advocating the imposition of restraints on such subsidies and those states which took the view that the social and political benefits of domestic subsidies outweigh the adverse economic repercussions. As a direct consequence, the provisions relating to domestic subsidies add little, if any, clarification to the terms of Article XVI as amended, and in fact perpetuate, and even exacerbate,

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[1083] See text, supra pp.121-122.

the ambiguities of the original GATT provisions.[1084]

Similarly, the artificial rationale for distinguishing between agricultural and industrial export subsidies on the basis of an economic distinction can be traced back to a profound disturbance in the initial consensus for regulating subsidies. This formula arose originally as a political attempt to reconcile the formulation of restraints on the use of export subsidies with the internal policies of the United States. The European Union later hijacked the distinction in order to preserve the integrity of its own Common Agricultural Policy. In both cases, the impetus for maintaining the distinction was political and the consequence was to prevent the formation on any genuine consensus around an effective prohibition on the use of export subsidies. These interests again surfaced at the Uruguay Round to such a degree that they threatened to jeopardise the success of the whole round of MTNs.[1085]

Even the most explicit provision of the Code - the prohibition of export subsidies on industrial products - proved to be based on the misconception that the provision could be effectively enforced. In the United States complaint against European Union subsidies on exports of pasta, despite a clear finding of prohibited subsidies, the European Union managed to avoid having to change its policy by effectively vetoing the adoption of the report. Even although stated in the clearest terms possible, the normal consequences of a legal obligation of this sort did not follow.[1086]

The jurisprudence of dispute settlement under the Code's

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[1084] See text, supra pp.91-97.

[1085] See text, supra pp.438-441.

[1086] See text, supra pp.106-112.

provisions additionally provides evidence of the failure to arrive at an adequate consensus on the terms of the Code. One of the earliest panels adjudicating on the contents of the Code expressed its contempt to such a degree that it declared itself 'unable to conclude' whether a breach of Article 10 of the Code has occurred in a complaint lodged by the United States against the European Union.[1087] Other panel reports on the application of the terms of the Code were ignored in practice either by the refusal of the signatory found in violation to accept the adoption of the report or by bilateral settlement of the matter in terms which rarely reflected the findings of the panel.

It cannot be said with certainty that the terms of the Subsidies Code 1993 are based on a sufficient degree of consensus between the two protagonists - the United States and the European Union. In effect, the classification of subsidies into the prohibited, actionable and permissible categories remains open pending definitive discussions on the matter. Here there exists an open battle-field for conflict between the two parties once the moratorium on complaints contained in the so-called 'peace clause' has lapsed. There is little doubt that this issue has not been satisfactorily resolved and the vagueness and overlap between the categories allows considerable for unilateral interpretation.[1088]

Therefore, the failure of the 1979 Code at the technical level can largely been attributed to establishing rules on an inadequate consensus. The result was grey areas which were perpetually exploited by the United States and the European Union in order to avoid their

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[1087] See text, supra p.105.

[1088] See text, supra pp.140-144.

obligations. Similarly, the prohibited/actionable/ permissible classification being introduced in the Subsidies Code 1994 is a primary weakness in this regime. There are inadequate rules to categorise specific programmes into each of these baskets because there was an inadequate consensus underpinning the formulation of the rules in the first place.[1089]

Turning to the rules of the Subsidies Code 1979 relating to countervailing duties again the same phenomenon appears. The original purpose of countervailing duty measures, it will be recalled, was to prevent injury to a domestic industry due to foreign subsidies granted on competing products. However, few rules were agreed in the GATT, other than those in Article VI, to regulate these measures quite simply because their use was not considered to be prevalent at that time.

As pressure for greater protectionism through the use of these mechanisms has grown, so to has the need to regulate their use through international constraints. Here, the competition of interests emerges. On the one hand, the policy of the United States has been to resist attempts to curtail the discretion of states to resort to such measures. On the other hand, a number of states, including the European Union and Japan, have colluded to counter this propensity. The inevitable consequence is an inability to arrive at an effective consensus on which to build international rules which will have sufficient normative impact.[1090]

An illustration of this tension was the proposal espoused by the European Union at the Tokyo Round to confine the use of countervailing measures to subsidies

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[1089] See text, supra pp.131-142.

[1090] See text, supra pp.177-187.

prohibited at the general level by the Subsidies Code itself. The impact of this would have been to restrict the use of countervailing measures to export subsidies on industrial products. The United States, of course, resisted the proposal to assimilate the treatment of subsidies and to co-ordinate the treatment of particular subsidies, and the proposal was never adopted.[1091]

In contrast to the position of the European Union vis-a-vis subsidies, the United States successfully resisted the attempts to impose shackles on its countervailing duty laws. No consensus was reached on the scope of a number of key terms, including the concept of countervailable subsidy, quantification rules, guidelines for establishing specificity, anti-circumvention measures and the standards for assessing material injury.[1092] In addition, by once again depending on the reliability of the PPA, the United States was only required to apply this new regime to the minority of contracting parties which became signatories to the Code.

In the dispute settlement process, this time it was the United States which was on the defensive, continuously blocking the adoption of adverse reports and refusing to amend its legislation retrospectively particularly when cash deposits had already been lodged. The United States was, by far, the respondent in the majority of complaints brought before panels for resolution and yet few amendments liberalising these laws in favour of foreign producers have been implemented. This is further testimony to the extremely ineffective nature of the dispute resolution procedure and the limited normative nature of the substantive rules contained in the Code

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[1091] See text, supra pp.126-137.

[1092] See text, supra pp.183-187.

itself.

The position vis-a-vis the Anti-Dumping Code 1979 is more complex quite simply because the opposing parties were not so clearly defined. Hence, the nature of the vested interests bringing about the collapse of the necessary consensus cannot be readily identified. The starting point is, however, recognition that anti-dumping measures cannot be justified by economic argument and are therefore, in reality, a political mechanism used by Western developed countries to limit the volume of imported products into their markets. Since these countries exercise the greatest negotiating power inside the GATT, an agreement to regulate this matter will probably embody their interests which are primarily to allow the greatest degree of flexibility and manoeuvrability possible when administering and adopting anti-dumping measures.

The 1979 Code provisions on procedure, determinations of dumping and adjustments are deliberately extremely vague as are the rules for establishing material injury.[1093] The Code even failed to establish a common standard for the application of the injury test between the United States and the European Union. Nevertheless, it is in the extensive scope of issues not regulated by the 1979 Code that absence of consensus is apparent. No rules were agreed to regulate indirect dumping (input and sub-assembly dumping), cumulation and cross-cumulation of injury, the problem of exchange rate volatility, anti-circumvention measures and anti-absorption techniques.[1094]

With one or two minor exceptions, the vast majority of

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[1093] See text, supra pp.178-184.

[1094] See text, supra pp.184-189.

complaints brought under the Anti-dumping Code have been levelled against either the United States or the European Union. Nevertheless, neither the United States or the European Union has shown any deference to the authority of panel reports ruling against their policies or activities. Legal technicalities, blocking the formation of consensus and a host of other techniques have all been mustered to justify procrastination in adopting panel reports.[1095] The European Union did not, for example, amend its anti-dumping laws to comply with the ruling of the panel in the Screwdriver Case. The United States, on the other and, preferred to enter into a phase of bilateral discussions designed to reach a 'mutually satisfactory solution' rather than change its anti-dumping laws.[1096] It is therefore a justifiable conclusion that the panel system exercised no genuine normative influence over the behaviour of these two states.

Establishing a sufficient degree of consensus in the rules of the 1979 Codes was not aided by the fact that the patterns for many of the rules had already been entrenched even before the Tokyo Round commenced. Building on flawed concepts proved to be profoundly dangerous particularly in the case of the Subsidies Code. Instead of constructing the new regime on the unworkable formula contained in Article XVI, the negotiators would have been better starting with a fresh page. This was the approach adopted a decade later during the Uruguay Round negotiation and which gives the final text of the Second Subsidies Code more credibility than its predecessor. However, the task of the Uruguay Round negotiators has been made more difficult,

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[1095] See text, supra pp.187-192, 194-201.

[1096] For example, United States Anti-Dumping Duties on Imports of Cement from Mexico, supra pp.195-197.

particularly in developing rules for subsidies, by the fact that the preceding agreement was inept at controlling the proliferation of unlawful subsidies. In order to obtain credibility the revised Code must now reign in this abuse and bring state aid inside the domain of normative influence which will impose an immense strain on the new system from the very outset.

Constructing regulatory regimes on an inadequate consensual basis creates its own consequences both for circumscribing the normative influence of such rules and undermining the credibility of the system as a whole.

The most obvious adverse consequence is that such a deficiency can only lead to the creation of unworkable rules which will ultimately render the whole edifice of normative regulation ineffective. Both the Anti-Dumping and the Subsidies Codes are replete with unworkable formula and rules, but this quantity is most evident in the Subsidies Code. For example, the 'seek to avoid' formula adopted in Article 8(3) of the Code diluted the normative influence of this rule to such a degree that no signatory could be confronted for failing to prevent injury Through the introduction of a domestic subsidy.[1097] This interpretation is confirmed by the fact that the provision never formed the basis for a complaint by any signatory against another. Similarly, mere 'recognition' that subsidies other than export subsidies may cause injury to a domestic industry was tantamount to acknowledgement that the rule contained in Article 11(2) was a formulation based on the concept of 'regulation without observation'.

Many more instances of unworkable rules permeate the Subsidies Code. The test of 'equitable share', when

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[1097] See text, supra pp.91-92.

applied by the panel in EU Subsidies on Exports of Wheat Flour, was subject to overt criticism. This was a clear endorsement of the view that the formula could not be effectively applied in light of the complex interplay of economic factors at work in the international market-place. Even the explicit prohibition on export subsidies on industrial products proved difficult to apply and caused one panel member to issue an unprecedented dissenting opinion in the first test case brought. Each of these formulations proved to be too vague to be proper systems for the effective identification of legal obligations, a phenomenon which can be directly attributed to the fundamental lack of consensus which existed when these formulae were conceived.

A further consequence of rules conceived on an inadequate consensus is that the rule-identification and development mechanisms established under these agreements suffered from a thrombosis brought about as a result of the difficulties of applying and evolving the existing rules. The Subsidies Committee, in particular, was unable to escape this condition particularly in relation to developing rules for the uniform interpretation and application of the Code despite this function being an express role of that agency. Indeed, inside the Committee itself, fragmentation occurred in the membership as a result not only of divergent opinions as to its role but also in relation to formulating recommendations providing guidance on the rules.[1098] Although the Anti-Dumping Committees was more successful in this task, the guidelines which it produced were mere recommendations which were not binding on signatories and implementation of these recommendations could only be achieved on a

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[1098] See text, supra pp.56-57.

voluntary basis.[1099] In fact, the common response of signatories to the publication of these recommendations was to assert that their existing national laws and administrative procedures complied with the terms of these recommendations and therefore no subsequent amendments were necessary.

The demise of the organisational structure behind the Codes inevitably resulted in the failure to secure new rules to tackle the more complex and exotic measures and practices devised by the United States and the European Union for applying anti-dumping and countervailing duties. Anti-circumvention and anti-absorption measures were never specifically regulated by Code provisions or recommendations from the Anti-Dumping Committee and were only controlled through the application of general principles. Similarly, signatories were left on their own to develop national laws to deal with indirect dumping, indirect subsidies, cumulation and cross-cumulation, exchange rate fluctuations and the definition of countervailable subsidies.[1100] In other words, the failure to arrive at a proper consensus on the basic principles produced a knock on effect when the signatories came to address the issue of regulating new techniques.

The cumulative impact of these factors was to relegate the role of the Code rules in terms of both their normative efficacy and their credibility. This is evidenced by the fact that gradually contracting parties which were also signatories to the Code based complaints on the general principles of the GATT rather than the tailored provisions of the Code. For example, the United States complaint against European Union subsidies to

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[1099] See text, supra p.57.

[1100] See text, supra pp.183-188.

producers of certain types of canned fruit was brought under Article XXIII of the GATT and not Article 8 of the Code.[1101] Equally, the United States complaint against European Union oilseed subsidies was brought under Article III of the GATT.[1102] Likewise, the Japanese complaint against the European Union's anti-circumvention measures was initiated on the basis of Article III and not the relevant provisions of the Anti-Dumping Code. This abandonment is proof that both Codes, but especially the Subsidies Code, lost their credibility as their normative influence was eroded.

In turn, this process led to the eventual abandonment of compliance with the terms of both agreements especially by the United States and the European Union. The fact that the Subsidies Code provided no effective remedy to a complaint was recognised as early as 1985 and, as panel reports were increasingly prevented from being adopted, fewer complaints were lodged with the Subsidies Committee. As for the Anti-Dumping Code, although use was made of the complaints procedure much of this activity can be attributed to attempts to place pressure on states during the Uruguay Round negotiations. This is certainly true of the majority of complaints lodged after 1989.

The decline in the normative impact of these agreements has much broader implications which also merit consideration in the context of this discussion. The most noticeable effect is that disputes which should have been resolved through the channels set up under these agreements became increasingly acrimonious as the parties attempted to arrive at a settlement outside the framework provided by the agreements. Once the dispute

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[1101] See text, supra pp.93-95.

[1102] See text, supra pp.95-98.

was removed from the proper forum for resolution, peripheral issues and concerns were introduced by the antagonists in order to defend their policies and positions. This explains why complaints alleging violations of Code provisions were regularly met with counterclaims accusing the complaining state of equivalent conduct in different guises. Such accusations were not confined to the immediate proeedings in each case. For instance, the United States complaint against European Union subsidies on wheat flour was immediately followed by a EU complaint against the United States alleging unlawful subsidisation of wheat sales to Egypt.[1103] The rationale for this tactic was simply to place pressure on the United States to justify its own positions when castigating or condemning those of another state. Similarly, the U.S. complaint against the Airbus programme was met by a counterclaim that American companies receive equal indirect assistance through government-financed military and space research programmes.[1104] This again was a spoiling tactic by the European Union to divert international criticisms of its policies.

Opening up disputes by introducing peripheral, and often unrelated issues, has its own consequences. Disputes become more protracted and intense as each side defends its position by reference to external considerations and factors. Trade disputes escalate as growing frustration enters the process. The prevalent tendency is for diplomacy to play a greater role in the process. Of course, diplomacy and legal resolution are two distinct processes and once the former element enters the equation the whole process tends to stagnate. For example, even although the panel in the Airbus dispute

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[1103] See text, supra p.115.

[1104] Ibid.

ruled against the European Union and the Union expressed the view in the Council that it would not stand in the way of the adoption of the report, its position was qualified by the rider that the Union would only fulfil the panel's findings in the context of the implementation of the results of the Uruguay Round. This allowed the European Union sufficient breathing space to achieve a bilateral settlement with the United States, the results of which were eventually incorporated in the Uruguay Round Final Act as the Agreement on Civil Aircraft. This agreement embodies the diplomatic settlement sought by the European Union which, by that stage, clearly no longer felt compelled by the decision of the panel on this matter. In other words, the European Union had avoided implementing the panel's conclusions and effectively renegotiated the rules governing this matter, modelled on a greater degree of convergence with its own policies.

Rules based on inadequate consensus also do not properly channel internal pressures within states into the proper conduits. Faced with unsatisfactory rules, procedures and processes, governments feel a greater need to respond to internal pressures. This occurred, for example, where the failure to enact effective international rules caused the United States to rely on its countervailing duty rules as a means of providing relief to its agricultural and industrial producers.[1105] Effective international structures relieve these pressures and facilitate the creation of channels whereby legitimately aggrieved industries can obtain effective remedies in accordance with the international rules. Failure to release these pressures, as we shall see later, merely encourages illegal unilateral behaviour on the part of states especially the United

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[1105] See text, supra pp.378-388.

States and the European Union.

These pressures also affect the shape of state policies. For example, the need to respond to internal pressures compelled the United States to adopt a two pronged strategy for tackling foreign subsidies.[1106] First, the United States attempted to persuade trading partners to remove subsidies at both the multilateral and bilateral levels. This emphasis later changed significantly towards bilateralism in the form of the Canada-United States Free Trade Agreements and similar understandings. The second prong of this strategy was to resort to its own countervailing and anti-dumping laws. The problem here was that, while anti-dumping and countervailing duty measures can relieve the problem of subsidised imports, the concerns of United States producers relating to unfair competition in foreign export markets, caused by government assistance to domestic producers, cannot be similarly placated. This problem could only be addressed, in the view of the U.S. government, through unilaterally imposed pressures and hence the eventual use of section 301 measures.

The final outstanding matter that falls to be considered when analysing the consensus behind the international rules regulating subsidies, countervailing duty and anti-dumping measures is whether the new system established at the Uruguay Round will rectify the system by embodying a sufficient consensus behind the rules. There are a number of reasons for being skeptical even although the new agreements represent a significant movement towards the promotion of legalism in international economic affairs and a regression from the diplomacy-oriented system that characterised the first three decades of the functioning of the GATT.

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[1106] See text, supra pp.255-263.

A number of technical difficulties exist in the terms of the Second Subsidies Code caused by failure to arrive at a proper consensus. The Subsidies Committee, or a subsidiary organ, should have been given power to create additional principles and rules to facilitate the evolution of the terms of the Code. However, the main contentious and unresolved issue is the types of subsidies which will be included in the so-called 'green box' and which will therefore be non-actionable.[1107] Similarly, the terms of the Code relating to countervailing duties are not a radial overhaul of the original agreement and, in many respects, the defects which existed in that agreement have been repeated.

The negotiation of the new Anti-Dumping Agreement 1993 proved to be an exacting task because of the tension between the major importing nations, such as the United States and the European Union, and the major exporting countries. No consensus materialised on the terms of a final document until the 'Dunkel draft' and even the final text of the third Anti-Dumping Agreement has some glaring textual omissions reflecting lapses in consensus. The final agreement itself therefore reflects probably none of the policy objectives of any of the major negotiating states which highlights its inadequacy and its future inability to effectively influence the behaviour of the United States or the European Union.

**(3) The Compatibility Between the Policy Objectives of States and the Content of International Rules**

(A) <u>The United States</u>

A number of alternatives have been espoused as the main policy objectives of U.S. trade policy. The U.S.

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[1107] See text, supra pp.140-142.

government, at least the Executive, would claim that the general goal of its commercial policy is international trade liberalisation akin to the dogmatic concept of 'a level playing field'. The evidence suggests, however, that its trade policy pursues a different agenda namely the reduction of the trade deficit with other countries and the protection of U.S. economic and commercial interests abroad. This conclusion is difficult to avoid if the shape of U.S. trade policy is examined in detail.

If the United States seriously advocates the promotion of international trade liberalisation, why has so much erosion occurred within its own internal commercial policy undermining its commitment to the fundamental principles of the GATT/WTO trading system? Governmental agencies have systematically manipulated U.S. import laws and administrative practices to reduce the level of imports entering the territory. Unilateral reclassification of imports has occurred on a widespread scale. Much of the impetus for this practice has stemmed from political sources and has the effect of providing de facto protection to certain industries.[1108]

The illegal introduction of custom users' fees is another example of declining adherence to international standards. Panel reports have been issued condemning the arbitrary nature of such charges as being inconsistent with the obligations of the United States under Articles II(2)(c) and VIII(1)(a) of the GATT.[1109] Instead of implementing the findings of the panels, the United States has been content to maintain such illegal practices albeit on a reduced level.

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[1108] See text, supra pp.246-247.

[1109] See text, supra pp.248-249.

Equally, the United States has been found guilty of introducing discriminatory internal taxes in contravention of Article III of the GATT. This was the conclusion of the panel established to investigate the so-called SuperFund tax introduced at rates which blatantly discriminated between domestic and foreign producers. Similarly, excise taxes, the burden of which falls more heavily on domestically-produced goods, are a common feature of United States budgetary measures.[1110]

There is also a plethora of other indicators of the change in the direction of U.S. trade policy. Imports are restricted through discriminatory measures taking the form of quantitative restrictions, discriminatory product standards, pro-American public procurement policies and barriers in certain service sectors.[1111] Many of these national measures are flagrantly inconsistent with the terms of the Tokyo Codes.

Ample evidence therefore exists of the undermining of the United States commitment to the fundamental principle of the GATT from the manipulation of its customs laws, its internal tax system and other devices which limit imports. There can also be little doubt that the motive behind many of these measures is to improve the overall trade deficit which the United States has maintained with certain countries over the last fifteen years. In reality, the United States has not even attempted to disguise this motive in many of these measures.

This evidence debunks the claim that the United States is attempting to create some form of 'level playing

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[1110] See text, supra pp.249-251.

[1111] See text, supra pp.252-255.

field'. The United States engages in equally pernicious trade practices as its trading partners and many of these practices flout the international standards set down in the General Agreement.

In these circumstances, it is more credible that United States trade policy seeks to reduce its trade deficit and to protect United States economic and commercial interests in foreign markets. Proof of the obsession of the United States government, both in Congress and in the Administration, with its trade deficit abounds in government records. For example, it will be recalled that the principal negotiating objective identified in Section 1101(b) of the Omnibus Trade and Competitiveness Act of 1988 was to:

'develop rules to address large and persistent global account imbalances of countries, including imbalances which threaten the stability of the international trading system, by imposing greater responsibility on such countries to undertake policy changes aimed at restoring current account equilibrium, including expedited implementation of trade agreements where feasible and appropriate'.[1112]

In addition, the numerous proposals from Congress to reduce the trade deficit through draconian measures also evidence this objective. The first Gephardt amendment, which would have required a country with a trade surplus with the United States to reduce this surplus by ten percent annually, is a fine illustration of Congressional views on the manner as is the second Gephardt bill which would have required mandatory measures to reduce the U.S. trade deficit with Japan by

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[1112] See text, supra p.377.

20% in each of the following five years.[1113] In the late 1980s and early 1990s, mandatory retaliation against countries with trade surpluses had bipartisan support in Congress with both Democratic and Republic supporters favouring such action.

Most of these proposals were never adopted simply because of their impracticality. The United States cannot force foreign consumers to purchase United States goods any more easily than it can force its own consumers to purchase American-manufactured products instead of foreign-produced goods. However, these proposals had the virtue of allowing their proponents to posture before the electorate as being men of action.

On the other hand, at a practical legal level, the influence of the increasing trade deficit and the need to protect United States commercial interests abroad, has created two noticeable phenomenon in the direction of United States trade policy. The first is the movement away from the traditional policy of multilateral trade diplomacy towards bilateral trade diplomacy. The second is the increased penchant of the United States to use unilateral measures to seek to achieve trade policy objectives.

There is substantial evidence pointing to a change in emphasis in United States trade policy from multilateral to bilateral diplomacy. Although not explicitly inconsistent with any of the general obligations of the GATT, the manifestation of this phenomenon is disturbing. For historical reasons already noted, the United States has traditionally been a supporter of the GATT system.[1114] Being the original dynamo behind the

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[1113] See text, supra pp.261-262.

[1114] See text, supra pp.28-29.

system, the GATT represented an extension of both the content and shape of United States commercial trade policy. In the event that this support is eroded, or lost, the normative influence of the trading order in general would suffer a serious setback.

Broadly speaking, United States bilateral strategies for pursuing trade policy objectives can be classified according to whether the aim is the negotiate primary commercial agreements, secondary commercial agreements or tertiary understandings.

Primary commercial agreements are comprehensive free trade agreements with trading partners. At present, the main example is the North American Free Trade Agreement (NAFTA). This agreement will serve to ensure that United States trade policy objectives are secured on a bilateral basis, as far as that term can be used to describe a multi-party agreement of limited membership. Like the original GATT agreement, NAFTA is an extension of the policy objective of ensuring long-term access to foreign markets for United States goods and services, in this case in neighbouring or adjacent states.[1115] The agreement provides insight into the model of trading environment which the United States seeks to promote on the international plane.

Already the United States has been the driving force in extending the system established under this system further south. In the event that more countries are included within this framework, it is likely that a regional economic bloc will be created with the United States at the centre as its dynamo. In such circumstances, NAFTA would place the United States in the same position relative to the participating states

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[1115] See text, supra pp.257-259.

(present and future) as was the case in the immediate post-war international trading community. Th aims and objectives of U.S. trade policy will then be complete albeit on a less grand scale.

Nowadays, bilateral trade agreements between the United States and other countries tends to be sector-specific and hence they have assumed a secondary character. The bilateral agreements between the United States and the European Union in trade in civil aircraft and co-operation in the field of anti-trust/competition law enforcement, for example, illustrate the modern approach adopted by the United States.[1116] It is possible that these secondary agreements may assume a greater function in the near future with possible bilateral trade agreements being entered into between the United States and the Pacific Rim states.

Tertiary understandings and agreements are the loosest form of international agreements used by the United States. The most prominent example of such a medium is the Declaration on European Union - United States Relations of November 1990.[1117] Such understandings provide a series of mutually-agreed, yet vague, principles for conducting both economic and political relationships.

The negotiation of free trade agreements, bilateral accords and understandings may be an expeditious means of conducting international trade relations but, in the short term, the establishment of a network of such agreements at the expense of full participation in the multilateral system will damage the international trading system and may lead to polarisation and even

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[1116] See text, supra pp.260-261.

[1117] See text, supra p.260.

fragmentation of the system. This is especially the case when the European Union makes such extensive use of such arrangements. In the event that the WTO is unable to function as designed, it is feasible that there will be a gradual polarisation of the North American markets and the European market simply because of the tendency of both states to resort to comprehensive bilateral trade agreements to achieve their trade policy objectives.

That said, it is the propensity of the United States to resort to unilateral measures when its trade policy objectives are being frustrated that is the most condemning evidence of the breakdown of the normative influence of the international trade legal system when its rules collide with the promotion of the policy objectives of the United States. Subjectivity and coercion are the two main components of unilateral measures and it is these two factors which indicate that the United States pays little attention to international rules when engaging in such practices.[1118]

The United States has pioneered the use of unilateral measures because it perceives that the objectives and goals of its trade policy are being frustrated at the international level. Section 301 and analogous measures are unequivocally intended to impose diplomatic pressure on trade partners to reduce or remove commercial trade practices which are considered undesirable by the U.S. trade policy-makers. The main point is that Section 301 and the related measures operate independently of any objective assessment of the legality or otherwise of the behaviour of the state against which the measures will be directed. The primary consideration in the process is the degree to which the national laws and administrative practices of the foreign state frustrate the objectives

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[1118] See text, supra pp.264-265.

and goals of U.S. trade policy and, in particular, by restricting market access for United States producers.

Section 301 has changed the shape of United States trade policy, if not in terms of content, then certainly in the way that trade policy goals and objectives are secured. Hence, its functioning is an anathema to the international trade legal system and highlights the separation of United States policy interests from the international rules established under the General Agreement.

Examining the evolution of U.S. unilateral retaliatory measures over the course of the last twenty years provides an insight into the breakdown of the normative influence of legal principles on the formulation of trade policy. Quite clearly, Section 301 is incompatible with many of the principles of the GATT.[1119] The mechanism frustrates the proper functioning of the dispute resolution procedures mandated by the GATT and the Tokyo Round Codes. Unilateral coercion and the settlement of disputes through consultations and conciliation are poles apart. Although the General Agreement authorises the use of retaliation in Article XXIII(2), this sanction may only be applied when the CONTRACTING PARTIES formally approve of such action. Individual contracting parties are not at liberty under the General Agreement to engage in unilateral retaliation without this approval. The same principles apply to super section 301 and special special 301 measures except that, as we have seen, these mechanisms are an aggravation of the illegality of this situation.

The impetus for the aggressive use of unilateral measures has originated primarily from the U.S.

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[1119] See text, supra pp.286-289.

Congress. It was Congress that devised the original measure and it was the same organ of government that refined the mechanism into its present lethal form.[1120] Congress insisted on improvements to this legislation with the passage of every significant trade measure since its enactment. These amendments achieved the desired effect. Between 1979 and 1984, twenty nine Section 301 investigations were launched. Between 1985 and 1988, a total of thirty three investigations were conducted and retaliation authorised in nine instances. Similarly, between 1988 and 1992, twelve investigations were opened and of the six investigations concluded as at January 1, 1993, retaliation was approved in two cases.[1121]

From these statistics, two conclusions can be drawn. First, the annual number of investigations has increased reflecting the success of the amendments made by Congress. Second, retaliation has been authorised in an increasing proportion of cases. These trends are disturbing particularly during the 1988-1993 period when the Uruguay Round negotiations were continuing which required the United States to exercise a degree of sensitivity in implementing trade policy. Delicate negotiations can easily be unravelled by the clumsy use of retaliatory measures.

However, it is the proposals made by Congress that reveal the greatest contempt for international trade law in general and the General Agreement in particular. There is little doubt that through the 1980s, Congress has been utterly determined to move the device of unilateral retaliation from the background of trade policy to the foreground. This is evidenced not only by

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[1120] See text, supra pp.266-273.

[1121] See text, supra pp.268-272.

the amendments actually made to the legislation but also the proposals suggested by individual Congressmen, such as those in the Gephardt amendments, to strengthen the unilateral and automatic nature of the measure. Unilateralism is construed by Congress as underpinning a successful trade policy and Congress has, to a significant degree, achieved its objective, first, by removing many of the discretionary powers from the Executive and, secondly, by creating super and special Section 301 designed to facilitate automatic retaliation against specific countries. [1122]

Nevertheless, it is not only the existence of the measure that substantiates the breakdown of the normative influence of international law on United States trade policy; the international rules have played little influence on shaping the continued refinement of the mechanism. The movement towards mandatory measures introduced by the 1988 Act and the scope of 'unreasonable practices' for the purposes of discretionary action both illustrate that strict trade policy considerations are no longer paramount. Similarly, both super and special 301 were enacted with a minimum of reference to international legal principles. The automatic nature of any retaliation, had any been required, would have violated the consultation and conciliation obligations of the General Agreement and the degree of unilateralism involved would have infringed the Most-Favoured-Nation principle.

A further disconcerting development in this context is the proposals presently being considered in United States governmental circles to use this type of mechanism to unilaterally pursue non-WTO regulated isues such as 'blue 301 measures' to sanction loose labour

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[1122] See text, supra pp.290-297.

laws and human rights and 'green 301 measures' to ensure states protect the international environment.[1123] This separation of trade policy from non-commercial considerations raises legitimate suspicions that the United States will employ any pretext to distort trade with foreign manufacturers and producers.

The inference is therefore that multilateral trade diplomacy does not play a central role in the conduct of United States trade policy when the policy objectives and goals of the government are not best served through this medium. In other words, where the legal obligations and procedures of the international legal system conflict with these objectives, the United States will switch the means of conducting trade policy to unilateral measures and bilateral diplomacy. In making this switch, the United States pays little attention to the international rules prescribed in the General Agreement.

True, the United States continues to participate in the Multilateral Trade Negotiations and in the committees and organisational structure of the GATT but this participation does not contradict the fundamental assertion that multilateral trade diplomacy is a second string in the United States negotiating bow, the first two strings being unilateral measures and bilateral diplomacy. In fact, the rationale for the continued participation of the United States at this level is simple; certain trade policy objectives can only be effectively secured through multilateral negotiations.[1124]

For example, the reductions in levels of export

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[1123] See text, supra pp.298-299.

[1124] See text, supra pp.299-306.

subsidies, continually preached by the United States can only be achieved to a limited extent through unilateral measures or bilateral negotiations. International co-operation is the most effective method of achieving such reductions, a fact grudgingly acknowledged by the United States placing such a high degree of priority to the issue during the Uruguay Round. Improved market access for U.S. goods is another example where a broad approach must be taken in order to achieve success. The assault on pirated products and copyright theft is yet another illustration of the same phenomenon. Although the United States has employed the threat of unilateral measures against states failing to protect intellectual property rights, in particular the Peoples' Republic of China, there is widespread recognition in governmental circles that only unilateral negotiations can achieve the necessary degree of international protection for such rights.

The final conclusion is therefore that rules of international law are only effective in regulating the trade policy profile of the United States when there is a degree of congruence between the policy objectives and goals of the United States and the content of the international rules. Where international rules conflict with the overall aims of reducing the trade deficit or the protection of United States trade interests in foreign markets, the normative value of such rules is circumscribed.

(B) The European Union

The European Union is composed of fifteen sovereign states whose commercial interests are diverse. Consequently, external trade policy is not the embodiment of the commercial interests of a single state

but rather a compromise among the interests - internal and external - of the various Member States. These commercial and economic interests vary immensely despite the over-arching goal of economic integration among the Member States. A diffuse spread of interests impinge on the processes inside the European Union which are designed to harmonise the formulation of a consistent commercial policy towards third states.[1125]

Different economic sectors are considered by different Member States to have a greater priority than others either from the point of view of protection from international competition or the promotion of products or services in the international market-place. At the same time, the significance of external trade links with non-European Union states is a matter of greater national priority for some Member States than for others. This melting pot of economic and commercial interests is an important factor behind both the shape and content of European Union external trade policy because it is the trade off of these interests that becomes the final policy.

The institutional processes enshrined in the EC Treaty are intended to focus these interests and to allow the European Union to conduct a single consistent policy when negotiating with other states. Reality is, of course, quite different. The external trade policy of the European Union is fragmented and inconsistent due to the inability of the institutional mechanisms to reconcile these interests.[1126] This produces two consequences. First, external trade policy is the product of a bare minimum of consensus possible under these circumstances. Second, the trade policy goals and

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[1125] See text, supra pp.312-314.

[1126] See text, supra pp.314-319.

objectives of the European Union are quite basic and unambitious. There is no hidden agenda to the European Union's trade policy because balance of payments deficits, for example, remain the concern of individual Member States.

Nowhere is this conflict of interests more evident than in the Council of Ministers which, together with the European Commission, has responsibility for the formulation and implementation of external trade policy. For example, the inability of France and Germany to agree with other Member States on the levels of subsidies to be provided to their farming communities was the immediate cause of postponing the conclusion of the Uruguay Round in December 1990 and again threatened the successful conclusion of the round in December 1993.[1127]

This inability to agree on an effective and consistent external trade policy has not only had serious repercussions at the international level but is also the primary reason why the European Union places such great reliance on bilateral trade diplomacy. Bilateral agreements are much more easy for the Council of Ministers to swallow than multilateral trade agreements or even the negotiating mandates of the Commission at such discussions. Bilateral diplomacy has therefore been an extremely important ingredient in the European Union's trade policy. In this context, bilateral trade diplomacy is synonymous with dialogue with individual states or groups of states with a view to placing commercial relationships on a formalised legal basis. Only when the structure of this edifice of bilateral trade agreements is examined can the genuine trade policy objectives of the European Union be identified.

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[1127] See text, supra pp.438-441.

The primary trade policy objective of the European Union is to manage trade with states or limited groups of states to suit its own economic and commercial interests. This explains the compertmentalisation of trading partners according to different geographical areas.[1128] Proceeding on this basis allows the European Union to regulate the precise nature of its commercial relationships with trading partners by tailoring each individual agreement to suit the economic strategies of the Union. Further, during such negotiations, the European Union generally has considerable ability to influence the final content of such agreements due largely to its size and importance in the international market-place.

Thus, in the European Economic Area Agreement, the European Union was able to extend the application of the acquis communautaire to many of the remaining countries of Western Europe.[1129] As a result, from a legal perspective, the important EFTA states (with the exception of Switzerland) no longer remained a part of the external commercial trade relationship with the European Union but rather a partially integrated element of the internal market programme initiated under the aegis of the Union. This objective was considered desirable not only because these states were the most likely prospective future members of the European Union but also because of their pre-existing close economic and commercial relationships to the European Union.

The extension of the web of comprehensive commercial agreements eastwards with the negotiation of the series of the 'Europe Agreements' with Hungary, Poland, the Czech Republic and the Slovak Republic is further

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[1128] See text, supra pp.322-337.

[1129] See text, supra pp.324-327.

corroboration of the penchant of the European Union to pursue trade policy objectives on a bilateral basis.[1130] These treaties allow the European Union to exercise considerable influence over the future economic development of these countries. There is little doubt that the Union considers these states to be inside its economic sphere of influence; this is evidenced by the fact that these agreements constitute a microcosm of the EC treaty itself although safeguards have been installed to facilitate the undisrupted integration of these states into the Union's economic and commercial fold. Thus, for example, the complete introduction of the principle of free movement of goods is delayed for a transitional period to prevent a flood of inexpensive basic goods from these countries undercutting European Union producers while a similar arrangement has been put in place for the principle of free movement of labour to forestall large-scale migration of workers into the European Union.

A similar phenomenon has occurred in relation to the northern Mediterrean states with association agreements being negotiated with Turkey[1131], Cyprus and Malta. These agreements provide for the creation of an environment for the unrestricted movement of goods while preventing a migration of labour by denying the right of free movement of persons.

The major omission in this structure is, of course, comprehensive trade agreements with the United States and Japan. The explanation for this state of affairs is

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[1130] See text, supra pp.327-331.

[1131] In 1995, the European Union and Turkey agreed the terms of a free trade agreement to regulate their commercial relationship which was approved by the European Parliament in November 1995.

two-fold. First, the European Union would not be able to exercise the negotiating leverage against these states in order to obtain an agreement which would accommodate its precise economic and commercial interests. This factor is the main stumbling block preventing the opening of the necessary negotiations. Second, the magnitude of such agreements would signal the demise of the multilateral trading system in its present form since the three main trading blocks would effectively regulate their economic and commercial relationships without reference to the principles embodied in the GATT/WTO. The same factors do not, of course, impinge on the possibility of negotiating sector-specific agreements.

In light of the construction of this comprehensive legal edifice, which is an integral and fundamental external trade policy objective of the European Union, the limited normative influence of the international trade legal order on the formulation and functioning of the trade policy of the European Union can be explained. The existence of this superstructure allows the European Union to pursue its own agenda relatively unconstrained by the norms and obligations set down in the GATT. Further, as consensus at the multilateral level, for a variety of reasons, becomes more and more difficult to obtain, there is little doubt that the European Union has come to rely increasingly on bilateral/regional agreements to manage its trade policy objectives and goals.

The existence of this labyrinth of international agreements conflicts with the principles of the GATT on a number of technical legal grounds. Article XXIV permits the negotiation of free trade agreements but subject to a number of strict criteria. First, free trade agreements must not increase the pre-existing

average levels of tariffs or duties applicable to trade between the countries entering the free trade agreement relative to third countries. Second, national regulations governing commerce existing prior to the agreement also cannot be increased. Third, free trade agreements must comply with the definition set out in Article XXIV(8)(b) for special treatment and, in particular, must eliminate all duties and restrictions on 'substantially all trade' between the parties to the agreement. Fourth, free trade agreements must be notified to the CONTRACTING PARTIES in order to allow the preparation of the necessary reports and recommendations as may be deemed appropriate. The customary practice is for the CONTRACTING PARTIES to establish a working party to investigate implementation of the terms of such agreements and to recommend adjustments if necessary. Finally, contracting parties are required, under Article XXIV(7)(a) not to maintain or put into force any such agreement unless they are prepared to modify them in accordance with the recommendations.[1132]

Other than in the case of accession agreements, there is very little evidence that the European Union has complied with this notification procedure when entering into such agreements. Nor is there convincing evidence that these agreements comply with the substantive requirements of Article XXIV particularly in view of the variations which exist among them in terms of content.

At an even more fundamental level, the creation of this sub-structure beneath of multilateral system undermines the principle of multilateralism enshrined in the General Agreement and permit the European Union to pursue its own trade policy agenda largely independent

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[1132] See text, supra pp.336-337.

of multilateral constraints. Hence, even the very existence of this structure raises legitimate concerns as to the normative impact of the international trade legal order on the formulation of basic European Union trade policy.

With such an extensive array of bilateral commercial agreements behind it, it is not difficult to explain the relatively limited resort to unilateral measures made by the European Union. The European Union can afford to adopt a more passive approach to achieving trade policy objectives. Disputes with countries which have bilateral commercial accords can be settled by reference to the principles set out in such agreements. In the more advanced commercial agreements, especially those with European countries, there are even institutional mechanisms to facilitate the settlement of trade disputes.

It is only when the bilateral commercial links with states are weak that the prospect of unilateral measures is raised. Hence, investigations under the NCPI were confined to states such as Argentina, Indonesia, Thailand, Jordan and the United States.[1133] None of these countries maintained an effective bilateral agreement with the European Union and hence the need for a more active response once bilateral diplomatic overtures proved fruitless.

Now that the European Union has adopted a new regulation to replace the NCPI, this chapter in the European Union's trade policy is now closed. In retrospect the NCPI seems to have been more of a bluff than a measure of substance. The instrument had two main policy objectives. First, to secure protection for EU producers

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[1133] See text, supra pp.337-349.

from foreign imports produced with the benefit of some form of unfair competitive advantage other than subsidies or dumping. Second, to dissuade the European Union's trading partners from engaging in, or permitting, certain types of illicit commercial practices. However, the main strategy of the Union in its use of the measure was to ensure that its trading partners were aware of the existence of the mechanism rather than in its actual employment.

The almost immediate redundancy of the NCPI can also be explained against the historical background against which it was conceived. The Union perceived the possible need for such an instrument when the threat of Section 301 was at an apogee. In the event that Section 301 was to be applied in the manner considered by Congress to be appropriate, the best response would be to counter with the threat of measures under the NCPI. The motives for the creation of the device did not therefore centre around a genuine belief that it could be a useful tool to achieve trade policy objectives. On the contrary, the rationale for its enactment was to protect the European Union in the pursuit of its own internal policies and to threaten and posture with countermeasures if these were being hampered by extensive use of Section 301.

The inability of the European Union Member States to arrive at any more than a fragile consensus on trade policy objectives also explains why, at the multilateral level, the principal aim of the organisation was to secure such unambitious goals especially in comparison to the extensive agenda pursued by the United States. The main objectives of the European Union were extensions of traditional GATT principles (ie. cuts in tariffs, reduction of non-tariff barriers, and the application of GATT rules to unregulated sectors) and the protection of intellectual property rights. As if

to emphasise the defensive nature of the European Union's position at these negotiations, the final principal aim was to achieve a revision of the GATT rules 'to prevent the use by the United States of unilateral trade measures'.[1134]

These circumscribed objectives reflect the lack of enthusiasm that the European Union generated for the multilateral trade negotiation process. This lack of enthusiasm may also explain why the European Union was unsuccessful in preventing the adoption of many of the rules which operate against its interest such as those for the elimination or reduction of agricultural subsidies, the tightening of anti-dumping measures or the restraints on assistance for the production of commercial aircraft. This result confirms the statement that the European Union tends to view trade negotiations as an opportunity to defend existing policies, laws and practices rather than as an opportunity for attacking foreign trade measures considered to be detrimental to European Union interests.[1135]

In the long-term, the continued commitment of the European Union to the principle of multilateralism may decline as the network of trade agreements which it maintains becomes geographically more extensive and, in terms of subject-matter, more comprehensive.[1136] To a certain extent, such a trend will reflect an existing antipathy and contempt for the multilateral trade legal system which stems from reassurance that the fundamental trade policy objectives of the European Union can be guaranteed by the existing, and future, bilateral commercial and trade agreements. In these circumstances, there are few reasons to believe that the European Union

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[1134] See text, supra pp.349-351.
[1135] See text, supra pp.351-352.
[1136] See text, supra pp.336-337.

will mould its external trade policy to conform with the multilateral rules unless there is an element of congruence between these policy objectives and the international rules. Where the international rules conflict, the European Union will continue to formulate external trade policy by ignoring the normative influence of such rules.

**(4) The Ability of Rules to Permeate the Decision-Making Processes Inside States**

(A) The United States

The ability, or inability, of international trade rules to permeate the decision-making processes inside the United States which lead to the creation of a uniform trade policy is a decisive factor in ascertaining the normative impact of such rules. If the participants in the decision-making process take cognizance of the influence of international rules, a substantial degree of normative efficacy could be demonstrated. However, in reality, for a spectrum of reasons, international rules play an almost negligible role in the decision-making processes which eventually culminate in the formulation and implementation of U.S. trade policy.

The constitutional framework for the creation of trade policy itself is a substantial limiting factor which promotes the dissipation of the potency of international rules by disbursing constitutional authority to formulate and apply trade policy to different governmental branches. This disbursement actively encourages conflicts between the various organs of government and in this competition the authority of international rules is diluted as organs compete with each other to increase their influence over trade

policy. International rules become subsumed to these interests and their effect circumscribed.

While at least in formal constitutional terms Congress has primary responsibility for both the formulation and implementation of trade policy, the reality is that the Executive is, generally speaking, an equal partner in this process. This is for two reasons. First, the Executive has the important organic constitutional responsibility to negotiate international treaties including international trade agreements. In the discharge of this function, the President also is endowed with an inherent foreign affairs power to conduct international diplomacy in the pursuit of trade policy objectives and goals.[1137] Second, substantial delegated authority has been conferred on the President to implement trade policy. The consequence of this bifurcation is that the government organs charged with formulating trade policy are in direct competition with each other and, in this competition, neither organ is primarily concerned with compliance with international obligations.

Notwithstanding the degree of influence possessed by the Executive, since 1974 the Congress has made a determined effort to regain its constitutional mantle as the principal organ responsible for shaping trade policy. This has goal has been substantially achieved, first, by limiting the prerogatives of the Executive to negotiate international agreements and, second, by insisting on an unprecedented level of Congressional participation in subsequent multilateral trade negotiations. Together, these developments signal increased intervention on the part of Congress in the conduct of trade policy.[1138]

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[1137] See text, supra pp.374-376.
[1138] See text, supra pp.365-374.

Increasing the participation of Congress in the formulation of trade policy is synonymous with a decline in compliance with international rules quite simply because Congress is more prone to domestic pressures when enacting policy than the Executive quite simply because the President is more isolated from direct domestic pressures than individual Congressmen.[1139] Equally, direct contact by the President with foreign government officials tends to counter, to a limited extent, the domestic pressures for protection from foreign competition. Congress, on the other hand, tends to react to currents of domestic opinion with the result that legislative proposals are framed with the short-to-medium term effects in mind and largely ignoring the long-term impacts of such proposals. This propensity is all the more disturbing in trade policy matters as Congress acquires greater and greater authority in this sphere.

Examples of Congress acting in total disregard of international rules are replete throughout the history of trade policy decision-making process. The circumstances surrounding the enactment and tightening of Section 301 and its related measures proves that the project was an initiative originating in Congress. When setting up the mechanism, little consideration was given by Congress to the international repercussions of establishing a mechanism which so obviously flouted the international obligations of the United States.[1140] Similarly, in 1984, Congress enacted legislation on overrule undesirable decisions by Executive-controlled agencies in the field of administered protectionism and introduced draconian measures to protect certain economic sectors, such as agriculture, from international competition.[1141]

[1139] See text, supra pp.374-376.
[1140] See text, supra pp.266-273.
[1141] See text, supra pp.662-666.

While neither the Executive or the ITA can be said to be bastions for the protection of the international rule of law in trade matters, nevertheless in reversing their findings Congress attacked both the little integrity in international trade matters which the Executive and the ITA maintained as well as the objectivity of these organs. In other words, even assuming that these organs invariably complied with the international rules, an assault of this nature is clearly designed to deny any relevancy of international law in the formulation of trade policy.

The proposals made by Congress during the 1984 to 1988 period well illustrate the degree of contempt which that institution maintained for international rules. In 1985, over three hundred trade bills were introduced in Congress to change areas of trade policy considered by individual Congressmen to be unfavourable to American producers.[1142] In the following year, the Omnibus Trade Bill proposed by the House of Representatives contained so many illegal measures that President Reagan described it as 'Kamikaze legislation'. The majority of the provisions of the bill were framed in a manner which enshewed reference to the rules of the GATT such as, for example, measures designed to permanently exclude foreign producers from the United States market if they were caught by trade protection measures, the automatic imposition of safeguard measures after an affirmative injury determination, the unilateral expansion of the definition of actionable subsidy and the liberalisation of the anti-dumping rules to allow greater relief for American industries.

A very limited bulwark to these proposals, and other draft measure, has been offered by the Executive. While

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[1142] See text, supra pp.271-273.

the last three Administrations have presided over a considerable growth in protectionist measures, at least these Administrations have been prepared to filter out the most draconian proposals made in Congress. On other occasions, however, Administrations have agreed that measures are necessary to respond to the strategic commercial objectives and goals of U.S. trade policy, the Omnibus Trade and Competitiveness Act of 1988 being the most obvious example.

This struggle between institutions for control over the formulation of trade policy is the most apparent limitation on the normative influence of international law on the decision-making processes inside the United States. There are, of course, a host of other limiting factors stemming from the institutional structure of the process. Of these, one can cite as particularly damaging the inability of the United States government (both the Executive and Congress) to reconcile national economic and industrial policy with an internationally-consistent trade policy.[1143]

The components of national economic policy are both diverse and complex but nevertheless the composition of this policy exercises considerable influence over the profile of trade policy. Fiscal policy, the control of inflation, interest rates, trade imbalances, budget deficits and control over levels of foreign investment all impinge on the shape of trade policy because they are elements of national economic policy. As noted, of these elements, rectifying the U.S. trade deficit has been the single most influential factor.[1144] For at least twenty years, the U.S. government has directly linked the merchandise trade deficit with the need to restrict foreign imports and to prise open foreign

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[1143] See text, supra pp.375-388.
[1144] See text, supra pp.377-380.

markets. The impact of this obsession on the use of measures of administered protection has been charted in two chapters of this work and little more needs to be said on the point excep to note that the U.S. government has consistently deflected responsibility for the trade deficit away from its own domestic policies, the relative competitiveness of U.S. industries and the preferences of consumers and towards the practices and policies of trading partners. No attribution of responsibility has been placed on these important domestic factors or on budgetary controls, interest rates or industrial policy. This problem is compounded by the government attempting to rectify the balance of payments deficit by resorting to trade policy measures which infringe the international obligations of the United States. This behaviour is justified by governmental sources as a legitimate attempt to solve a pressing internal economic problem.

Reconciling domestic economic policies with an internationally-consistent trade policy is a difficult task for any government. Nevertheless, the immense ambit of the task should not disguise the fact that the United States government is faced with a simple dilemma; should it opt for a strategy which would placate American citizens by introducing controls which affect foreign producers or should it chose an internationally-consistent trade policy which would require adjustment of internal economic factors which might impose rigours on American citizens? For at least the last fifteen years, the United States has, on the whole, opted for the first course of action thereby curtailing the impact of international rules on the formulation of policy by allowing domestic economic policy considerations to prevail.

If the inability to reconcile international trade policy

and domestic economic and industrial policy was not enough to circumscribe the influence of international law, then the strategies of non-governmental participants in the decision-making process is sufficient to achieve the isolation of the process from international influence. Non-governmental participants in the process consist, on the whole, of domestic producer interest groups and individually influential corporations. Importers and consumers have a nominal influence in the process in comparison to U.S. manufacturers which are, on the whole, better organised, better financed and, above all, have better channels of communication with government officials.

Notwithstanding the direct influence of private interest groups on the governmental decision-making process through, for example, Congressmen, such groups have direct access to the enforcement of U.S. trade policy by virtue of the extensive array of trade protection measures authorised under American law. With the exception of Section 301 and 337 measures, anti-dumping, countervailing duty and safeguard measures are, of course, internationally-approved means of commercial defence and, if operated in a manner compatible with the international rules, there can be no question of their legitimacy. But it is not the use by United States industries of occasional resort to measures of contingent protection that distorts U.S. trade policy in relation to international obligations; on the contrary, it is the systematic abuse of these mechanisms by American industries to harass foreign competitors and importers. Of course, it is a question of degree when the use of such measures becomes harassment. Nevertheless, U.S. industries have manipulated the system of trade protection laws to attain almost permanent isolation of these industries from the

international trading system.[1145]

There is little doubt that the American steel industry is suffering major structural difficulties but this industry is a prime example of one which has abused its position as a strategic domestic industry by repeatedly invoking almost every conceivable trade protection measure to safeguard its own interests.[1146] Anti-dumping and countervailing complaints are periodically lodged until quotas are negotiated with foreign governments to restrict the levels of steel imports. When attempts to procure protection through this strategy are unsuccessful, the industry resorts to safeguard actions to impose pressure on the Executive to act to restrain imports. The fruit of this strategy has been quasi-permanent protection for the industry through multilateral restraint arrangements with the European Union and South East Asian governments. The legitimacy of such arrangements under the GATT is, of course, dubious but legal considerations appear to be a negligible factor in the creation of these barriers to trade.

Similar strategies for harassment have been adopted by the motor vehicle, motor cycle, consumer electronic and semi-conductor industries. Each has used trade protection measures to compel foreign competitors to enter into quantitative restrictions.[1147] Many of the U.S. consumer electronic industries have even enlisted the aid of U.S. anti-trust laws to limit market penetration by foreign competitors. American semi-conductor manufacturers are, however, an outstanding example of an industry abusing these mechanisms having resorted to Section 301 applications,

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[1145] See text, supra pp.388-390.
[1146] See text, supra pp.390-397.
[1147] See text, supra pp.397-410.

Section 337 petitions as well as the standard plethora of anti-dumping, countervailing and safeguard measures.[1148]

The influence of American industries resorting to these tactics should not be discounted when assessing the contribution of private interest groups to the enforcement of United States trade policy. American trade protection laws have traditionally granted greater access and rights of participation in the process than other contracting parties. However, this philosophy has had two major consequences. First, industries are abusing their right to participate in the process to harass foreign competitors and, second, the protections which are eventually conceded at the international level - quantitative restrictions - are frequently incompatible with the standards set in the GATT.[1149]

If the rules of international trade law could be enforced in United States courts, the normative influence of these laws would be immensely enhanced. Such rights would both discourage the enactment of legislation inconsistent with international obligations and would allow interested parties - mainly foreign producers - the right to challenge inconsistent legislation and administrative practices with a prospect of obtaining effective redress. Indirectly, this would allow foreign producers a limited right of participation in the decision-making process enforcing trade policy. At the same time, denial of these rights prejudices foreign producers and benefits domestic industries which, more often than not, are the beneficiaries of applications of policies, laws and decisions which infringe the international obligations of the United States. Since the GATT dispute settlement procedures are

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[1148] See text, supra pp.402-410.
[1149] See text, supra pp.408-410.

not open to private parties, the granting of such rights are even more imperative to redress the imbalance which exists in the decision-making process in favour of domestic industries.

The United States Federal courts have consistently denied direct effect in domestic law to the principles and rules of the GATT. In United States v Yoshida International Inc, the Federal Court even acknowledged that an import surcharge violated the express terms of the GATT but denied paramount to the agreement over the Federal statute because of the constitutional requirement that at treaty must be approved by Congress before it can prevail over legislation.[1150] Of course, the question whether the United States could gratuitously act contrary to general principles of international law was never submitted.

The remote prospect of international trade obligations prevailing over Federal laws caused Congress to expressly renounce this possibility in the Trade Agreements Act of 1979. Not only did Congress deliberately merely 'approve' the Tokyo Round agreements instead of ratifying their terms which is the normal course of action for international agreements but also an express provision was inserted into the statute which provided that no term of a trade agreement could prevail over any statute.[1151] Similarly, rights of action for private parties were expressly denied.

Hence, the sole rights, duties and remedies of private individuals are contained in the 1979 Act. Thus, if an administering authority imposes countervailing or anti-dumping duties in a manner which contravenes the international rules, an American court will not review

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[1150] See text, supra pp.414-415.
[1151] See text, supra pp.419-423.

the domestic legislation against the international standards. Since it is axiomatic that the overwhelming majority of such actions will be brought on behalf of foreign nationals a fundamental asymmetry is created by allowing nationals to rely on a body of laws, superficially modelled on international agreements but which in practice bear little resemblance to the international rules, while refusing to allow foreign interested parties to challenge the consistency of these national rules against the international standards. In effect, this is tantamount to an absolute exclusion of foreign groups from the decision-making processes which formulate and enforce United States trade policy.

(B) The European Union

European Union interests, individual Member State interests and private group interests all converge on the labyrinth institutional structure put in place to accommodate and reconcile these interests into a consistent external common policy.[1152] In competition with these interests, international law has a circumscribed normative value which fails to exercise a substantial influence over the final content of the policy and indeed its enforcement.

The decision-making process inside the European Union is infused with vested interests which can, broadly speaking, be categorised into those of Member States, embodied in the Council of Ministers, and those of the European Union, which for present purposes are represented and protected by the European Commission. This competition of interests gives rise to two points of tension, the first among Member States themselves in the Council of Ministers and the second between the

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[1152] See text, supra pp.430-441.

Council of Ministers and the European Commission.

Despite membership of the European Union, the commercial policy objectives of the Member States are seldom absolutely harmonised for the reasons discussed in the last section. Fractious dispute occur on a regular basis inside the Council of Ministers when Member States believe that their national interests are being threatened or compromised by the formulation of particular aspects of the common commercial policy. For example, the refusal of the French government to implement the second GATT panel report on oilseed subsidies isolated France in the Council, with other Member States recognising that imminent retaliatory action by the United States was inevitable in the absence of a consensus inside the Council on a proper course of action to respond to the threat.[1153] Similarly, France objected to the terms of the Blair House Accord and the final terms of the Agreement on Agriculture which effectively emasculated the Council at a time when a response was necessary to conclude the Uruguay Round Final Act. It was only when France successfully procured concessions from other Member States that the rift was closed and action possible to conclude the negotiations.[1154]

Such difficulties rarely occur within a single sovereign state even although different organs of government may be divided on a proper course of action in trade policy. These difficulties highlight the unique institutional problems of European Union participation in the international trading system and also that a common position in the Council of Ministers is often the result of internal compromises and trade offs which produce a 'lowest common denominator' approach to the formulation

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[1153] See text, supra pp.440-441.
[1154] See text, supra p.440.

of the common commercial policy. In these, often embittered, internal disputes, international law is not a fundamental factor in shaping the final policy or measures adopted.

The competition of interests between the Council of Ministers and the Commission is often equally destructive from the point of view of compliance by the European Union with its international obligations. The 113 Committee, for example, gives Member States an opportunity to inject their own national interests into the Commission's formulation of proposals on trade policy.[1155] From the personal experiences of the writer, inside this organ individual Member State interests are paramount and Member States are far more interested in asserting these interests and having them recognised by the Commission than ensuring that consistency with international obligations is maintained.

Similarly, inside the Anti-Dumping Committee, again from the present writer's experiences, national representatives are unconcerned with ensuring the consistency of the Union's anti-dumping procedures with the term of the Anti-Dumping Code. The main objective of national representatives in this Committee are to convince the Commission of the need for action if a national industry is being adversely affected by international competition or to persuade the Commission that measures are not justified if these would compromise the commercial interests of national manufacturers who, for example, uses the allegedly dumped products as inputs for their own finished products.

These institutional conflicts are a chief cause of the

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[1155] See text, supra pp.432-434.

lack of consistency between the European Union's external commercial policy and its international obligations but another central factor is the influence of other European Union policies in the formulation of an internationally-consistent common commercial policy. Five policies directly impinge on the content of the common commercial policy, namely the Common Agricultural Policy, the internal market programme, competition policy, regional and state aid policy and industrial policy. The changes made to the EC Treaty by the Treaty on European Union will introduce even more potentially conflicting policies due to the introduction of common policies in the areas of energy, consumer protection and the protection of the environment. However, at present, it is the Union's policies in agriculture, the internal market and competition which most undermine a GATT-consistent common commercial policy.

The CAP is the embodiment of the conflict between legal principles and non-legal, and in fact non-economic, forces. The rationales for the original policy were not primarily economic but rather the protection of supplies of agricultural produce to consumers and the preservation of standards of living of the farming community.[1156] Economic considerations played a subsidiary role in establishing the framework of the policy and international legal considerations even less. Hence, the main opposition of the United States to the creation of the European Community in 1957, as expressed in the GATT working parties convened to examine the matter, was that the CAP increased the levels of trade barriers for imports entering the customs union when the organisation was required under Article XXIV of the GATT to ensure that these barriers were lower than those existing prior to the creation of the customs union.

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[1156] See text, supra pp.442-443.

Hence, the CAP has never been approved by the GATT as being a policy consistent with the express terms of the General Agreement.

The United States has persistently attacked the CAP as illegal on justifiable grounds. The findings of the panels in the Pasta Case and the Oilseeds Case reaffirm the view that the basic and fundamental principles of the CAP contravene a host of provisions of the GATT including Articles II and III(4).[1157] Nevertheless, the European Union has equally persistently ignored adverse panel findings and international protests and complaints and refused to adjust the CAP to comply with the international rules. Even the reforms recently made to the CAP are questionably consistent with the new rules of the Agreement on Agriculture. The fact that political compromises were reached on a bilateral basis between the United States and the European Union on the progressive implementation of the new rigours on agricultural subsidies supports this assertion. In addition, the revisals to the CAP do not extend to all agricultural produce and the reforms do not include changes to the concept of tarrification which also indicate a lack of future consistency with the international rules.[1158]

Incompatibility also abounds between the internal market programme and the international rules. The pursuit of the single market agenda has brought the European Union into direct confrontation with many states, especially the United States, quite simply because many of the measures have been framed in total disregard of the applicable international rules. European Union measures harmonising the use of hormone treatments in cattle, technical standards for telecommunication equipment, the

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[1157] See text, supra pp.443-446.
[1158] See text, supra pp.450-451.

so-called 'Television without Frontiers' directive and the public procurement regime established as part of the programme all flagrantly infringe the European Union's long-established international obligations. This leads to two possible conclusions.[1159] Either the Council of Ministers and the European Commission deliberately ignored the international standards and flouted international law when this course ofaction suited their purposes. Alternatively, neither organ was aware of the obligations imposed at the international level when enacting the measures. In both scenarios, quite clearly the influence of international law was negligible, especially in light of the fundamental and obvious nature of the infringements.

The incompatibilities between European Union competition policy and international obligations are more subtle in comparison to the straight-forward violations committed in the implementation and operation of the CAP and the single internal market programme. Nevertheless, there is a fundamental inconsistency in the operation of aspects of this policy with the general principles underpinning the international trade legal system. The main inconsistency is that different rules can apply to European Union producers and foreign producers even although both sets of manufacturers are engaged in the production of the same goods and are indulging in the same commercial practices.

The main instances of such distortions occur in the different treatment of Union industries and foreign producers when both are alleged to have engaged in practices amounting to dumping in the economic sense of that term. As far as Union producers are concerned, intra-Union dumping is permissible as long as such

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[1159] See text, supra pp.451-463.

practices do not involve any element of predatory pricing which would infringe Article 86 of the EC Treaty. Foreign producers are, of course, subject to the rigours of the anti-dumping regime operated by the Union. In other words, even although two suppliers - one Union, one foreign - are engaged in identical commercial practices, from a legal perspective two separate concepts are applied to their activities. The important point, and the one which causes the distortion, is that the preconditions for establishing dumping are considerably less onerous than for proving the existence of predatory pricing.[1160]

The inconsistent methodologies applied to anti-dumping and competition investigations are also a source of harassment for foreign producers. Different tests are applied by the anti-dumping and competition authorities inside the Commission to determine the relevant products subject to scrutiny. The immediate consequence of this dual standard is that foreign companies deemed to have been dumping may be subject to different rules when attempting to comply with the relevant standards of competition policy. This phenomenon, while not contrary to any express rule of international law, has a substantial harassment effect which could arguably be in violation of the obligation to treat domestic and foreign products equally as regards 'laws, regulations and requirements affecting the sale, offering for sale, purchase, transportation, distribution or use of the products' under Article III(4) of the GATT.

There is, consequently, ample evidence that the European Union takes little cognizance of international standards in the complex decision-making processes which are part of its institutional structure. Again, however, the

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[1160] See text, supra pp.470-472.

decision-making processes are also impregnated by the influence of European Union non-governmental groups whose interests rarely lie in compliance by the Union with its international obligations. Non-governmental groups have multiple means at their disposal to influence the shape of European Union trade policy as both national representatives and Union officials participate in the trade policy decision-making process. At the same time, direct access of trade policy enforcement is provided through the commercial defence system although, for the most part, the main form of relief takes the form of anti-dumping measures as opposed to anti-subsidy duties or measures under the New Commercial Policy Instrument. Even although access of the whole spectrum of commercial defence measures is not always available, the European Union's anti-dumping legislation in itself provides a potent weapon for European industries to level against foreign competitors.

The profile of anti-dumping relief granted between 1980 and 1990 substantiates the claim that certain European Union industries, in common with their American counterparts, use anti-dumping complaints as a means of obtaining institutionalised protection from competition. The three most notable industries resorting to strategies of harassment through the use of anti-dumping complaints are the steel, chemical and consumer electronics industries. Of all anti-dumping measures imposed by the European Union in this ten year period, over half concerned chemicals and allied products followed by consumer electronics and steel products.[1161]

The influence exerted by these three manufacturing sectors on the decision-making process has been profound

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[1161] See text, supra p.475.

from the point of view of obtaining protection from foreign competition. The European steel industry, for example, has been successful in abusing its strategic position in the European Union economy to extract comprehensive bilateral quantitative restrictions and extensive anti-dumping duties. The industry has also been successful in coordinating its efforts in the decision-making process; thus, between 1977 and 1992, three separate barrages of anti-dumping complaints were lodged to impede imports.[1162]

The European chemical industry has adopted a different strategy when using the trade policy decision-making process to its advantage. The chemical sector is one of the most heavily regulated areas in terms of anti-dumping measures applied, indicating that the industry has made strenuous use of trade protection laws. Most protection has been granted to industries producing basic chemical compounds and tertiary chemicals and the majority of complaints have been launched against the countries of Eastern Europe, the Soviet Union, China and Korea. However, it has been the tendency of these companies to link the use of anti-dumping complaints with anti-competitive practices that has helped to protect some sectors of the chemical industry from international competition.[1163] Production of many of these chemicals is in the hands of very few companies which facilitates the deployment of cartels to regulate supply and demand. Anti-dumping measures are used to isolate the European Union market and to underpin anti-competitive behaviour. While relying on anti-dumping measures to redress so-called 'unfair trade practices', the same companies have been found guilty of indulging in anti-competitive practices contrary to European Union competition policy. Such strategies are

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[1162] See text, supra pp.475-481.
[1163] See text, supra pp.481-486.

blatant exploitation of the anti-dumping process and discriminate against the interests of foreign manufacturers.

No counterbalance to GATT-inconsistent behaviour in the trade policy decision-making process has been provided by the incorporation of the international trade obligations contained in the GATT system into European Union law. The European Court of Justice has rejected attempts to allow private parties to rely on the rules enshrined in the General Agreement or the Tokyo Round Codes in the judicial review of trade policy measures although its legal reasoning on this point is spurious at best. While the Court has allowed private individuals to rely on the direct effect of bilateral trade agreements, it has refused to grant the same privilege in relation to the General Agreement.[1164]

The methodology relied on by the Court in its decisions on this point has been criticised on justifiable legal grounds and can only be explained on the basis of policy as opposed to the strict application of principles of the Court's jurisprudence. To allow the General Agreement direct effect would have profound repercussions on trade policy formulation and implementation. Trade policy measures could be reviewed against the GATT for compatibility and, if found wanting, could be annulled. Similarly, other aspects of European Union policy, such as the CAP and the single internal market programme, could be undermined by granting such rights. In order to preserve the integrity of the European Union in formulating both trade policy and other central policies, the European Court considered itself as having no option but to deny direct effect to the erms of the General Agreement.

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[1164] See text, supra pp.489-495.

The same limitation was endorsed by the Court in relation to the incorporation of the Tokyo Codes in EU law. Through skillful legal side-stepping, the Court managed to avoid directly answering the question whether trade protection measures could be assessed against the standards set down in the Tokyo Codes.[1165] This reluctance lead to the existence of two separate and contradictory decisions, one allowing reliance on the Anti-Dumping Code's provisions to challenge a trade protection measure (although the facts of the case indicate that the applicant had little prospect of success) and the other refusing such relief (when the prospects of success were arguably greater).

The Council of Ministers and the European Commission have now taken steps to ensure that review of trade policy measures against the international principles contained in the Uruguay Round Final Act will not occur.[1166] By adopting this approach, the two organs have agreed that such review is undesirable and have forestalled any future reversal of the Court's jurisprudence.

The combined resistance of the Council, the Commission and the Court, to grant direct effect to international trade law to counter GATT-inconsistent behaviour is an indication of a deliberate policy of preventing the effective enforcement and compliance by the European Union of its international obligations. The most important repercussion of this denial is that no effective counterbalance exists to protect the position of foreign producers from abusive behaviour by European Union agencies. By denying the application of international rules inside the European Union legal system these producers are placed at a disadvantage and

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[1165] See text, supra pp.495-501.
[1166] See text, supra pp.501-503.

in the unenviable position of being emasculated when defending their positions against illegal measures. This circumvention indicates that the normative efficacy of international trade law in the formulation and enforcement of European Union trade policy is effectively circumscribed.

**(5) The Strength of Rules and Their Ability to Withstand Dilution or Avoidance When Incorporated and Applied at National Level by National (or Supranational) Agencies**

The last observable phenomenon which has emerged from this study is that the limited normative impact of international law on the formulation and implementation of the trade policies of the United States and the European Union can be measured in terms of the ability of such rules to withstand avoidance or dilution at the hands of national (or supranational) agencies and officials charged with responsibility for performing the functions which the international rules purportedly regulate. The method of measuring the effectiveness of the rules is to compare and analyse the degree of consistent application of the international obligations contained in the General Agreement, the Anti-Dumping and the Subsidies Codes against the substantive rules of national law and the administrative practices conducted by national officials. In this analysis, in order to obtain a complete picture of the interface between the two legal regimes, it is necessary to examine both the substantive and procedural aspects of anti-dumping and countervailing investigations carried out in the United States and the European Union.

(A) <u>The United States</u>

Only at the most superficial level are the anti-dumping

and countervailing duty laws and administrative practices of the United States consistent with the rules contained in the General Agreement, the Anti-Dumping Code and the Subsidies Code. The basic legal framework is broadly compatible, at least in conceptual terms, with the international models for the application of anti-dumping and countervailing measures. However, it is in the detailed implementation and administration of these mechanisms that divergence occurs between national laws and practices, on the one hand, and the relevant international rules and principles on the other hand. Particularly since 1979, the United States has enacted numerous rules which are blatantly inconsistent with the international standards. This illegal behaviour has been compounded by administrative practices which also fly in the face of the spirit, if not the letter, of the international trade rules engendered under the auspices of the GATT.

The United States has also taken advantage of almost every loophole and deficiency in the international system of regulation to liberalise its anti-dumping and countervailing laws to make relief available to its domestic industries. In other words, at national level these rules have been manipulated for non-legal rationales, almost invariably without reference to the international rules. The evidence to support this proposition is overwhelming.

The United States authorities have expanded the basic definition of dumping to include not only trade in goods but also the supply of services relating to the manufacture and sale of products if the inclusion of such an element is convenient to inflate the margin of dumping.[1167] In addition, the calculation of foreign

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[1167] See text, supra pp.524-526.

market values is subject to dubious practices which have the overall effect of increasing margins of dumping. Calculating weighted-averages, sampling, the choice of applicable exchange rates, the selection of third countries for valuation purposes and the practices perpetrated when constructing foreign market values all disclose degrees of arbitrariness which contravene many of the terms of the Anti-Dumping Code 1979.[1168] Adjustments to both the U.S. price and the foreign market value also are carried out which artificially inflate the margin of dumping.[1169]

In developing more exotic variations of anti-dumping measures, the United States has also fallen foul of the terms of the Anti-Dumping Code. The legislative provisions concerning component dumping, sub-assembly dumping and product monitoring all sit uncomfortably beside the international obligations of the United States under the Code.[1170]

The use by the United States of its countervailing duty laws follows the same profile. Again there can be few doubts that the United States has steadily increased its use of countervailing measures for protectionist motives and not because of an indigenous growth of complaints. Liberalising access to relief will always encourage domestic industries to lodge an increasing number of complaints. Since 1979, U.S. countervailing legislative amendments have consistently favoured United States industries and penalised foreign manufacturers and exporters. When framing these amendments the U.S. government pays little attention to its international commitments in this field.

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[1168] See text, supra pp.528-539.
[1169] See text, supra pp.539-544.
[1170] See text, supra pp.545-551.

There is a plenitude of evidence to support this statement. For example, the failure of the United States to introduce a test of injury, despite having amended its countervailing legislation in 1974, is inconsistent with the fundamental principles of the General Agreement itself and the Protocol of Provisional Application.[1171] The definition of countervailable subsidy has also been progressively expanded to include a greater and greater number of programmes.[1172] In fact, the United States authorities have now removed all self-limiting interpretations of countervailable subsidies and are encroaching into territory which will inevitably lead to a conflict with the terms of the Subsidies Code. The proposals for the creation of new categories of countervailable subsidies to counter export targeting subsidies, natural resources subsidies and upstream subsidies are proof of this tendency.[1173]

In both anti-dumping and countervailing duty investigations, a determination of injury is required. If this standard is set too low, the result will be an affirmative determination whenever dumping or subsidisation is found. In other words, by neutralising this requirement, more anti-dumping and countervailing duties can be applied even although no injury is caused to the domestic industry. Although this practice is contrary to Article VI of the GATT and the terms of both Codes, nevertheless this has been the broad policy of the United States in this area.

The preliminary indication of injury standard has even been rebuked by the Court of International Trade as being too lax.[1174] Nevertheless, the authorities have

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[1171] See text, supra pp.563-566.
[1172] See text, supra pp.570-604.
[1173] See text, supra pp.605-607.
[1174] See text, supra pp.633-634.

persistently failed to reverse their policy in this regard. The consequence is that complaints which lack adequate evidence of injury nevertheless proceed to examination which has a harassing effect on foreign competitors exporting to the American market. The ITC has also been guilty of manipulating the standards in actual material injury investigations. It selects the indicators of injury which are most suitable to an affirmative finding of injury and ignores factors which mitigate the effects of injury.[1175] This has happened on too many occasions to be mere coincidence. The approach of the ITC in this matter has been approved by Congress which, in the 1988 Act, authorised the ITC to consider other relevant economic factors as well as those expressly stated in the pre-existing legislation, the purpose being to relax the injury standard as far as possible and therefore encouraging affirmative determinations.

The doctrines of cumulation and cross-cumulation have also been used to great effect by the ITC to exaggerate the effects of injury on a domestic industry. The precedent set by the ITC in this area was subsequently incorporated into U.S. legislation to allow the agency almost unlimited authority to investigate cumulation and cross-cumulation in the search for an affirmative finding of injury.[1176]

Even the basic concepts which the ITC has been instructed to apply, namely increasing volumes of imports, the effect of imports on domestic prices and the impact of imports on domestic production, have been diluted in their application to such an extent that the ITC can find injury if and when it wishes. Congress has also greatly facilitated this process. Hence, by

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[1175] See text, supra pp.634-646.
[1176] See text, supra pp.643-651.

statutory enactment, the ITC can examine 'actual' and 'potential' as well as 'absolute' and 'relative' economic indicators.[1177] The use of these concepts provides the ITC with a larger scope for subjectivity and discretion. This trend contradicts the express terms of both Codes which stipulate the economic indicators which must be taken into account when assessing injury in an anti-dumping or countervailing duty investigation.

Although the concept of 'threat of material injury' is necessarily more vague than that of 'actual injury', again U.S. trade law in this area appears to be abusive. In 1984, Congress introduced new broad criteria for establishing the existence of such a threat in an attempt to encourage greater use by the ITC in injury determinations. In 1988, again Congress changed the law once it became apparent that its 1984 amendments had not achieved the intended effect.[1178] Special rules were also introduced at the same time to facilitate an affirmative determination of a threat of injury in agricultural cases. Again, the criteria for determining the existence of a threat of material injury in United States law bears only a passing resemblance to the requirements and disciplines contained in both Codes.

'Like product' findings are also a potential source of abusive behaviour on the part of the United States authorities. The principles applied in this process illustrate a biased methodology. Where expansion of the like product range is desirable to include industries which are suffering decline, the ITC as demonstrated a willingness to identify a wide like product range. Conversely, where a specific industry has demonstrated injury, the ITC will restrict the definition of like product as far as possible to that industry in order to

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[1177] See text, supra p.638.
[1178] See text, supra pp.653-654.

exaggerate the injury and to prevent the economic health of other industries producing similar products from damaging the possibility of establishing injury.[1179]

In addition, although required under both Codes to establish a causal connection between subsidised or dumped imports and injury, the investigating authorities rarely provide express evidence of such a link in their findings.[1180] Such a finding is an express and essential requirement under both Codes and is not satisfied merely through a presumption after an affirmative finding of injury. Quite clearly, in many cases the authorities have tended to assume that, if dumping or subsidisation is found to exist, injury has been caused as a consequence of such practices. This situation is exacerbated if the ITC finds particular practices, such as price underselling and negative import trends, and assumes that these conditions invariably cause injury to domestic industries. This undermines the need to satisfy an express condition contained in the Codes and results again brings the United States authorities into conflict with the international obligations of that state.

The same observations apply as regards the procedural rights of parties in such investigations with the additional comment that there exists a fundamental asymmetry in the rights of domestic producers and foreign manufacturers/exporters during this process. The procedural apparatus set up to administer these mechanisms operates against the interests of foreign producers who are required to justify their commercial decisions and behaviour to the administering agencies while domestic parties have the passive role of initiators of investigations.[1181] Once a complaint has

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[1179] See text, supra pp.661-665.
[1180] See text, supra 673-678.
[1181] See text, supra pp.688-690.

been initiated, the competition is between the United States authorities, with unlimited financial resources, and foreign producers with limited resources.

Illegitimate protection can be provided in the form of a failure to comply with the procedural law requirements set out in the Codes in much the same way as by manipulating the substantive rules in a manner inconsistent with international obligations. Both Codes specify procedural requirements which should be implemented in national law and evidence of failing to comply with these obligations is further proof of the limited normative impact of the international rules not only on the legislative content of anti-dumping and countervailing duty laws but also in their administration.

The laxity of the standing requirements for the initiation of investigations has, for some considerable time, been seen as an effective non-tariff barrier because of the wide range of parties (interested and otherwise) entitled to initiate complaints. The definition of eligible complainers has been continuously enlarged to permit access to the procedures to related interest groups which are not producers of like products but manufacturers of products associated with the imported goods.[1182] For example, the addition of agricultural commodity producers to the list of eligible petitioners for processed and finished agricultural goods in the 1988 Act is a clear contravention of the 1979 Codes because standing is restricted by these agreements to producers of like products. Congress was under no delusion when enacting this legislation that the measure contravened the terms of the Codes and hence the clause restricting its application in the event that

[1182] See text, supra pp.690-702.

the measure is successfully challenged at the international level.[1183] This is a sound illustration of the circumscribed role of international obligations when Congress is engaged in legislating in the area of trade law and policy.

Both the ITA and the ITC also stand accused of inequitable and illegal conduct in the course of conducting investigations. The most flagrant example of such conduct is in the application of slack petition requirements. The 'reasonable indication' standard makes a mockery of any attempt to impose a semblance of an evidential threshold for the initiation of complaints.[1184] This is confirmed by the fact that examples of the ITA rejecting complaints as manifestly unfounded on the basis of the insufficiency of evidence are rare. Failure to properly review the evidence contained in a complaint encourages United States producers to abuse anti-dumping and countervailing duty procedures for the purposes of harassing foreign exporters.

Failure to properly apply the procedural rules contained in both Codes also occurs when the ITA applies the rules relating to exclusion requests, in the application of the 'best information available' rule and in the general lack of symmetry between the rights of a complainer and a foreign producer accused of dumping or manufacturing subsidised products.[1185] The rules relating to the protection of confidential information operates against the interests of foreign producers by granting domestic producers liberal access to all business proprietary information on the basis of administrative protection orders. Finally, the onus of disclosure imposed on

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[1183] See text, supra pp.694-695.
[1184] See text, supra pp.704-706.
[1185] See text, supra pp.712-716.

foreign companies is excessive and, once requested information has been submitted to the ITA, there is little that a respondent can do to protect its confidentiality.

The same inconsistent behaviour when the novel forms of applications introduced by the 1988 Act, such as downstream product monitoring and short life cycle applications, are considered.[1186] Both procedures do not require the establishment of a link between the complainer and the relevant domestic industry. Since both procedures may culminate in duties akin to countervailing and anti-dumping duties, the consistency of these procedures with the international requirements is open to question.

The operation of downstream product monitoring and short life cycle application procedures is also inconsistent with the international rules of the Codes. Downstream product monitoring procedures infringe the Codes because of the excessive right of petition granted to complainers, the failure to establish the necessary relationship between the complainer and the relevant product and the circumvention of the injury requirement. Similarly, the short life cycle product procedure has a penal nature which contravenes the basic premise of both anti-dumping and countervailing mechanisms which is intended to be compensatory rather than penal.

The legal principles introduced by Congress to prevent the circumvention of anti-dumping and countervailing measures are also, in many respects, incompatible with the rules of the General Agreement.[1187] The implementing legislation expands the scope of anti-dumping and countervailing duty orders for particular goods from

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[1186] See text, supra pp.701-704, 719-723.
[1187] See text, supra pp.723-737.

specific countries to include related, though by no means similar or identical, goods as well as goods from countries to which the original order did not apply. In other words, the measure breaks the link between products manufactured or produced by the complainer and foreign imported goods which is an infraction of a fundamental rule of the General Agreement and both Codes, namely that complainers must be producers of like products.[1188] There is also a strong argument that the United States anti-circumvention rules relating to assembly and finishing in the United States infringe Article III of the General Agreement in the same way that the rules of the European Union were held to be incompatible because they imposed discriminatory internal charges on foreign products.

At the level of implementation and administration of U.S. anti-dumping and countervailing duty law the most subtle infractions are committed. For example, the failure to properly apply the rule that a complaint must be representative of a domestic industry has been manipulated to allow groups which are obviously not representative of the majority of producers in the sector to submit complaints.[1189] The grant of financial and technical assistance to American industries to enable them to prepare and file anti-dumping complaints aggavates this situation.

Similarly, many of the practices of the Department of Commerce in identifying the relevant industry do not withstand scrutiny under the international rules. The exclusion rule for domestic producers who are also importers of the relevant products is arbitrary and excessive.[1190] Even if a non-U.S. company has

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[1188] See text, supra p.735.
[1189] See text, supra pp.695-700.
[1190] See text, supra pp.708-709.

established production facilities in the United States and sells all its production in that market, it can still be excluded from the scope of the domestic industry because of its foreign associations. This is an over-indulgent application of the related parties principle contained in the Codes and the effect of this practice is not only to artificially restrict the scope of relevant domestic industry to probably less efficient producers but also to blatantly discriminate against foreign investment.

(B) The European Union

The European Union relies virtually exclusively on its anti-dumping legislation as its principal weapon of commercial defence almost to the complete exclusion of anti-subsidy and safeguard measures. Hence, its profile in the use of administered protectionism differs significantly from that of the United States. It is therefore appropriate to concentrate on the degree of consistency between the Union's anti-dumping regime on the one hand and the General Agreement and the Anti-Dumping Code on the other hand when ascertaining the strength of the international rules and their ability to withstand dilution or avoidance when incorporated and applied at the supranational level by European Union institutions.

The main characteristic of the 1988 basic regulation is that the principles, rules and guidelines contained therein are stated in the most vague terms which allows exclusive latitude and discretion for the creative application of anti-dumping policy. In fact the basic regulation is so vague that there is general recognition that the European Commission can manufacture artificial dumping margins without deviating from the express terms

of the regulation itself. This produces an inherently unsatisfactory situation in that the Commission and the Council can indulge in GATT-inconsistent practices without actually falling foul of European Union law. This unfortunate paradigm has been perpetuated by the refusal of the European Court to conduct effective judicial review of the anti-dumping legislation and administrative practices under the standards set out in the European Union's international obligations in this field.[1191] In effect, the approval of this position has meant that the Court has passively acquiesced to the effective autonomy of the European Commission (and to a lesser extent the Council of Ministers) in this critical area of trade policy implementation.

The shape of the basic regulation originally enacted to incorporate the disciplines of the 1979 Anti-Dumping Code - Council Regulation (EEC) 3017/79 - broadly follows the general conceptual model for the imposition of duties as set out in the Code. From the outset, reservations may be expressed whether the terms of this measure imposed sufficient disciplines on the European Commission to comply with the obligations imposed by the Code in terms of the administration of the Union's anti-dumping regime. The major criticism was the excessive discretion given to that agency to develop and evolve inconsistent principles and practices through the administration of the system.

This legislation was subsequently amended on a number of occasions before consolidation in the 1988 basic regulation which has formed the backbone of this part of the study.[1192] These amendments occurred despite the fact that between 1979 and 1988 no major international agreements were negotiated under the GATT to regulate

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[1191] See text, supra pp.486-504.
[1192] See text, supra pp.753-757.

anti-dumping. As an initial observation, therefore, it appears that the 1988 basic regulation was the product of politically-motived amendments being made to the original implementing measure which itself was subject to the significant criticism that its terms only broadly followed the conceptual framework of the 1979 Anti-Dumping Code.

Hence, it is no surprise that the anti-dumping law and administrative practices of the European Union significantly deviate from the Union's international obligations under both the General Agreement and the Anti-Dumping Code. However, since the 1988 Basic Regulation has such a vague nature, in terms of both substantive and procedural content, the actual anti-dumping legislation itself is not the main source of inconsistent behaviour. On the contrary, it is in the administration and application of anti-dumping law and policy that the most abusive practices are perpetrated quite simply because of the excessive discretion enjoyed by the European Commission in the performance of its functions under this policy.

Starting first with the computation of dumping margins, only part of this process is congruous with the international legal obligations of the European Union. Each of the four steps involved in arriving at a dumping margin is imbued with an extensive degree of latitude for the creative application of anti-dumping policy.

Although the European Union is required to establish export prices where possible on the basis of actual prices, in reality constructed export prices are the norm and have been used in some of the most important and controversial investigations in recent times.[1193]

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[1193] See text, supra pp.761-766.

Such calculations, of course, involve extensive subjective value judgments and violations of the Code obligations are committed, for example, when the Commission deducts both direct and indirect expenses for export prices while only allowing direct costs in the construction of normal value.[1194] These asymmetric deductions are designed to decrease the final export price and inflate the normal value resulting in the creation of artificial dumping margins. The same effect is achieved by building into the constructed export price an arbitrary margin of profit for related sales companies.

Another abusive behaviour perpetrated when constructing export prices is the charging of duty as a cost when reconstructing export prices in refund applications.[1195] Quite clearly, this practice infringes Article VI of the General Agreement and Article 8(3) of the Anti-Dumping Code since the level of anti-dumping duties imposed will exceed the margin of dumping found to exist. Nevertheless, the European Court has refused to accept this argument as a basis for annulling anti-dumping measures and has therefore approved a clear-cut violation of both agreements by adjudicating in favour of the European Union institutions.

In calculating normal values, again the Commission's methodology is incompatible with the terms of the Code. The use of constructed normal values is facilitated by the excessively rigorous criteria imposed on the use of actual values. Actual values can be ignored in the event of a finding of insufficient volumes of sales or inadequate sales made in the ordinary course of trade and such findings allows the substitution of constructed values which exposes the whole process to arbitrary

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[1194] See text, supra pp.763-765.
[1195] See text, supra pp.766-768.

determinations. For instance, in constructing normal values, the Commission has included government subsidies in the computation, has refused to allow deductions attributable to income from financial investments (non-operating income) even although requires the deduction of non-operation expenses in the calculation of the costs of production and has over-estimated levels of profit.[1196] Each of these practices inflates the margin of dumping.

Another illustration of abusive behaviour in the calculation of dumping margins is the practice of comparing normal values and export prices on a transaction-by-transaction basis and eliminating the effect of 'negative dumping' by disallowing negative margins where these would adversely affect the prospects of lowering the final overall margin of dumping.[1197] By calculating dumping margins in this manner, the benefits of negative dumping are not carried forward or back to the detriment of the foreign manufacturers which are the subject of the investigation.

The treatment of goods from non-market economy countries is also excessively arbitrary. In common with the United States, the European Union selects analogue countries to arrive at a comparable normal value for the goods. The selection of the most appropriate country is critical in this process and the basic principle of E.U. anti-dumping law is that this selection should be made on 'an appropriate and not unreasonable manner'. Nevertheless, there is little evidence that the selection of analogue countries is made on the basis of objective economic criteria such as the relevant levels of economic development or per capita GNP of the two countries.[1198] In fact, even the Commission admits that

[1196] See text, supra pp.781-782.
[1197] See text, supra pp.791-792.
[1198] See text, supra pp.796-802.

administrative factors impinge on the process for selecting analogue countries. The degree of co-operation from producers in a potential analogue country, the existence of economic data that has already been analysed and aministrative convenience are hardly suitable substitutes for objective economic criteria. Even the European Court, normally an ardent supporter of the European Commission's policy in the field of anti-dumping, was unable to support the arbitrary practices of the Commission in this area and issued a rebuke for selecting grossly inappropriate surrogate countries.[1199]

The Commission has also developed its own concept of input dumping without waiting for legislative approval. The Commission will now adjust constructed normal values to take into account the fact that producers purchase raw materials at a price which is lower than their production costs.[1200] Again this has the effect of inflating normal values and hence the margin of dumping determined in the final investigation.

The methodologies in the injury determination aspect of anti-dumping investigations are also open to criticism for lack of compliance with the rigours of the Anti-Dumping Code. This lack of compliance also stems from the inability of the international rules to influence the Commission officials conducting investigations. The Commission is instructed to take into account three determining factors for establishing material injury, namely (a) the volume of imports; (b) the price of the imports; and (c) the impact of the imports on the European industry. While the Commission is instructed to examine all of these indicators, it

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[1199] See text, supra pp.800-801.
[1200] See text, supra p.780.

rarely does so and this deviation from the express terms of the 1988 basic regulation has been sanction by the European Court.[1201] Naturally, if the Commission is permitted to select which criteria to consider, injury may be found in virtually any investigation. Further, it is not necessary for the Commission to conclude that all these factors are negative for an affirmative determination of material injury.

Even in the application of the express criteria for establishing injury, which for the most part follow those set out in Article 3 of the Anti-Dumping Code, abuse has occurred in the administration of these principles. For example, in assessing actual and relative increases in the levels of imports, the European Commission has been arbitrary in selecting the relevant periods for assessing trends in volume.[1202] Assessment periods have ranged between five months and five years and in between these extremes other periods have been used without adequate justification giving rise to suspicions that the arbitrary nature of the selection process operates against the interests of foreign manufacturers and exporters.

The ease with which the European Commission can select the means of measuring increasing volumes of imports is also disconcerting. The choice whether this measurement is made in absolute terms, relative to Union production or Union consumption, although admittedly permissible under Article 3(2) of the Code, grants wide latitude to the Commission to find injury. The Commission has abused the right to select among these options by finding too low levels of increasing imports as justification for an affirmative finding of material injury even after being allowed to opt among these choices. A market share as

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[1201] See text, supra pp.845-846.
[1202] See text, supra pp.846-848.

low as 2.47% over a one year period has been held to justify an affirmative determination even although imports in this particular case increased neither in absolute terms or relative to Union production.[1203]

In assessing the effects of imports on domestic prices, the European Commission relies almost exclusively on the concept of price undercutting (or price underselling). A finding of significant price undercutting usually leads to a positive determination of injury. The Commission's methodology towards determining price undercutting is not consistent with the Code because hypothetical prices for European producers are used as opposed to actual prices.[1204] Target prices are created on the assumption that dumped goods have already depressed prices. Not content with artificially inflating domestic prices in this manner, the European Commission increases prices further by including in this figure an appropriate amounts as a minimum profit for European Union producers. In these circumstances, it is not surprising that the Commission frequently discovers the existence of price undercutting in its investigations.

The final economic indicator which may be analysed by the Commission in the assessment of injury is the impact of imports on domestic production. In this area, the analysis adopted by the Commission is both haphazard and inconsistent. In some investigations, production statistics are the most important factor while in others, market shares, levels of profit and levels of employment are more important. The relative importance of negative indicators for each of these indices is difficult to discern but the Commission has not been reluctant to hold an adverse finding in one of these

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[1203] See text, supra p.850.
[1204] See text, supra pp.853-855.

categories as a justification for proving material injury.

The approach to the process of defining the relevant European Union industry also suffers from short-comings. The reasoning and logic behind like product determinations is often obfuscated and it is difficult to discern which are the most important characteristics in the identification of like products. There is also evidence of abuse in the application of the related parties rule to artificially circumscribe the relevant domestic industry.[1205] It is also notoriously difficult for a foreign manufacturer to challenge the Commission's findings on this point because the European Court has, in the past, fully supported the exercise of discretion by the Commission (and Council) in determining the scope of the like product market.

Article 3(4) of the Anti-Dumping Code is explicit in its requirement that it 'must be demonstrated that the dumped imports are...causing injury' to a domestic industry. The need for an explicit causal connection is also stressed through the 1988 basic regulation itself. Nevertheless, the European Court has agreed with the Commission that it is permissible to attribute responsibility to an importer for injury caused by dumping even if the losses due to dumping are merely part of more extensive injury attributable to other factors.[1206] In addition, the dislocation between assessing dumping and injury which often occurs in investigations raises legitimate concerns regarding causation. If these two periods are not identical, can it be proved that the injury occurring during the investigation period was caused by the dumping? The Commission would answer this question in the affirmative

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[1205] See text, supra pp.868-872.
[1206] See text, supra pp.872-873.

but the compatibility of the methodology with the Code requirements is open to debate.

Considering the procedural aspects of European Union anti-dumping law, initial concerns are immediately raised by the fact that not all the material sources of procedural rights and duties are contained in the basic regulation. The development of procedural rights and safeguards has been largely dependent on general principles of law which, although flexible, are difficult to identify with precision. This problem is particularly acute if the investigating authorities take advantage of these uncertainties to render arbitrary or capricious rulings which are supported by the European Court.[1207] The evidence suggests that European industries have benefited more from this situation than foreign manufacturers.

European industries have benefited, in the first place, from the extremely liberal standing requirements imposed on private parties lodging anti-dumping complaints.[1208] The requirement of the Code that a complaint must be made on behalf of a domestic industry has been diluted to such an extent in European Union law and practice that often groups which are not truly representative of an industry are successful in lodging complaints. This has occurred through manipulation of the 'majority representation' rule and, in particular, by the Commission's active participation in ensuring that sufficient representation is obtained during the initial phases of a complaint. Other techniques are also employed by complainers to overcome this requirement including defining the relevant product as narrowly as possible, relying on the regional industry rule or excluding non-indigenous European producers from the

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[1207] See text, supra pp.889-892.
[1208] See text, supra pp.892-900.

scope of the relevant industry.[1209] The techniques are deployed with the full collaboration of the European Commission and the result is a mockery of the Code disciplines restricting the standing of private parties.

The criteria applied by the Commission in the assessment of the admissibility of complaints is also open to challenge for inconsistency with Article 5 of the Code. Although the Code requires 'sufficient evidence' of dumping, injury and causation in a complaint, the evidential standards applied by the Commission allow complaints based on the most superficial of evidence. For example, a complaint need not show that all the undertakings accused of dumping have in fact committed such acts; the Commission will take up the task of ascertain whether or not this is so on behalf of the complainant.[1210]

Further, the Commission's recently adopted practice of permitting selective complaints conflicts with the peremptory principle of Article VI of the General Agreement, namely that anti-dumping investigations are conducted against products from contracting parties and not against individual private companies.[1211] The Commission justifies this practice on the basis that it does not constitute an infringement of European Community law. This does not, however, justify the practice under international law and brings the European Union into direct conflict with its international obligations.

During investigations, many of the administrative practices of the Commission prejudice the interests of foreign manufacturers and exporters. For example, the

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[1209] See text, supra pp.896-898.
[1210] See text, supra pp.902-903.
[1211] See text, supra pp.903-904.

application of the 'facts available' rule does not require the Commission to examine evidence other than that submitted in the complaint even if more accurate and reliable information can be relatively simply obtained. Also, the policy of penalising non-co-operating foreign manufacturers is also of dubious legitimacy. In at least one instance, the Commission maliciously imposed higher duties on a non-co-operating producer even although the information available warranted a lower margin of dumping.[1212] Similarly, the Commission has recently adopted a strategy of setting residual duties for non-co-operating companies at higher levels than for non-co-operating producers. The Commission is effectively using the pretext of non-co-operation to maintain a policy of deliberately setting higher levels of duties than is warranted after an investigation.

Article 5(1) of the Anti-Dumping Code requires that, except in special circumstances', investigations are to be concluded within one year after their initiation. The requirement is repeated in the 1988 Basic Regulation. In reality, anti-dumping investigations frequently take much longer to complete and periods of between three and five years are not unheard of for investigations. The European Court has persistently refused to condemn the Commission for the excessive delays perpetrated in these investigations, instead holding that the one year period is merely a guideline and not a mandatory requirement of European Union law.[1213] The fact that the practice contravenes the terms of the Anti-Dumping Code does not appear to concern the European Court.

Once an affirmative determination of dumping and injury, together with causation, has been made, the Anti-Dumping

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[1212] See text, supra pp.909-911.
[1213] See text, supra pp.918-921.

Code authorises the imposition of anti-dumping duties or, alternatively, the acceptance of price undertakings from foreign manufacturers. The policy of the Commission towards the acceptance of price undertakings is completely arbitrary. For example, the Commission has recently adopted a policy of refusing to accept undertakings from Japanese producers found to have been dumping due to the present state of the European Union's commercial relations with Japan.[1214] Similarly, offers of undertakings have been rejected from Canadian producers on the ground that Canadian anti-dumping law does not permit the possibility of undertakings being accepted from European Union producers.[1215] In addition, the Commission has refused in some case to explain why undertakings from manufacturers have been refused. In these circumstances, there is little doubt that the Commission's policy towards the acceptance of undertakings is influenced more by the existence of broader considerations such as the existence of negative trading balances than the need to maintain objective and impartial criteria for this process.

The Anti-Dumping Code does not provide for the possibility of definitive measures other than anti-dumping duties being imposed by signatories. Nevertheless, the European Union applies numerous miscellaneous forms of relief in addition to ad valorem anti-dumping duties. Fixed duties have been applied calculated relative of volumes, quantities and the values of imports as have voluntary export restraint agreements to terminate investigations.[1216] None of these mechanisms is expressly authorised under the Code.

The European Union has also evolved novel forms of

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[1214] See text, supra p.926.
[1215] See text, supra pp.926-927.
[1216] See text, supra pp.930-932.

protective measures to fortify the basic anti-dumping mechanism established under the 1988 Basic Regulation. One unique type of measure is the anti-absorption procedure which allows the imposition of additional duties in the event that the Commission finds that anti-dumping duties have been borne by foreign exporters or manufacturers.[1217] This procedure infringes the terms of the Anti-Dumping Code on a number of grounds. First, complaints can be lodged by parties which are not representative of European Union industries. Second, the subsequent investigation is not compatible with procedural safeguards contained in the Code for the conduct of such investigations. Third, the levels of duties imposed, in some circumstances, exceed the original dumping margins found to exist.

The second novel form of protective measure to fortify the main structure of the European Union's anti-dumping laws is, of course, the anti-circumvention measures in the 1988 Basic Regulation.[1218] The compatibility of this legislation with the terms of the General Agreement has already been assessed at the GATT level and found incompatible with Article III. Nevertheless, the European Union refused to repeal this legislation or to amend it in order to comply with the panel's recommendations although no new investigations under this provision have been initiated since the panel's ruling was issued.

There are also a considerable number of minor inconsistencies between the European Union's procedural regime and the terms of the General Agreement and the Code. Of these, the most obvious include the semi-institutionalised nature of many of the measures adopted caused by the bias in the review process, the

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[1217] See text, supra pp.936-940.
[1218] See text, supra pp.940-946.

asymmetry in refund procedures and the difficulties encountered by foreign exporters when seeking judicial review of anti-dumping measures.[1219] These inconsistencies merely compound the overall picture of the schism which exists between the European Union's anti-dumping laws and its international obligations under the General Agreement and the Anti-Dumping Code.

The fact that European Union anti-dumping policy is so inconsistent with the Union's international obligations provokes greater concern when it is remembered that over 95% of measures of administered protection take this form. The use of anti-subsidy measures, safeguard measures and measures under the New Commercial Policy Instrument are the exception rather than the rule. At least in the case of anti-subsidy measures, their lack of use stems from the perspective of the Union towards the nature of these measures and the possible consequences of their use on a widespread basis.

While the European Union has not made aggressive use of anti-subsidy measures in the past, there is no guarantee that this policy will not change especially since the new Subsidies Code contains many of the rules which the European Union wished to see regulate subsidies at the international level. In any event, the small number of anti-dumping cases should not be mistaken for a benevolent attitude on the part of the European Union. The primary motivation for this policy was to secure international objectives.[1220] Now these have been atained, at least to a considerable degree, a more active role might await these measures.

From the analysis conducted of the existing anti-subsidy rules again the impression from a review of the European

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[1219] See text, supra pp.949-962.
[1220] See text, supra pp.806-812.

Union's anti-subsidy laws is that of general vagueness. The Commission retains far too much discretion in the application and formulation of the anti-subsidy policy. This discretion is all the more distressing since the substantive rules remain at an unsophisticated level and their lack of use has resulted in an absence of refinement. For example, the specificity test applied by the European Union has not been fully developed and has been applied in a haphazard fashion. The endorsement of the test of de facto specificity does hint at the evolution of sophistication in this perspective.[1221] Nevertheless, the rules regulating quantification and allocation of benefits (over both time and units) are both primitive and unrefined.

However, even the present policy of the European Union towards anti-subsidy measures has caused distortion in the overall structure of the European Union's commercial defence systems. The greatest distortion must be the spill-over that refraining to use such measures has caused in the anti-dumping regime. Anti-dumping actions are raised when the proper recourse should be to anti-subsidy procedures. This is a dangerous development not least because anti-dumping measures are not the proper form of relief against foreign subsidisation practices. The application of anti-dumping measures in such circumstances is suspect.

The wisdom of the pursuit of the strategy of minimising the risks to the European Union's own freedom to introduce subsidy programmes at the international level by refraining from anti-subsidy measures must also be called into question. Not only has the European Union tied itself into absurd negotiating positions but a fundamental tautology has been introduced between the

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[1221] See text, supra pp.826-830.

European Union's own internal subsidisation policy and its international position.[1222] Its state aid policy also operates on clearly distinct principles from those asserted in its international posture.[1223] This implies that, while one set of rules is adequate for internal regulation, another completely different set of principles is adequate for the relationship between the European Union and third stated. Not only is confusion engendered but also charges of hypocrisy.

**(2) Final Conclusion**

As stated at the outset of this study, the purpose of this project was to establish that the institutional and legal framework for the regulation of international trading relationships, as established under the GATT, exercises only the most superficial normative influence on the present trade policies of both the United States and the European Union, having regard to both the general direction of the trade policies of this state and this organisation and the particular rules of international trade regulation selected for this study.

This is due to five main factors limiting the impact of the international rules on the behaviour of the United States and the European Union. These factors are:

(a) The limited normative efficacy of the international trade legal order itself.

(b) The lack of international consensus which the international substantive rules for the regulation of anti-dumping duties, countervailing duties and subsidies themselves embody in relation to their content.

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[1222] See text, supra pp.813-817.
[1223] See text, supra pp.814-817.

(c) The significant incompatibility of these international rules with the policy objectives and goals sought to be achieved by the United States and the European Union as measured in terms of commercial policy.

(d) The inability of the substantive rules to permeate the decision-making processes inside the United States and the European Union and to prevail over non-legal factors and considerations.

(e) The weakness of such rules in terms of their ability to withstand dilution or avoidance when incorporated and applied at national level by national (or supranational) agencies.

Each of these factors combines to limit the normative influence of the international trade laws of the GATT system on the behaviour of the United States and the European Union. The ultimate consequence is that the system exercises only the most superficial normative influence on the present trade policies of both the United States and the European Union

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