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## Trade Protection in the New Millennium: The Ascendancy of Antidumping Measures

Christopher F. Corr

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# Trade Protection in the New Millennium: The Ascendancy of Antidumping Measures

*Christopher F. Corr\**

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## I. INTRODUCTION

Several years ago, at the ancient trade center Marrakesh, ministers from over one hundred countries signed a trade agreement creating the World Trade Organization ("WTO").<sup>1</sup> The Agreement was forged at a time of unprecedented, robust and sustained growth in world trade.<sup>2</sup> The legion of Uruguay Round negotiators stoked this heated trade activity by dramatically liberalizing trade rules in several respects. First, the WTO Agreement they negotiated provides for a phase-out or phase-down of import duties throughout the world on a vast array of commodities, reducing tariffs in de-

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<sup>1</sup>The trade ministers signed the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, [hereinafter Final Act], and The Agreement Creating the World Trade Organization, Apr. 15, 1994, RESULTS OF THE URUGUAY ROUND: THE LEGAL TEXTS (1994) [hereinafter THE LEGAL TEXTS], 33 I.L.M. 1125, 1141 (1994) [hereinafter WTO Agreement]. The WTO Agreement contains four annexes, all dated Apr. 15, 1994: the Multilateral Agreements on Trade in Goods, Annex 1A, THE LEGAL TEXTS at 20, 33 I.L.M. 1154 (1994) [hereinafter Agreements on Trade in Goods] (including the Antidumping Agreement, *infra* note 17), the General Agreement on Trade in Services, Annex 1B, THE LEGAL TEXTS at 325 (1994), 33 I.L.M. 1168 (1994) [hereinafter Agreement on Trade in Services], the Agreement on Trade Related Aspects of Intellectual Property Rights, Annex 1C, THE LEGAL TEXTS at 365, 33 I.L.M. 1197 (1994), as well as the Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2, THE LEGAL TEXTS at 404, 33 I.L.M. 1226 (1994) [hereinafter Dispute Settlement Understanding], the Trade Policy Review Mechanism, Annex 3, THE LEGAL TEXTS at 434 (1994), and the Plurilateral Trade Agreements, Annex 4, THE LEGAL TEXTS at 438. All but Annex 4 are binding on all WTO Members. WTO Agreement, art. II.2. The Agreement went into force on January 1, 1995. Final Act, para. 3. See *The WTO: A New Organization for a New Era*, GATT/WTO NEWS, Dec. 21, 1994, for a general overview of the World Trade Organization. The Final Act and WTO Agreement were the result of painstaking negotiations which began in 1986 in Punta del Este, Uruguay. The extraordinary length of the negotiations was primarily due to fundamental disagreement among certain Member countries regarding agricultural trade reform. For an overview of the progression of the Uruguay Round negotiations from the U.S. perspective, see S. REP. NO. 103-412, at 1-6 (1994).

<sup>2</sup>The global growth rate in the mid-1990s was nearly double the rate in the 1970s and 1980s. *World Trade in 1995 - Overview*, WTO ANN. REP. 1995, at 9. World trade in goods increased every year between 1984 and 1995, and experienced a pronounced volume increase of almost 10% in both 1994 and 1995. See WTO ANN. REP. 1996, at 10. In value terms it increased even more — by nearly 20%. Between 1973 and 1995, trade in goods increased over eight fold, from \$575 billion to almost \$5 trillion. *Id.* at 5. One major factor behind this trend is the dramatic increase in imports and exports by developing (non-OECD) countries. WTO, *World Trade Expanded Strongly in 1995 for the Second Consecutive Year*, Press Release 11, Mar. 22, 1996, at 1. Central and Eastern European countries experienced the most dramatic increases, of over 25%. *Id.* Asian countries also became increasingly important drivers for world trade, as import growth in Asia exceeded export growth for the fourth consecutive year in 1995. *Id.*; see also *Global Growth Reaches A New, Higher Level That Could Be Lasting*, WALL ST. J., Mar. 13, 1997, at A1 (attributing global growth trend of "unprecedented size and scope" to "vast expansion of economic freedom and property rights, coupled with reductions in scope of government and an explosion in trade and private investment," as well as by "quickening innovation").

veloped countries by an average of roughly forty percent.<sup>3</sup> Second, the WTO Agreement provides new disciplines to enhance cross border trade in huge sectors such as agriculture, investment and services.<sup>4</sup> Third, it creates the binding WTO Dispute Settlement Understanding to better enforce new and preexisting trade liberalization rules.<sup>5</sup>

These measures undoubtedly will enhance the momentum of global trade — which reached \$6 trillion in 1996 — by an estimated \$755 billion annually by the year 2002.<sup>6</sup> For example, since the execution of the WTO Agreement in 1994, U.S. exports increased by nearly thirty percent for goods on which tariffs were eliminated under the WTO Agreement.<sup>7</sup>

To heighten the momentum further, at the first Ministerial Conference of the WTO, held two years after the WTO Agreement's starting date,<sup>8</sup> the Members executed a supplemental Information Technology Agreement which reduced or eliminated the remaining tariffs on a wide variety of electrical equipment and electronics.<sup>9</sup> Two months later, WTO Members reached another supplemental agreement, this time to liberalize trade in telecommunications, and within the year, the Members reached yet another agreement, on expanding trade in financial services.<sup>10</sup>

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<sup>3</sup>Tariff reduction commitments under the WTO are contained in schedules annexed to the Marrakesh Protocol to the General Agreement on Tariffs and Trade, Apr. 15, 1994, Agreements on Trade in Goods, *supra* note 1, THE LEGAL TEXTS at 37, 33 I.L.M. 1165 (1994) [hereinafter GATT 1994]. For example, Schedule XX of the Protocol contains the U.S. duty reduction commitments. These reductions were dramatic. For instance, duties on most chemical products were reduced from levels as high as 30-40% to roughly 5% or were completely phased out. *Id.*

<sup>4</sup>The agreements concerning these sectors are in Annex 1 of the WTO Agreement, *supra* note 1. Further, the WTO Agreement outlaws protective "grey" measures commonly used by countries to limit exports such as export or import restraint agreements. See, e.g., *infra* notes 72-83 and accompanying text for a discussion of the effect of the Antidumping Agreement on grey-area measures.

<sup>5</sup>See *infra* notes 131-34.

<sup>6</sup>See *supra* note 2.

<sup>7</sup>Bruce Stokes, *Up and Crawling*, NAT'L J., Mar. 30, 1996, at 709.

<sup>8</sup>The Ministerial Conference constitutes the highest level of the WTO, and is comprised of the trade ministers from each of the WTO Members. Conference meetings are held once every two years. INTERNATIONAL TRADE CENTRE UNCTAD/WTO & COMMONWEALTH SECRETARIAT, BUSINESS GUIDE TO THE URUGUAY ROUND 34 (1995) [hereinafter BUSINESS GUIDE TO THE URUGUAY ROUND]. The first meeting was held in Singapore in December 1996, two years after the commencement of the WTO. See WTO Agreement, *supra* note 1.

<sup>9</sup>WTO Ministerial Declaration on Trade in Information Technology Products, December 13, 1996, executed on March 26, 1997. See *ITA DONE DEAL!*, OFF. OF U.S. TRADE REPRESENTATIVE, Press Release 97-25, Mar. 26, 1997; *Information Technology Agreement on Track Toward March 26 Conclusion*, OFF. OF U.S. TRADE REPRESENTATIVE, Press Release 97-21, Mar. 13, 1997; INFO. & MEDIA REL. DIV., WTO, *Elimination of Tariffs on Computer Products by Year 2000 Agreed*, FOCUS, Mar. 1997, at 1.

<sup>10</sup>See WTO, *Ruggerio Congratulates Governments on Landmark Telecommunications Agreement*, Press Release 67, Feb. 17, 1997; WTO, *Successful Conclusion of the WTO's Fi-*

These sweeping reforms present tremendous opportunities for global exporters to expand their overseas markets, and for domestic industries and consumers to enhance their access to competitive overseas suppliers of materials and finished products. There is, however, one significant threat to the sanguine prospects for freer international trade — antidumping action. While the WTO Agreement limits the mechanisms that Member countries may employ to restrict imports, it allows antidumping action as one of the few remaining protections against imports. The WTO Agreement contains a revised Antidumping Agreement setting forth the rules under which each Member country may impose antidumping duties on imports of targeted merchandise traded at “unfair” prices.<sup>11</sup>

At a time when global export volume is burgeoning, customs duties are phased out and other import barriers are eliminated, industries throughout the world find themselves exposed to international competition as they have never been before. Predictably, many will seek import protection. The Antidumping Agreement is now the most viable basis for imposing or preserving protective duties. A Trade Ministry official from China, the most frequent target of global dumping actions, perceived this trend, remarking: “In a world where tariff and non-tariff barriers decrease rapidly, antidumping measures are becoming increasingly important in protecting domestic manufacturers.”<sup>12</sup>

This article will first examine why the antidumping law will become the weapon of choice for import protection in the new millennium. It then will provide an overview of the antidumping regulatory regime, and the controversy it has engendered. Finally this article will discuss the compliance measures that global exporters should consider in order to avoid antidumping liability in the future.

## II. ANTIDUMPING MEASURES: THE WEAPON OF CHOICE FOR PROTECTION

### A. Background

The antidumping concept has been in circulation since the late 18th century.<sup>13</sup> International use of antidumping rules was formalized at Bretton

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*Financial Services Negotiations*, Press Release 86, Dec. 15, 1997 (financial services include banking, insurance, securities and financial information).

<sup>11</sup> See *infra* notes 136-50 and accompanying text.

<sup>12</sup> Tony Walker, *Beijing in Tough Line on Dumping*, FIN. TIMES, Feb. 4, 1997, at 4 (quoting Zhang Yugling, Deputy Director General, China Ministry of Trade).

<sup>13</sup> See JACOB VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE, 35-68 (1966) (providing a history of the origin of the dumping concept, dating back to Alexander Hamilton's 1791 “Report on Manufactures,” as well as the emergence of domestic and international legislation to counteract dumping practices, largely in the United States and European countries).

Woods, in 1947, where the contracting parties drafted Article VI of the original GATT to deal with the antidumping "problem."<sup>14</sup> In order to discipline the growing and disparate application of antidumping duties within a framework of substantive and procedural rules, the GATT parties formulated a detailed "Antidumping Code" at the Kennedy Round of multilateral negotiations in 1967,<sup>15</sup> and again in amended, more detailed form at the Tokyo Round negotiations concluded in 1979.<sup>16</sup> The WTO Antidumping Agreement in turn replaced the 1979 GATT Code and, as discussed in this article, sets forth the current international precepts which WTO Members must implement and abide by.<sup>17</sup>

Antidumping complaints have emerged as a profoundly effective weapon. Often, the mere filing of an antidumping complaint has a marked chilling effect on competition, both on price levels and import volume. The complex and discretionary antidumping rules, and the burdens an antidumping investigation imposes, often place exporters and importers at a severe disadvantage.

The results of antidumping investigations speak for themselves. In the United States, for instance, the Department of Commerce, which is responsible for investigating whether exporters are dumping in the United States, has a dumping "conviction rate" of over ninety-six percent.<sup>18</sup> It is no wonder then that exporters and importers facing even a rumor that they will be brought before such a "hanging judge" often become reluctant to pursue opportunities in the U.S. market.<sup>19</sup> The startling success of antidumping complaints has a predictable effect. Continuing with the example of the

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<sup>14</sup>General Agreement on Tariffs and Trade, Oct. 30, 1947, article VI, T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

<sup>15</sup>Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 1968, GATT B.I.S.D. (15th Supp.) at 32, 651 U.N.T.S. 320 (1968).

<sup>16</sup>Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, 1979, GATT B.I.S.D. (26th Supp.) at 171, 31 U.S.T. 4919 (1979).

<sup>17</sup>See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Apr. 15, 1994, Agreement on Trade in Goods, *supra* note 1, THE LEGAL TEXTS at 168 [hereinafter Antidumping Agreement]. GATT 1994, *supra* note 3, incorporates by reference the antidumping provisions of Article VI of the GATT, *supra* note 14. See GATT 1994, *supra* note 3 (incorporating the provisions of the original GATT, as amended by the Final Act).

<sup>18</sup>See Import Trade Administration website at <[http://www.ita.doc.gov/import\\_admin/records/stats](http://www.ita.doc.gov/import_admin/records/stats)>, showing that only 3.9% of active cases from January 1, 1980 to July 31, 1997 resulted in a "negative" dumping determination (*i.e.* a finding that exporters were not dumping); see also CONG. BUDGET OFF. REP., HOW THE GATT AFFECTS U.S. ANTIDUMPING AND COUNTERVAILING DUTY POLICY 50 (Sept. 1994). The International Trade Commission ("ITC"), the U.S. entity responsible for assessing whether a domestic industry is materially injured by dumped imports (the other phase of an antidumping investigation), makes affirmative findings in over 60% of the cases brought before it, a less certain but still troubling scenario for exporters and importers faced with an antidumping action. *Id.*

<sup>19</sup>See *infra* notes 276-80 and accompanying text for further criticism of current enforcement of antidumping laws.

United States, U.S. unfair trade measures, particularly dumping duties, reduced U.S. manufactured imports by roughly twenty percent between 1980 and 1988.<sup>20</sup> These barriers are expensive, and will cost the U.S. economy an estimated \$16 billion by the year 2000.<sup>21</sup> The economic effect of anti-dumping actions is particularly acute in the steel, electronics, textile, agricultural and chemical sectors, which are most prone to antidumping action.

## B. The Trend Toward Antidumping Litigation

As countries are forced to decrease tariffs and phase out other trade barriers to comply with WTO rules, reliance on the WTO Antidumping Agreement inevitably will increase. Historically, the United States, the European Union, Canada and Australia, have been the primary users of the antidumping law, accounting collectively for over two-thirds of the antidumping cases initiated between 1990 and 1995.<sup>22</sup> This statistic is conservative because it does not include the annual "administrative reviews" initiated by the United States pursuant to its unique retroactive dumping assessment system;<sup>23</sup> the United States initiates many more of these extensive reviews in a given year than it does new investigations.<sup>24</sup> This relatively

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<sup>20</sup> See Daniel Thefler, *Trade Liberalization and the Theory of Endogenous Protection: An Econometric Study of U.S. Import Policy*, 101 J. POL. ECON. 151 (Feb. 1993). Imports into the United States are not the only products negatively affected by antidumping laws. The spread of the antidumping virus to other WTO Members increasingly threatens U.S. exporters, as discussed *infra*, which account for one in six U.S. manufacturing jobs.

<sup>21</sup> ECONOMIC EFFECTS OF ANTIDUMPING AND COUNTERVAILING DUTY ORDERS AND SUSPENSION AGREEMENTS, USITC Pub. 2900, Inv. No. 332-334 (June 1995).

<sup>22</sup> Between the years 1990 and 1995, the United States initiated 299 anti-dumping cases, Australia initiated 265, the EU initiated 186 and Canada initiated 117. Committee on Anti-dumping Practices, *Report of the Committee Presented to the Contracting Parties*, G L 123 (1996); Committee on Anti-dumping Practices, *Report of the Committee Presented to the Contracting Parties*, GATT B.I.S.D. (40th Supp.) at 195, 201-204 (1995); Committee on Anti-dumping Practices, *Report of the Committee Presented to the Contracting Parties* (1994); Committee on Anti-dumping Practices, *Report of the Committee Presented to the Contracting Parties*, GATT B.I.S.D. (39th Supp.) at 388, 393-95 (1993); Committee on Anti-dumping Practices, *Report of the Committee Presented to the Contracting Parties*, GATT B.I.S.D. (38th Supp.) at 82, 87-88 (1992); Committee on Anti-dumping Practices, *Report of the Committee Presented to the Contracting Parties*, GATT B.I.S.D. (37th Supp.) at 297, 301 (1991). Moreover, in the one year since the execution of the WTO Agreement, the United States has initiated 13 antidumping proceedings, the EU has initiated 33, and Canada has initiated 9, accounting for almost half of the total antidumping proceedings in that period. WTO ANN. REP. 1996, at 104; see also John H. Jackson, *Dumping in International Trade: Its Meaning and Context*, in ANTIDUMPING LAW AND PRACTICE: A COMPARATIVE STUDY (John H. Jackson & Edwin A. Vermulst eds., 1989).

<sup>23</sup> See *infra* notes 147-48 and accompanying text.

<sup>24</sup> The periodic retroactive "administrative reviews" analyze whether imports in the previous year, entered under a pre-existing antidumping order, were dumped, using the same rigorous data collection procedures as in the initial dumping investigation. See the Import Trade Administration's website at <[http://www.ita.doc.gov/import\\_admin/records/stats](http://www.ita.doc.gov/import_admin/records/stats)> for statistical information on new investigations and administrative reviews. For instance, in



small traditional users group has successfully employed antidumping measures to protect its national industries for many years. Even developed countries like Japan, which traditionally were critical of antidumping proceedings, have begun to utilize their antidumping laws.<sup>25</sup>

Developing countries have learned well from this example and have been gaining ground on the traditional users group. In a dramatic proliferation of the antidumping weapon, developing countries have been filing antidumping actions against one another, and against members of the traditional users group, to the growing consternation of developed nations.<sup>26</sup> Having made great use of the antidumping weapon themselves, however, the developed countries will have a hard time complaining about the acquisition and use of this weapon by others.

In 1990, developing countries accounted for less than ten percent of antidumping cases initiated, but by 1995 they accounted for forty-three percent.<sup>27</sup> Mexico has been cited often as an illustration of this trend. As Mexico eliminated other barriers to trade, it became a frequent user of the

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1996, the Commerce Department initiated only 21 investigations, but it completed 96 administrative reviews in the same year. Likewise, in 1995, the Department initiated only 14 new investigations, but it completed 126 reviews. *Id.*

<sup>25</sup> Although still critical of widespread use of antidumping measures, Japan has begun to employ antidumping measures to protect its own industries. In 1993, Japan for the first time decided to impose antidumping duties against imports of Ferro-Silico-Manganese from China. It later brought the same case against Norway and South Africa. *See* Cabinet Order regarding imposition of antidumping duty on Ferro-Silico-Manganese, Heisei-5, 2-Sei-15, amended in part, Heisei-6, 12-Sei-15. In 1994, Japan brought another antidumping proceeding against cotton thread from Pakistan. *See* Cabinet Order regarding imposition of antidumping duty on cotton thread, Heisei-7, 8 Sei-308; *Customs Weekly Reports*, Feb. 3, 12, 1993, Nos. 2087, 2089. *See also* WTO ANN. REP. 1996, at 104. *See generally* Norio Komuro, *Japan's First Anti-dumping Measures in the Ferro-Silico-Manganese Case*, J. WORLD TRADE, June 1993, at 5 (discussing the use of Japan's antidumping law in its first case). These measures contrasted with Japan's actions in the early 1980s, when it initiated antidumping investigations on both cotton thread (1982) and Ferro-Silico-Manganese (1983), but later terminated both cases.

<sup>26</sup> A report by the U.S. General Accounting Office highlighted the concerns of developed countries regarding the spread of antidumping measures: "[F]earing possible abuse of these laws, [countries with established procedures] have expressed concern over their adoption and use by newly industrialized countries such as Mexico, South Korea and Brazil." *See* UNITED STATES GENERAL ACCOUNTING OFFICE, REPORT TO CONGRESSIONAL REQUESTORS: COMPARISON OF U.S. AND FOREIGN ANTIDUMPING PRACTICES 10 (1990).

<sup>27</sup> *See* GATT ANN. REP. 1994, at 28; WTO ANN. REP. 1996, at 104; *see also* BUSINESS GUIDE TO THE URUGUAY ROUND *supra* note 8, at 202 ("Complaints of dumping ... are on the increase in most developing countries implementing liberalization measures. While many of these complaints are due to the inability of domestic industries, long accustomed to heavy levels of protection, to adjust to the changed competitive situation resulting from the removal of tariffs and other barriers, some complaints ... are undoubtedly genuine."). *See generally* Shishni Astrana, *The Dumping Ground*, SMART INVESTOR, Feb. 17, 1997 (discussing a number of recent antidumping actions India has brought against developed and developing countries).

antidumping weapon.<sup>28</sup> Between 1985 and 1990, Mexico initiated a total of forty-five antidumping cases.<sup>29</sup> Between 1990 and 1995, Mexico initiated more than *double* that amount — 104.<sup>30</sup> South Africa serves as another example. In 1994, South Africa initiated nine antidumping measures.<sup>31</sup> In 1995, it initiated *twice* as many — 18.<sup>32</sup> Even China, which has been the most frequent victim of antidumping actions,<sup>33</sup> has drafted antidumping legislation, and has initiated its first antidumping case.<sup>34</sup>

A striking number of countries with no prior experience have adopted antidumping regulatory regimes. In 1994, only twenty-five countries had joined the GATT Antidumping Code and implemented antidumping legislation.<sup>35</sup> By December 1996, that number rose *five fold*: there were 128 WTO Member countries, and the terms of the WTO Agreement require that all must join the Antidumping Agreement and ensure adoption of conforming legislation.<sup>36</sup> Twenty-eight other countries have joined working parties to facilitate their accession to the WTO.<sup>37</sup> In the new millenium, it is possible that virtually all sovereign countries will have joined the Anti-dumping Agreement.

The long term trends support the expectation that antidumping cases will increase.

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<sup>28</sup> See Nancy E. Kelly, *Mexico's Enhanced Trade Muscle: Did U.S. Furnish The Steroid?*, AM. METAL MARKET, Oct. 10, 1996, at 1 (discussing antidumping cases against the United States, and fact that Mexican antidumping law is based largely on the U.S. system). India and Pakistan have also increasingly used antidumping measures. See N. Vasuki Rao, *India and Pakistan Hit Back on Dumping*, J. COM., June 3, 1997, at 3A (discussing the readying of import duties in both countries as apparent retaliation against Western trade challenges).

<sup>29</sup> GATT ANN. REP. 1994, at 28.

<sup>30</sup> *Id.*; WTO ANN. REP. 1995, at 31.

<sup>31</sup> WTO ANN. REP. 1995, at 31.

<sup>32</sup> WTO ANN. REP. 1996, at 104.

<sup>33</sup> See WTO ANN. REP. 1995, at 32 (showing that exports from China were the targets in 20% of all cases in 1994); WTO ANN. REP. 1996, at 105 (showing that exports from China were the targets in 15% of all cases in 1995).

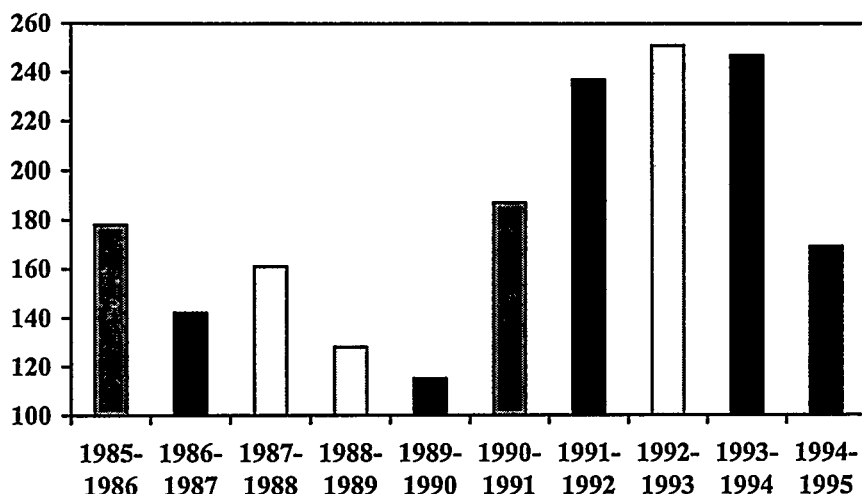
<sup>34</sup> See Antidumping and Countervailing Regulations of the People's Republic of China, issued Mar. 28, 1997 per State Council Order No. 214 in *People's Republic Daily* (Overseas Edition), Mar. 29, 1997. For further discussion of China's new regulations, see *China to Establish Antidumping Rules to Protect State Industries*, Daily Executive (BNA) No. 23, at A-2 (Feb. 4, 1997). China initiated its first antidumping case against newsprint from the United States, Korea and Canada on December 12, 1997. See INSIDE U.S. TRADE, Dec. 19, 1997, at 8.

<sup>35</sup> See Renato Ruggiero, *The State of World Trade, Trade Policy and the WTO*, FOCUS, Dec. 1996, at 8.

<sup>36</sup> See INFO. & MEDIA REL. DIV., WTO, *WTO Members*, FOCUS, Jan. 1997, at 11; see also *infra* note 130 and accompanying text.

<sup>37</sup> See Ruggiero, *supra* note 35, at 8.

Table 1: Total Number of Antidumping Cases Initiated



1. Sources: 1994 GATT Annual Report by the Director-General; 1995 and 1996 WTO Annual Reports by the Director-General.
2. Reporting period is July to June of subsequent year.
3. Accounts for post-1994 South Africa cases.

As shown in Table 1, there has been a sharp increase in the number of antidumping actions initiated in the 1990s when compared to the 1980s.<sup>38</sup> Although the number of cases initiated will fluctuate from year to year depending on the economic cycle, the trend appears unmistakable. The total number of antidumping measures in force also increased by almost ten percent between 1994 and 1995.<sup>39</sup>

<sup>38</sup> Other factors affecting the volume of antidumping cases reported as initiated are:

(i) *The transition period in implementing antidumping legislation may delay initiation of cases.* Members had to introduce new rules to implement the new agreement, and national industries have awaited these rules before filing antidumping complaints. For instance, it took the U.S. government over two years to issue final regulations implementing the WTO antidumping rules. This transition process will be more difficult in countries without prior antidumping experience.

(ii) *Members may not provide the GATT/WTO with current reports of antidumping cases they have initiated.* Notification to the WTO has been incomplete in the past, and it will be increasingly difficult for the WTO to monitor the actions brought by the dramatically expanded group of countries using the antidumping weapon.

(iii) *Antidumping actions tend to vary countercyclically from the general economic trend.* Thus, from 1990-1993, a time of recession in many countries, antidumping actions increased significantly.

See Table 1.

The dip in antidumping actions after 1994 may be a result of all of these factors.

<sup>39</sup> Compare GATT ANN. REP. 1994, at 10 (reporting almost 740 measures in effect as of June 30, 1994), with WTO ANN. REP. 1995, at 14 (reporting 805 antidumping measures in effect as of June 30, 1995).

This growth trend is seen not only in the number of antidumping actions, but also in the number of *countries* undertaking antidumping actions. As more countries add antidumping regimes to their domestic legislation, and as other alternatives for protection are eliminated, the number of countries initiating antidumping actions each year has escalated rapidly — from nine countries in 1990, it nearly doubled to sixteen countries in 1995.<sup>40</sup> Contrary to conventional assumptions, many of these antidumping actions target developed countries such as the United States and the EU.<sup>41</sup>

The growing frequency of antidumping actions is likely to result in a corresponding increase in the number of antidumping decisions contested before the WTO Dispute Settlement Body (“DSB”). The WTO established a new and improved binding dispute resolution procedure, under which a complaining Member may request that a WTO panel render a ruling on whether the laws, practices or decisions of another Member are consistent with WTO obligations and principles.<sup>42</sup> The WTO Antidumping Agreement sets forth special rules for resolving disputes involving antidumping cases.<sup>43</sup> The DSB rules are significant because they offer countries meaningful recourse to an objective international tribunal when they believe their exporters were unfairly subjected to dumping measures. Developing countries are especially encouraged by the binding nature of the DSB process, because powerful industrialized countries can no longer block decisions favorable to exporters from developing countries.<sup>44</sup> Of ninety-one requests for consultations under the GATT between 1989 and 1994, twenty-five percent related to antidumping actions.<sup>45</sup> One can expect an even greater number of antidumping disputes before the DSB, given the expected increase in the volume of litigation<sup>46</sup> as well as the increasing involvement of developing countries.<sup>47</sup>

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<sup>40</sup> GATT ANN. REP. 1994; WTO ANN. REP. 1996, at 104.

<sup>41</sup> In 1993-1994, the EU was the second most prominent target of antidumping investigations (accounting for 11% of all investigations initiated), and the United States was the fifth most prominent target (accounting for 4.3%). See GATT ANN. REP. 1994, at 28. In 1995, the EU was the target of 17.1 % of the investigations initiated, and the United States was the target in 4.9 % of the investigations. See WTO ANN. REP. 1996, at 104-05.

<sup>42</sup> See Dispute Settlement Understanding, *supra* note 1, at arts. 4.7, 16.4. See generally Palitha T.B. Kohona, *Dispute Resolution Under the World Trade Organization: An Overview*, J. WORLD TRADE, Apr. 1994, at 23. See *infra* notes 131-34 and accompanying text for further discussion.

<sup>43</sup> See *infra* notes 131-34 and accompanying text.

<sup>44</sup> See Ruggiero, *supra* note 35, at 7 (WTO Director-General Ruggiero stating that “in a marked change from the past, when the dispute settlement system was mostly used by developed countries, both developed and developing countries are actively using the system to settle their trade disputes. This is a sign of increased confidence in the impartiality and effectiveness of the WTO’s multi-lateral dispute settlement system.”).

<sup>45</sup> See WTO ANN. REP. 1995.

<sup>46</sup> Only “final actions” normally may be referred to the WTO dispute resolution process, and antidumping actions generally take over one year to complete and become “final.” Accordingly, there will be a lag in dispute resolution of antidumping cases under the WTO.

### C. Other Less Significant Weapons

The WTO Agreement encompasses several Multilateral Agreements on Trade in Goods.<sup>48</sup> The three main agreements governing import protection are: (i) the Agreement on Safeguards, (ii) the Agreement on Subsidies and Countervailing Measures (the "SCM Agreement") and (iii) the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Antidumping Agreement").<sup>49</sup> The first two — the Safeguards and the SCM Agreements — are far less significant than the Antidumping Agreement and are discussed in the following sections of this article.

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Trade-related disputes accounted for 16% of dispute resolution requests as of the first quarter of 1996. See *Overview of the State-of-Play of WTO Disputes*, (visited Apr. 1, 1996) <<http://www.wto.org/wto/dispute/bulletin.htm>>. This lag was encountered in the *Desiccated Coconut* case, a Dispute Settlement Understanding appeal of a countervailing duty action by Brazil against imports from the Philippines. See *WTO, Brazil-Measures Affecting Desiccated Coconut*, 55/22/R (Oct. 17, 1996). In that case, WTO Dispute Settlement Understanding rules were not yet applicable when the action was initiated, although duties in that action were levied in 1995, after the WTO came into effect. *Id.*

<sup>47</sup> See INFO. & MEDIA REL. DIV., WTO, *Developing Countries are Becoming Active Users of WTO Dispute-Settlement Rules*, FOCUS, Mar.-Apr. 1996, at 1-2.

<sup>48</sup> See Agreement on Trade in Goods, *supra* note 1.

<sup>49</sup> Agreement on Safeguards, Apr. 15, 1994, Agreements on Trade in Goods, *supra* note 1, THE LEGAL TEXTS at 315 [hereinafter Safeguards Agreement]; Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Agreements on Trade in Goods, *supra* note 1, THE LEGAL TEXTS at 264 [hereinafter SCM Agreement]; Antidumping Agreement, *supra* note 17. The WTO mandates that import protection measures must be authorized by the Agreements on Trade in Goods. Accordingly, to the extent that national measures are inconsistent with the WTO Agreement, they are subject to challenge if used. For example, the United States has on its books the Antidumping Act of 1916, 15 U.S.C. § 72, and Section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337. The 1916 Act imposes on the plaintiff U.S. industry the difficult burden of proving that importers *knowingly* imported dumped merchandise with the intent to injure the domestic industry. It also permits successful plaintiffs to collect substantial damages, which are not permitted under the WTO Antidumping Agreement. The 1916 Act was virtually never used prior to the Uruguay Round. (U.S. antidumping actions are taken under authority of the Antidumping Act of 1930 as amended, not the 1916 Act. See *infra* note 147.) However, a U.S. steel company filed suit under the 1916 Act in late 1996 against the U.S. subsidiary of a German steel exporter. See *Geneva Steel Co. v. Ranger Steel Supply Corp.*, No. 96-C-774B, 1997 U.S. Dist. LEXIS 14892 (C.D. Utah Sept. 19, 1997). The European Union, on behalf of Germany, challenged the U.S. law at the WTO as being inconsistent with any import protections permitted by WTO Agreements. Nancy E. Kelley, *Europe's Opposition in Trade Case Grows*, AM. METAL MARKETS (Sept. 25, 1997).

Section 337 permitted U.S. companies to petition the ITC for an order excluding imports of merchandise that infringed intellectual property rights and that were injurious to U.S. industry. Section 337 was successfully challenged in a 1988 GATT proceeding, GATT B.I.S.D. (36th Supp.) at 345 (1989). Subsequently, the U.S. Congress amended the law in 1988, and again in 1994, to make it parallel with other U.S. patent infringement proceedings. The injury requirement was eliminated. 19 U.S.C. § 1337.

### 1. Safeguards

Article XIX of the GATT 1994, also termed the "Escape Clause," allows Member States to provide temporary protection to domestic industries facing increased import competition. Specific procedures for implementing Article XIX and imposing safeguard measures were revised and set forth in the Safeguards Agreement annexed to the WTO Agreement.<sup>50</sup> The purpose of these safeguard measures is to afford domestic companies time to improve their position or shift their resources into another field.<sup>51</sup> The drafters of the Safeguards Agreement borrowed heavily from the existing U.S. safeguards law.<sup>52</sup>

#### a. Standards

Article XIX and the Safeguards Agreement authorize Members to restrict imports when they are in increased quantities which cause or threaten serious injury to a domestic industry.<sup>53</sup> The Safeguards Agreement specifies that safeguard measures may only be taken in response to an increase in imports; the increase can be absolute or relative to domestic production.<sup>54</sup> Serious injury to the domestic industry is defined as "a significant overall impairment to its position."<sup>55</sup> The Safeguards Agreement injury test is intended to be greater than the injury test in the Antidumping Agreement, but ultimate discretion is left with the administering authority, which can effectively lower the burden for a showing of injury.<sup>56</sup> Developing countries

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<sup>50</sup> Safeguards Agreement, *supra* note 49.

<sup>51</sup> In addition to Article XIX, there are other "safeguard" measures under the WTO Agreement. For example, Articles XII and XVII:B of the GATT 1994 permit restrictions on imports to safeguard a country's external financial position and its balance of payments. These provisions generally are available only to developing countries and then only in extraordinary cases. Extraordinary protective measures also are permitted under Article XX, which allows for protection of public morals, health, laws and natural resources, and Article XXI, which allows for protection of national security. Because they are rarely used, these extraordinary measures are not further discussed in this article. The standard safeguard measures under Article XIX are available to all Member states, and therefore are likely to be most relevant in the future as an import protection alternative to antidumping actions.

<sup>52</sup> In the United States, safeguard protections are provided under Sections 201-204 of the Trade Act of 1974, 19 U.S.C. § 2251-2254, which is administered by the ITC. The Trade Act of 1974 served as a model for the Safeguards Agreement. For example, the definitions of serious injury and threat in the Safeguards Agreement are based on Section 202 of the Trade Act. 19 U.S.C. § 2252(c)(6)(C)-(D). Also, as under U.S. law, the Safeguards Agreement requires a finding within 200 days of initiation of a safeguards investigation. 19 U.S.C. § 2252(d)(2)(D).

<sup>53</sup> Safeguards Agreement, *supra* note 49, art. 2.1.

<sup>54</sup> *Id.* There is a significant difference between findings based on absolute and relative import increases, as discussed *infra* in connection with compensation requirements.

<sup>55</sup> Safeguards Agreement, *supra* note 49, art. 4.1(a). The Agreement defines threat of serious injury as serious injury that is clearly imminent. *Id.* art. 4.1(b).

<sup>56</sup> *Id.*, arts. 4-5. Unlike antidumping protection, which is premised on the need to offset unfair pricing that is injurious, safeguards are conditioned only on injury to a domestic in-

have the benefit of a de minimis exemption under the Safeguards Agreement; individual developing countries comprising less than three percent of total imports are exempt, provided that the aggregate share of developing countries is less than nine percent of total imports.<sup>57</sup>

b. Remedy

If these standards are satisfied, WTO Members may impose safeguard remedial measures to protect the domestic industry while it recovers or shifts production to another sector.<sup>58</sup> The primary safeguard remedies are quantitative import restrictions and increased import duties.<sup>59</sup> There are important limitations on the import restrictions that may be imposed.

First, when Members apply the most common safeguard measure — quantitative restriction of imports, or quotas — they normally must limit the measure to bar only injurious imports; injurious imports are those that exceed the average quantity or value of imports over a three-year “representative” period for which statistics are available.<sup>60</sup> The three-year period is not specified and is left to national discretion, which could dilute this limitation.<sup>61</sup>

Second, remedies are subject to a “degressivity” requirement under which they must be phased down at regular intervals as the domestic indus-

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dustry irrespective of whether pricing is fair or unfair. The injury threshold for safeguard actions is intended to be higher, because they affect “fair” priced imports. In a safeguards injury investigation, there are several objective and quantifiable factors which are to be considered. Among them are: the growth rate in imports in absolute and relative terms; the increase in import market share; and any changes in the level of sales, production, productivity, capacity utilization, profits and employment of the domestic industry.

<sup>57</sup> *Id.* art. 9.1.

<sup>58</sup> However, safeguard measures may not be imposed by one North America Free Trade Agreement (“NAFTA”) country against another unless the country makes an additional finding that imports from the other NAFTA country account for a substantial share of total imports, and contribute importantly to the injury to the domestic industry. See Sections 311, 312 of the NAFTA Implementation Act, 19 U.S.C. § 331 (1997). The United States made such a finding with respect to Mexico in a safeguard action regarding broom corn brooms, discussed *infra* at note 90.

<sup>59</sup> See Safeguards Agreement, *supra* note 49, art. 5.1 and art. 6. If there is a finding of critical circumstances, in which delay would cause considerable damage, a Member may impose a provisional safeguard measure after making a preliminary determination (rather than waiting for a comprehensive final ruling). Provisional measures can last only two hundred days while the investigation is conducted and “should” take the form of tariff increases. *Id.* art. 6.

<sup>60</sup> *Id.* art. 5.1.

<sup>61</sup> The United States stated that it does not read this requirement to mean three consecutive years, indicating that it may be selective in choosing the “representative years,” picking the lowest volume prior years so as to ensure tough quotas. See *The Uruguay Round Agreements Act, Statement of Administrative Action*, MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE URUGUAY ROUND TRADE AGREEMENTS, TEXTS OF AGREEMENTS IMPLEMENTING BILL, STATEMENT OF ADMINISTRATIVE ACTION AND REQUIRED SUPPORTING STATEMENTS 656, 962-63 (1994).

try adjusts. The Safeguards Agreement does not specify the extent or schedule for phase-out over time, however. This determination is left to the Member imposing the remedy.<sup>62</sup>

Third, Article XIX requires governments to suspend obligations on a non-discriminatory, or Most Favored Nation, basis so that restrictions are applied to all imports “irrespective of source.” Quota shares normally must be allocated proportionately among different countries on the basis of relative import levels during a representative period.<sup>63</sup> This requirement limits the imposing Member’s freedom to concentrate restrictions on imports from exporters it views as problematic, and may cause diplomatic difficulties if many countries are affected by the measures. However, there is an exception to this non-discrimination requirement, which allows for more restrictive quota allocations when imports from certain countries have increased on a “disproportionate” basis. This fairly nebulous exception opens the gate to quota allocations targeted at specific countries.<sup>64</sup>

Two other important limitations on the safeguard remedy — duration and compensation — are discussed separately below.

### c. Duration

The duration of safeguard measures also is limited — they may be imposed only for four years initially, with a possible four-year extension if the injury is found to persist and the industry can show it has begun to adjust.<sup>65</sup> The absolute limit for safeguard actions is eight years, after which all measures must be removed. The only exception to this sunset provision is for developing countries, which may extend safeguards for a maximum of ten years.<sup>66</sup> To prevent circumvention of this limitation, the Safeguards Agreement mandates that after a safeguard measure is terminated, a new measure cannot simply be reimposed. Safeguard actions on the same product generally may not be initiated for a period equal to the time period in which the measures were in effect, and in any event cannot be reimposed for at least two years.<sup>67</sup>

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<sup>62</sup> Safeguards Agreement, *supra* note 49, art. 7.4. Measures may not be made more restrictive once they are imposed, even if extended. *Id.*

<sup>63</sup> *Id.* art. 5.2(a).

<sup>64</sup> *Id.* art. 5.2(b). The United States stressed the importance of this provision to targeting import restrictions at particular countries. See Statement of Administrative Action, *supra* note 61, at 957-58.

<sup>65</sup> Safeguards Agreement, *supra* note 49, art. 7.1-7.2. When safeguard measures are applied for more than three years, the administering authority must conduct a mid-term review to ensure the measure is still necessary to prevent injury, or whether it should be withdrawn or more swiftly phased out. *Id.* art. 7.4.

<sup>66</sup> *Id.* art. 9.2.

<sup>67</sup> *Id.* art. 7.5. There is a limited exception for safeguard measures of 180 days or less, which can be applied only when one year has passed since imposition of the safeguard



d. Compensation

One of the most significant restrictions on safeguard measures involves compensation. Under prior GATT practice, compensation or retaliation was available to a Member whose exports were restricted under Article XIX, after a safeguard measure went into effect. Under the WTO Safeguards Agreement, there is an exemption from the collection of compensation or retaliation during the first three years after the imposition of a safeguard measure.<sup>68</sup> In other words, the Member imposing the measure need not compensate the Member whose exports are subject to restriction for three years. However, compensation is only deferred when the safeguard action is based on an *absolute* increase in imports and the measure conforms with all other provisions of the Agreement.<sup>69</sup> Where it is based on a *relative* increase, a targeted Member may seek compensation immediately. If no agreement on compensation is reached within thirty days, the affected Member may retaliate by suspending "substantially equivalent" concessions or obligations.<sup>70</sup> The need to compensate the exporting country can be costly and can undercut the desirability of imposing the safeguard measure. The Antidumping Agreement, in contrast, imposes no such requirement.

e. Effect on "Grey-Area" Measures

Under the prior GATT, safeguard measures were widely viewed as of limited effect and were seldom used.<sup>71</sup> Governments made less formal arrangements, which allowed them to target particular countries, and extend the protections beyond the maximum duration of a safeguard measure; these arrangements are known as "grey-area" measures.<sup>72</sup> Unquestionably, the most significant feature of the new Safeguards Agreement is that it expressly prohibits grey-area measures that "afford protection" to the domestic industry.<sup>73</sup> To monitor the phase-out of existing grey-area measures, the

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measure and the measure has not been applied on the same product more than twice in the preceding five years. *Id.* art. 7.6.

<sup>68</sup>*Id.* art. 8.3. The three year "cooling-off" period for an absolute increase in imports will allow time for Members to consult under the agreement. *Id.* art. 12.

<sup>69</sup>*Id.* art. 8.3.

<sup>70</sup>*Id.* art. 8.2. Before retaliating, the Member must notify the WTO Council for Trade in Goods. *Id.* The Council has 30 days during which it may disapprove of the retaliation. *Id.*

<sup>71</sup>See discussion accompanying *infra* notes 84-86.

<sup>72</sup>See generally Ernesto M. Hizon, *The Safeguard Measure/ VER Dilemma: The Jekyll and Hyde of Trade Protection*, 15 NW. J. INT'L L. & BUS. 105 (1994); see also BUSINESS GUIDE TO THE URUGUAY ROUND, *supra* note 8, at 163-64.

<sup>73</sup>Safeguards Agreement, *supra* note 49, art. 11.1(b) n.4. For example, the prohibition on grey-area measures essentially undercuts the United States' ability to impose unilateral sanctions against WTO Members or force "voluntary" agreements under the controversial Section 301 provision of U.S. law. 19 U.S.C. § 2411 (1996). There is controversy regarding whether the United States can utilize Section 301 to impose sanctions in areas not covered by the WTO, such as anticompetitive practices. Even if the United States can permissibly

Safeguards Agreement establishes the Committee on Safeguards ("Committee"), under the governance of the Council for Trade in Goods.<sup>74</sup>

Grey-area measures commonly are agreements to limit imports, including voluntary export restraints, voluntary restraint agreements, orderly marketing arrangements, and export-price or import-price monitoring systems.<sup>75</sup> These "voluntary" agreements often were reached under duress after the importing country threatened to restrict shipments from the exporting country. Many governments favored grey-area measures because they were thought to be simpler, targeted, more diplomatic, and faster to impose, with no limits on duration, no need to offer compensation and no need to prove injury. Exporters often preferred grey-area measures to other import protections as the lesser of evils; the exporters at least were guaranteed input in the negotiation of the agreement, and might benefit from price increases resulting from the quota restraint.<sup>76</sup>

There were over 270 grey-area measures in effect as of 1989.<sup>77</sup> This figure is conservative, as many grey-area measures go unreported. A comparison with safeguard measures illustrates the popularity of the grey-area measures. As of November 1994, less than ten safeguard measures remained in effect under the prior GATT Agreement.<sup>78</sup>

The WTO Safeguards Agreement reflected a growing consensus among Members that grey-area measures were distortive non-tariff barriers, which legitimized cartels and often injured the domestic industries they were intended to protect.<sup>79</sup> One example of a problematic grey-area measure is the 1977 orderly marketing arrangement regarding televisions which the United States negotiated with Japan to protect the U.S. industry from Japanese television imports. After the arrangement went into effect, the source of imports simply shifted to Korea and Taiwan, and their market shares dramatically increased over a one-year period from fifteen to fifty percent.<sup>80</sup> The prohibition on grey-area measures in the Safeguards Agree-

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act against such practices unilaterally, however, it cannot do so via import duties or quotas on goods (the preferred method of imposing sanctions under Section 301) because all such retaliatory action would require approval of the DSB. *See* Dispute Settlement Understanding, *supra* note 1, art. 23.2.

<sup>74</sup> Safeguards Agreement, *supra* note 49, art. 11. The Committee also will monitor and report on the implementation of the Safeguards Agreement and all safeguard actions initiated and imposed.

<sup>75</sup> *See generally* Hizon, *supra* note 72, at 106 n.3.

<sup>76</sup> *Id.*

<sup>77</sup> GATT SECRETARIAT, *Report on Developments in the Trading System*, L/6530 at 91 (1989).

<sup>78</sup> GATT ANN. REP. 1994, at 4.

<sup>79</sup> *See* ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT [hereinafter OECD], *COMPETITION AND TRADE POLICIES: THEIR INTERACTION* 12 (1984).

<sup>80</sup> Hizon, *supra* note 72, at 120 n.70. Other examples are the 1981 United States-Japan automotive agreement, which reportedly paved the way for increased import competition in the premium-price auto sector that was important to U.S. auto producers, and the 1983 Euro-

ment is unequivocal, and specifically references orderly marketing arrangements, voluntary export restraints and other arrangements regarding exports or imports that "afford protection."<sup>81</sup>

All grey-area measures in effect as of 1995 must be brought into conformity with the requirements of the Safeguards Agreement or phased out before 1999.<sup>82</sup> One specific national measure, the EU agreement with Japan on autos, may be maintained until December 31, 1999.<sup>83</sup>

f. Relationship with Antidumping Actions

Historically, safeguard actions have been dwarfed by antidumping actions. There were only 15 safeguard measures in effect as of mid-1993, compared to 662 antidumping measures in effect at that time.<sup>84</sup> Further, unlike antidumping cases, safeguard actions are on a downward trend. The number of safeguard measures in effect declined by more than half by the end of 1994, from fifteen to seven.<sup>85</sup> Moreover, these seven safeguard measures, which were in force on the effective date of the WTO, must be terminated by January 1, 2000, under the terms of the Safeguards Agreement.<sup>86</sup> Only three safeguard measures have been imposed under the WTO Safeguards Agreement.<sup>87</sup>

Although many of the WTO Members have implemented new domestic safeguard legislation, it is unlikely that there will be a significant increase in safeguard actions due to the limitations on safeguard remedies and the requirement that countries imposing safeguards pay compensation.<sup>88</sup> The Safeguards Agreement's prohibition on grey-area measures is most

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pean Community-Japan video recorder agreement which was widely viewed as causing increased prices without protecting the European video industry. *Id.*

<sup>81</sup> Safeguards Agreement, *supra* note 49, art. 11.1(b). The specificity of this prohibition was intended to clarify the general prohibition on quotas contained in Article XI of the GATT.

<sup>82</sup> *Id.* art. 11.2. Measures may only be retained through 1998 if they are notified to the WTO. Cyprus, the EU, Korea, Slovenia, South Africa and Thailand notified the Committee that they maintained grey-area measures. WTO ANN. REP. 1996, at 100.

<sup>83</sup> Safeguards Agreement, *supra* note 49, art. 11 annex.

<sup>84</sup> See GATT ANN. REP. 1994, at 10, 28. See also BUSINESS GUIDE TO THE URUGUAY ROUND, *supra* note 8, at 200. Two hundred and fifty antidumping cases were initiated in the preceding year alone. See GATT ANN. REP. 1994, at 10.

<sup>85</sup> See GATT, GUIDE TO GATT LAW AND PRACTICE, ANALYTICAL INDEX 539 (6th ed. 1995). This total was comprised of three actions by South Africa, three by the EC (one dating back to 1958) and one by Nigeria (dating back to 1961). *Id.* at 539-542.

<sup>86</sup> See Safeguard Agreement, *supra* note 49, art. 7.

<sup>87</sup> The three countries that have notified the Safeguards Committee as to the application of safeguard measures are Brazil, Korea and the United States. See WTO ANN. REP. 1996, at 100.

<sup>88</sup> At the end of 1995, 60 WTO Members had notified the Committee that they had implemented safeguards legislation. See *id.* See *supra* notes 58-70 and accompanying text for a discussion of the limits on safeguard remedies.

likely to lead to an increase in antidumping actions as the most attractive remaining alternative for protection. Antidumping actions, like grey-area measures, permit the targeting of specific countries, and the imposition of protective measures of indeterminate duration, without compensation requirements.<sup>89</sup>

The United States' experience is illustrative. Safeguard actions under the original U.S. escape clause law were not popular, and there currently is only *one* outstanding U.S. safeguard measure.<sup>90</sup> The United States also initiated one unsuccessful safeguard action in 1995 — the tomato case. In that case, U.S. tomato producers failed to prove injury by reason of surging

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<sup>89</sup> Antidumping measures may subsume grey-area measures. Voluntary export restraints in the form of quantitative restrictions and tariff-rate quotas *arguably* are permissible, provided they are formed under authority of the Antidumping Agreement. Antidumping Agreement, *supra* note 17. In particular, Article 11(1)(c) of the Safeguards Agreement, *supra* note 49, provides that the prohibition on grey-area measures does not apply to measures "sought, taken or maintained" pursuant to the other WTO Multilateral Trade Agreements, including the Antidumping Agreement. Article 8 of the Antidumping Agreement, in turn, provides that antidumping actions may be settled through voluntary "price undertakings" between the parties. Article 8 states, in part, that antidumping actions may be terminated upon the entry of voluntary undertakings to "cease exports to the area in question at dumped prices so that the authorities are satisfied that the injurious effect of the dumping, by diminishing the quantity of dumped imports, is eliminated." Antidumping Agreement, *supra* note 17, art. 8. While Article 8 appears to permit only price-based agreements, it also can be interpreted to permit volume-based import quotas — quotas that effectively cease the "injurious effect" of dumping, "by diminishing the quantity of dumped imports," upon the termination of a case. *Id.* Accordingly, Article 11(1)(c) arguably shields quotas from the Safeguards Agreement's ban on grey-area measures. Although such an interpretation is at odds with the prevailing view of Article 11 and is subject to challenge, this possible exception is yet another reason why Members may be more inclined to initiate antidumping actions under the WTO. In the post WTO-period, quantitative antidumping settlement agreements have been entered only with countries deemed to be non-market-economies such as Russia and the People's Republic of China, which are not WTO Members. These cases have not raised the legality of such quotas within the WTO context.

<sup>90</sup> This one U.S. safeguard case involves broom corn brooms. See Report to the President on Investigations Nos. TA-201-65 and NAFTA-301-1; Broom Corn Brooms, 61 Fed. Reg. 42264 (1996). The United States increased tariffs on most broom corn broom imports after the ITC ruled that imports of broom corn brooms were a substantial cause of injury to the U.S. domestic industry. *Id.* The President accepted the ITC proposal to increase the tariffs on broom corn brooms for three years for all countries other than Canada and Israel which were specifically excluded based on their minimal shares of imports and their lack of contribution to injury. See Proclamation No. 6961, 61 Fed. Reg. 64429 (1996). The ITC increased tariffs on broom corn brooms to the highest bound rate for the prior three year period, to facilitate the efforts of the U.S. domestic industry to make a positive adjustment to import competition. Even this one action was not without controversy, however. The safeguard measure primarily affected Mexican imports, and Mexico lodged a challenge under the NAFTA dispute resolution procedures. See Notice, 62 Fed. Reg. 6035 (1997). Columbia also challenged the safeguard measure at the WTO before the Dispute Settlement Body. See *Columbia files WTO Action over Imported Brooms to US*, J. COM., May 5, 1997, at 2A.

imports, primarily from Mexico.<sup>91</sup> Tellingly, the U.S. industry then brought a successful antidumping case against Mexican tomato imports.<sup>92</sup>

## 2. *Antisubsidy Measures*

Another import protection mechanism permitted under the WTO Agreement is the antisubsidy measure. Like safeguard measures, antisubsidy measures are noteworthy, but are substantially less significant than antidumping measures. Under the WTO SCM Agreement,<sup>93</sup> Member governments may take protective measures against imports benefiting from certain types of "subsidies," in the exporting country. The SCM Agreement defines subsidies generally as financial contributions or other government measures (such as price supports or tax breaks) that "confer a benefit"<sup>94</sup> and are "specific" to a particular industry.<sup>95</sup>

The WTO SCM Agreement significantly revised the anti-subsidy rules under the prior GATT agreement, and these revised rules, in combination with other recent developments, have altered and diminished the effect of antisubsidy measures. The discussion below provides an overview of the substantive WTO rules governing antisubsidy measures and then assesses the effect of these measures, and their relationship to antidumping actions.

### a. Substantive Rules

The SCM Agreement divides subsidies into three categories, and provides for two types of enforcement measures.<sup>96</sup>

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<sup>91</sup> This safeguard investigation was terminated following a negative injury finding by the ITC. The ITC determined that increased tomato imports were not the substantial cause of serious injury nor did they threaten injury to the U.S. industry. *Fresh Tomatoes and Bell Peppers from Mexico*, 61 Fed. Reg. 42652 (1996); *Fresh Tomatoes and Bell Peppers*, USITC Pub. No. 2985, Inv. No. TA-201-66 (1996).

<sup>92</sup> After obtaining preliminary dumping margins on Mexican tomato imports ranging from 4% to 188%, 61 Fed. Reg. 56607 (1996), the U.S. domestic complainants agreed to settle the case by means of a suspension agreement under which Mexican producers must report periodically to the U.S. Commerce Department that they are selling above a minimum price. *See Tomatoes from Mexico*, 61 Fed. Reg. 56617 (1996). The suspension agreement freezes the antidumping investigation so long as the terms of the agreement are met.

<sup>93</sup> *See supra* note 49 and accompanying text.

<sup>94</sup> *See* SCM Agreement, *supra* note 49, art. 1.1(a)(1) (defining financial contributions); *id.* art. 14 (defining benefits).

<sup>95</sup> *See id.* art. 2. In other words, if the benefit is "generally available" to domestic industries at large, it would not be deemed an actionable subsidy. However, subsidies that are nominally available generally, but in effect disproportionately benefit a specific sector, may be deemed actionable.

<sup>96</sup> *See generally* Terrence J. McCartin, *Red, Yellow or Green: GATT 1994's Traffic Light Subsidies Categories*, 19 Practising Law Institute 611 (1994); *see also* WTO ANN. REP. 1995, at 102.

(1) *Three Categories of Subsidies*

(a) "Green Light" Subsidies — The SCM Agreement for the first time designates a category of permissible or "green light" subsidies.<sup>97</sup> These are subdivided into three types.

(i) *Research and Development* — The SCM Agreement explicitly permits direct government support for certain "pre-competitive" basic R&D or other industrial research.<sup>98</sup>

(ii) *Underdeveloped Regions* — The SCM Agreement also explicitly permits subsidies to underdeveloped regions, provided that the subsidies are based on "neutral and objective criteria" of what constitutes an "underdeveloped" region, and they are not specific to one region.<sup>99</sup>

(iii) *Environmental Adaptation* — The new SCM Agreement also permits governments to partially compensate domestic industries for their efforts to adapt to specific environmental regulations.<sup>100</sup>

(b) "Yellow Light" Subsidies — This second category of subsidies is actionable if the subsidies cause "adverse effects." However, the Agreement does not prohibit yellow light subsidies.<sup>101</sup>

(c) "Red Light" Subsidies — The SCM Agreement expressly prohibits two types of subsidies irrespective of any effect — first, those that are conditioned on export performance,<sup>102</sup> and second, those conditioned upon local content.<sup>103</sup>

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<sup>97</sup> See SCM Agreement, *supra* note 49, art. 8.2.

<sup>98</sup> See *id.* art. 8.2(a). A subsidy must not be for more than 75% of industrial research, and 50% of pre-competitive research, as defined in the SCM Agreement. See *id.* art. 8.2(a), n.24-25.

<sup>99</sup> See *id.* art. 8.2(b). Such subsidies previously were actionable under the GATT.

<sup>100</sup> See *id.* art. 8.2(c). The subsidies are limited to 20% of the adaptation costs. *Id.* art. 8.2(c)(v).

<sup>101</sup> See *id.* at arts. 5 and 6. "Adverse effects" include injury to the domestic industry, nullification or impairment of GATT rights, or other "serious prejudice." *Id.* art. 5.1. Article 6 defines "serious prejudice" and also sets forth four types of subsidies which are presumptively deemed prejudicial: substantial subsidies, subsidies covering operating losses to an industry or to a particular company on a recurring basis, and subsidies relieving debt liability. *Id.* art. 6.1. The presumption is rebuttable. See *id.* art. 6.2.

<sup>102</sup> *Id.* art. 3.1(a). See generally *id.* at Annex I (providing an illustrative list of prohibited export subsidies).

<sup>103</sup> See *id.* art. 3.1(b). In other words, subsidies cannot favor domestic over foreign merchandise and inputs.

(2) *Two Types of Antisubsidy Enforcement Measures*

(a) WTO Measures — One way to contest subsidized imports is through the WTO dispute resolution process. With respect to both yellow and red light subsidies, a complaining Member State may request consultations with the Member conferring the alleged subsidy under the WTO Dispute Settlement Understanding.<sup>104</sup> If no resolution is reached, the SCM Agreement provides for the establishment of a dispute settlement panel.<sup>105</sup> The timetable for WTO panel proceedings on complaints regarding red light subsidies is swifter,<sup>106</sup> and the burden of proof is lower,<sup>107</sup> reflecting the negotiators' view that these are more insidious than yellow light subsidies. When the Dispute Settlement Body ("DSB") adopts a panel report agreeing that a challenged subsidy is actionable, the complaining country is authorized to take appropriate countermeasures.<sup>108</sup>

Green light subsidies are more difficult to contest. Members may challenge only the *categorization* of a subsidy as "green light."<sup>109</sup> They may not challenge the subsidy outright, if the host country previously notified the Committee on Subsidies and Countervailing Measures of the subsidy and claimed green light status.<sup>110</sup> The complaining Member must present its argument on the green light classification to the Committee, rather than a DSB panel.<sup>111</sup> If a green light classification is upheld, the complaining Member may obtain compensation only if it convinces the Committee that it has suffered "serious adverse effects," a higher standard than for the other subsidy categories.<sup>112</sup>

(b) Domestic Countervailing Duty ("CVD") Investigations — The second type of enforcement countermeasure allows Members to challenge allegedly subsidized imports through their own domestic CVD legislation.

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<sup>104</sup> Article 4 provides for consultations regarding red light subsidies, and Article 7 provides for consultations regarding yellow light subsidies. *Id.*

<sup>105</sup> *Id.* arts. 4.4, 7.4.

<sup>106</sup> For example, there is a thirty-day deadline for consultations regarding red light subsidies, *id.* art. 4, whereas there is a sixty-day deadline for yellow light subsidies, *id.* art. 7.4. Similarly, in red light proceedings the panel has 90 days to issue a report, whereas it has 120 days regarding yellow light subsidies. *Id.* art. 7.5.

<sup>107</sup> In yellow light proceedings, as opposed to red light proceedings, the complaining country must establish the requisite adverse effects. In red light proceedings, adverse effects are assumed. *Id.* art. 5.

<sup>108</sup> See *Brazil Measures Affecting Desiccated Coconut*, *supra* note 46. Countermeasures in a WTO proceeding, unlike a national CVD proceeding, evidently may not include the imposition of countervailing duties. See SCM Agreement, *supra* note 49, part V.

<sup>109</sup> See SCM Agreement, *supra* note 49, art. 8.

<sup>110</sup> See *id.* art. 8.3. This committee, comprised of delegates from all SCM Member countries, normally meets twice a year. See *id.* art. 24.1.

<sup>111</sup> See *id.* art. 8.4.

<sup>112</sup> See *id.* art. 9.1.

Members may obtain relief through only *one* of the two types of counter-measures.<sup>113</sup>

Domestic CVD actions differ significantly from WTO proceedings. In a domestic CVD action against a red light subsidy, there is no presumption of injury so that the complainant must establish not only that a red light subsidy exists, but also that the subsidy causes or threatens material injury.<sup>114</sup> Further, green light measures which have been notified to the Subsidies Committee may not be challenged via domestic subsidy legislation.<sup>115</sup>

A domestic CVD action normally is a more effective countermeasure than a WTO action, for several reasons. First, a *private* domestic party may file a complaint to initiate a CVD investigation against targeted imports, whereas only a Member government may initiate a WTO proceeding.<sup>116</sup> Second, a Member may impose import duties to directly countervail subsidized imports pursuant to domestic CVD law, as opposed to WTO dispute resolution, which normally entails less specific prospective remedies such as compensation or withdrawal of the subsidy measure.<sup>117</sup> Third, the domestic industry may perceive its likelihood of success in challenging a subsidy before domestic agencies to be better than in a multilateral WTO context.<sup>118</sup>

#### b. Effect of Antisubsidy Measures and Relationship with Antidumping Actions

Antisubsidy measures imposed under authority of the SCM Agreement and the GATT have had a relatively small impact on trade, as compared to antidumping actions. Antisubsidy measures are not commonly applied by most countries. The United States has been the predominant user of anti-subsidy measures, generally through domestic CVD legislation. It initiated sixty percent of total cases worldwide between 1983 and 1994,<sup>119</sup> and ac-

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<sup>113</sup> See *id.* art. 10 n.33. While a Member may pursue both tracks simultaneously at the outset, *i.e.*, the WTO dispute resolution process and a domestic CVD investigation, it must choose between the two before seeking relief.

<sup>114</sup> See McCartin, *supra* note 96, at 655 (stating that there is a presumption of injury for red light subsidies in WTO proceedings).

<sup>115</sup> See SCM Agreement, *supra* note 49, part V. See also McCartin, *supra* note 96, at 647. If the measures have not been notified to the Committee, the complaining party is free to countervail the subsidy if it determines the subsidy is not "green."

<sup>116</sup> See SCM Agreement *supra* note 49, art. 11. Domestic industries injured by subsidized imports may file a CVD case themselves, and need not convince their national governments to pursue the issue at the WTO. Domestic industries thus have some control over the prosecution and timing of the case.

<sup>117</sup> As noted *supra* text accompanying note 108, countervailing duties evidently would not be permitted as countermeasures for parties who prevail in WTO panel proceedings, under Section V of the SCM Agreement.

<sup>118</sup> McCartin, *supra* note 96, at 611.

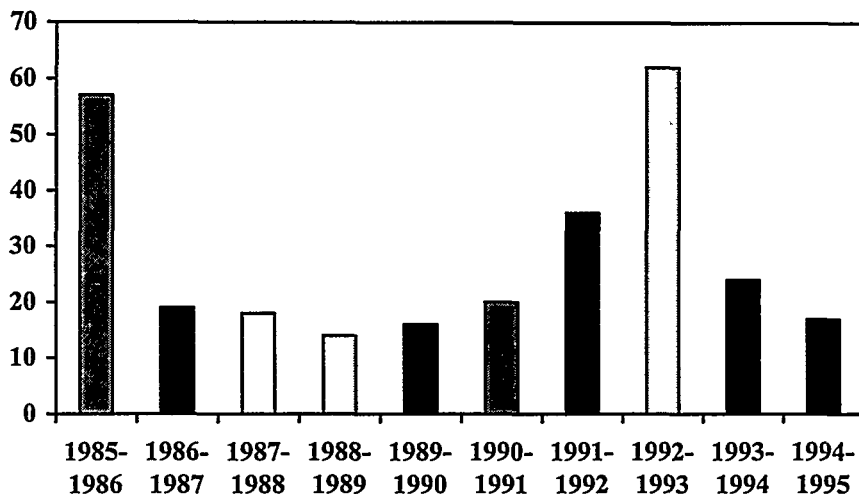
<sup>119</sup> See WTO ANN. REP. 1995, at 13. Australia and Canada, together with the United States, accounted for over 95% of CVD actions initiated in the same period. *Id.*



counted for roughly eighty percent of the CVD measures in force as of June of 1995.

Use of CVD countermeasures generally has been limited and declining, as shown in Table 2.

Table 2: Total Number of Countervailing Duty Cases Initiated



1. Sources: 1994 GATT Annual Report by the Director-General; 1995 WTO Annual Report by the Director-General.
2. Reporting period is July to June of subsequent year.

There are several reasons for this decline. The most frequent targets of U.S. CVD actions are its large Latin American trading partners such as Argentina, Brazil and Mexico, as well as the European Union countries.<sup>120</sup> In more recent years, these countries have significantly reduced their vulnerability to antisubsidy actions by eliminating government subsidies and privatizing state industries, as a result of new market-oriented government policies and fiscal limitations on the ability to confer subsidies. Another reason for the decline is that many developing countries, by signing the new WTO SCM Agreement, now are entitled to an injury test before countervailing duties can be imposed.<sup>121</sup> The injury test requirement makes CVD actions more difficult to pursue, and therefore less attractive to domestic industries. Under the previous GATT Subsidies Code, countries that were not signatories to the Code generally were not entitled to an injury test in do-

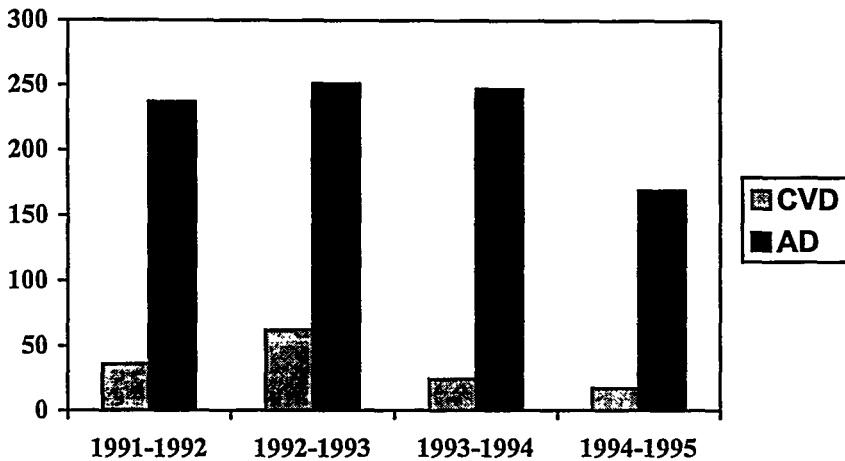
<sup>120</sup>GATT ANN. REP. 1994, at 11.

<sup>121</sup>In 1994, there were 25 signatories to the GATT Subsidies Code. See GATT ANN. REP. 1994, at 10. On January 1, 1995, all 123 original WTO Members became signatories of the WTO SCM Agreement.

mestic CVD actions; this rendered their exports an easy target for complaining industries, which did not need to show they were materially injured by reason of the subsidized imports before obtaining protective CVD duties.<sup>122</sup> Another factor relevant to the decline in CVD actions is that they generally result in significantly lower duties than antidumping investigations, affording less protection to domestic industries.<sup>123</sup>

It is no wonder then that antidumping actions have become increasingly popular, while antisubsidy measures have fallen off, as illustrated in Table 3.

Table 3: Number of Antidumping/Countervailing Duty Cases Initiated



1. Sources: 1994 GATT Annual Report by the Director-General; 1995 and 1996 WTO Annual Reports by the Director General.
2. Reporting period is July to June of subsequent year.

<sup>122</sup>For example, the United States imposed duties on numerous Argentine imports without examining whether the imports injured the U.S. domestic industry, because Argentina was not a signatory to the prior Subsidies Code under the GATT at the time of the investigation. See, e.g., *Oil Country Tubular Goods from Argentina*, 49 Fed. Reg. 46564, 46565 (1984). Countries that were not signatories to the GATT Subsidies Code could request an injury test if they signed an agreement with equivalent commitments.

<sup>123</sup>For example, in the United States, CVD margins normally are in the single digits, whereas antidumping duty margins commonly are in the double digits. Compare the antidumping cases *Freshwater Tail Meat from the People's Republic of China*, 62 Fed. Reg. 48218 (1997) (margins of 91.5%) and *Vector Supercomputers from Japan*, 62 Fed. Reg. 55392 (1997) (margins of 173.08% to 454.0%) with the CVD cases *Oil Country Tubular Goods from Italy*, 60 Fed. Reg. 40822 (1995) (country-wide ad valorem rate of 1.47%) and *Certain Pasta from Italy*, 61 Fed. Reg. 38544 (1996) (ad valorem rates ranging from 0.0 to 11.23%).

The SCM rules immunizing green light subsidies will further reduce the effectiveness of antisubsidy actions. Moreover, under the SCM Agreement, the act of privatizing state industries may extinguish certain subsidies previously deemed actionable.<sup>124</sup> These factors, and prevailing international policies against large government subsidies and state-owned industry, should ensure that the trend of diminished or diminishing antisubsidy actions continues for the foreseeable future.<sup>125</sup> As Table 3 illustrates, antisubsidy actions are marginal import protections, when compared to antidumping actions.

### III. OVERVIEW OF THE ANTIDUMPING REGIME

#### A. Introduction

The advantages and availability of antidumping relief relative to other protective measures demonstrates why the antidumping regime is and will continue to be the most important and popular international import protection measure. Antidumping actions are popular because it is relatively easy to file a successful complaint, to directly target specific competitors, and to impose duties that have a direct and sustained price effect on specific merchandise and may even act as market barriers. A closer look at the rules applicable to antidumping actions therefore is warranted.

#### B. The WTO Antidumping Agreement

The fundamental principles of the antidumping regime were set out in Article VI of the GATT of 1946, as detailed in an antidumping code that was periodically revised at the various GATT negotiating sessions.<sup>126</sup> The WTO Agreement contains a new and comprehensive antidumping framework — the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the “Antidumping Agreement”), which replaced all former antidumping codes.

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<sup>124</sup> See Tariff Act of 1930, as amended, 19 U.S.C. § 1677b(5) (1994); *Saarstahl AG v. United States*, 858 F. Supp. 187, *rev'd*, 78 F.3d 1539 (Fed. Cir. 1996); *Certain Carbon Steel Products From Sweden*; Final Results of Countervailing Duty Administrative Review, 62 Fed. Reg. 16549 (1997).

<sup>125</sup> However, there could be an increase in CVD actions against countries such as Russia and China, when they graduate from non-market economy (“NME”) status. Currently, because they are deemed NMEs, they are not subject to CVD actions. For an example, see the discussion in the recent U.S. antidumping case against Russian magnesium. Notice of Final Determination of Sales at Less Than Fair Value: Pure Magnesium From Ukraine, 60 Fed. Reg. 16432 (1995).

<sup>126</sup> See *supra* notes 14-17 and accompanying text.

### 1. *Comprehensive Membership*

A significant difference between the WTO Antidumping Agreement and the former antidumping codes under the GATT is that all signatories to the WTO Agreement were required to accede to the Antidumping Agreement as part of the single undertaking of WTO Membership.<sup>127</sup> This resulted in a dramatic increase in the number of players in the international antidumping game. In 1994, there were 25 signatories to the GATT Antidumping Code,<sup>128</sup> and just two years later, in 1996, there were 128 signatories to the WTO Antidumping Agreement.<sup>129</sup> All signatories to the Antidumping Agreement were required to ratify national legislation consistent with commitments in the Agreement.<sup>130</sup>

Although the Antidumping Agreement is flexible, providing each Member country with discretion to establish a unique national antidumping regime, it nonetheless requires Members to adhere to core substantive and procedural precepts, to ensure a substantial degree of consistency and uniformity among the various Members' regimes. The legal discipline of the Antidumping Agreement is especially relevant for developing countries and new signatories that had no previous procedural or substantive antidumping rules.

The following discussion will focus on the generally applicable WTO rules, as opposed to the varying national laws implementing the WTO Agreement.

### 2. *Binding Dispute Resolution*

Another significant difference between the WTO Antidumping Agreement and the prior GATT antidumping codes is that the current WTO rules are enforceable under *binding* dispute resolution pursuant to the new Dispute Settlement Understanding.<sup>131</sup> The WTO Antidumping Agreement

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<sup>127</sup> See WTO ANN. REP. 1995, at 14.

<sup>128</sup> See GATT ANN. REP. 1994, at 10.

<sup>129</sup> See WTO ANN. REP. 1995, at 13; see <<http://www.wto.org/wto/about/organsn6.htm>> for a listing of Members and the dates on which they joined the WTO.

<sup>130</sup> As part of the "single undertaking" rule, each WTO Member must accede to all WTO Multilateral Agreements in Annexes 1-3 of the WTO Agreement, including the Antidumping Agreement. See Final Act, *supra* note 1 at para. 2 (requiring signatories to submit the WTO Agreement to their "competent authorities" for approval), and the WTO Agreement, *supra* note 1, at arts. XIV.1-2 and XVI.4 (requiring conformance with, and acceptance and implementation of, the Multilateral Agreements). The Antidumping Agreement, *supra* note 17, art. 18.4, explicitly requires each Member to "take all necessary steps ... to ensure the conformity of its laws, regulations and administrative procedures with the Antidumping Agreement." See also BUSINESS GUIDE TO THE URUGUAY ROUND, *supra* note 8, at 15.

<sup>131</sup> Under Article 16.4 of the Dispute Settlement Understanding, *supra* note 1, decisions (*i.e.* reports) issued by dispute settlement panels become effective (*i.e.* are adopted) unless all Members of the DSB agree unanimously (*i.e.* by consensus) *not* to adopt the report. In practice, this means that the decisions of panels will virtually always be adopted and binding on the parties. Under the prior GATT rules, adoption of panel reports required unanimous

contains special rules setting forth the standard of review in dispute resolution proceedings involving antidumping actions. These special rules seek to strike a balance between, on the one hand, affording discretion to the national authorities actually implementing the antidumping rules and, on the other hand, ensuring that national authorities are imposing antidumping duties in conformity with the WTO Antidumping Agreement.<sup>132</sup> The United States was the major proponent of a special deferential standard of review for national antidumping proceedings, and was largely successful.<sup>133</sup>

Article 17 of the WTO Antidumping Agreement sets forth special rules which supplement the general rules of the Dispute Settlement Understanding in antidumping proceedings. Article 17 provides that: (i) *factual* determinations of national authorities in antidumping cases will not be disturbed by WTO panels unless establishment of the facts was "improper" or their evaluation was "biased," and (ii) *legal* interpretations of national authorities in antidumping cases will not be disturbed provided they are "permissible," even if there is more than one possible interpretation.<sup>134</sup>

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approval by Members, and thus any individual Member could "block" a panel decision from becoming effective. The losing side of a dispute usually had every incentive to block adoption of unfavorable reports. For example, a GATT dispute resolution panel ruled in favor of Mexico when it challenged a U.S. antidumping action against cement exports from Mexico to the United States. The United States, the losing party, "blocked" adoption of this report, which never became binding on the United States. United States Antidumping Duties On Grey Portland Cement and Cement Klinker from Mexico, 1992 WL 762944 (July 9, 1992).

<sup>132</sup>These conflicting interests were evident in the United States during the drafting of the WTO Antidumping Agreement. See generally William D. Hunter, *WTO Dispute Settlement in Antidumping and Countervailing Duty Cases*, 18 Practising Law Institute 547 (1994) (providing an interesting discussion of U.S. negotiating objectives with regard to establishing standards for WTO panel review of national antidumping determinations, told from the perspective of a U.S. negotiator). Certain U.S. domestic industries were concerned that WTO panels would run roughshod over decisions of the U.S. administering authorities which, as noted above, have generally been favorable to the domestic industry; the domestic industries pushed for a standard of review that provided unusual deference to administering authorities. See *GATT Partners Work Out Compromise on Controversial Dumping Issue*, INSIDE U.S. TRADE, Dec. 14, 1993, at 1-2. U.S. exporters, on the other hand, wanted WTO panels to have ample authority to intervene and reform antidumping regimes in other countries that were deemed arbitrary, non-transparent or unfair. *Id.* The domestic industries prevailed in the U.S. debate, and achieving a special, deferential standard of review became a U.S. negotiating objective. *Id.*

<sup>133</sup>*Id.*

<sup>134</sup>See Antidumping Agreement, *supra* note 17, art. 17.6. The insertion of this controversial review standard in the Antidumping Agreement, to be applied *only* to antidumping proceedings, as a supplement to the normal Dispute Settlement Understanding rules applicable to all other disputes under the WTO, indicates the special sensitivity of antidumping actions at the WTO. See Hunter, *supra* note 132.

### C. The Antidumping Precepts

The rules under the WTO Antidumping Agreement, while detailed and complex, may be reduced conceptually to several fundamental principles and a standard procedural framework. These are discussed below.

#### 1. The Antidumping Proceeding

An antidumping investigation commences after the national authority accepts a petition from a complaining domestic industry (or an appropriate representative) alleging that a designated type of merchandise<sup>135</sup> imported from one or more countries: (i) is being sold in the national market at dumped (*i.e.*, “unfairly” low) prices, and (ii) those sales are materially injuring the domestic industry, or are threatening material injury.<sup>136</sup> The national authority may only “initiate” an investigation if it is satisfied that the complaint provides a *prima facie* case supporting a dumping finding, and has notified the government of the targeted country.<sup>137</sup>

Upon initiation, the national authority must investigate whether the domestic industry has been materially injured or threatened with injury by reason of the targeted merchandise.<sup>138</sup> It also must separately investigate whether the targeted exporters are “dumping.”<sup>139</sup> The Antidumping Agreement sets forth a timeframe for provisional measures and final determinations of dumping and injury, as well as rules for public disclosure of these determinations (transparency).<sup>140</sup> It also lays out detailed substantive rules and standards for making the findings.

The national authority<sup>141</sup> has broad discretion in conducting the year-long investigation. It will select for investigation the exporters of the sub-

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<sup>135</sup>The Antidumping Agreement applies only to trade in goods, as part of Annex 1A. Agreement on Trade in Goods, *supra* note 1. The Antidumping Agreement does not apply to trade in services, which is covered by Annex 1B. See Agreement on Trade in Services, *supra* note 1.

<sup>136</sup>See Antidumping Agreement, *supra* note 17, art. 5.

<sup>137</sup>*Id.*

<sup>138</sup>See *id.* art. 3.

<sup>139</sup>*Id.* art. 2.

<sup>140</sup>See *infra* text accompanying notes 199-206.

<sup>141</sup>The Antidumping Agreement leaves to the WTO Members’ discretion the establishment of a national institutional structure for administering the antidumping law, referring only to “the authorities” where relevant. See Antidumping Agreement, *supra* note 17, art. 2.2.1 n.3. “Authorities” are defined “as meaning authorities at an appropriate senior level.” *Id.* Members generally implement the dumping regime through executive agencies or ministries, rather than through the legislature or judiciary. Some countries divide the responsibilities for making injury determinations and dumping determinations between separate administrative entities, and some do not. For example, the United States and Canada delegate to the Department of Commerce and Revenue Canada, respectively, responsibility for making dumping determinations, and to the International Trade Commission and Canadian Import Tribunal, respectively, responsibility for making injury determinations. In contrast, the EC Commission, Australian Customs Service and Mexican Commercial Secretariat are

ject product from the targeted country (generally all known exporters, or those comprising at least a majority of total exports).<sup>142</sup> It will issue to subject companies a questionnaire requesting sales and cost information for the "investigation period" preceding initiation (generally one year for dumping, although the injury analyses can involve a longer period).<sup>143</sup> After the questionnaire responses are submitted, the national authority may send auditors to conduct an on-site visit to the exporting company to verify the accuracy of the data submitted.<sup>144</sup> When the national authority is not satisfied with the substance, calculation or form of the information submitted, it may use so-called "facts available" *i.e.*, it may reject the submitted information and use alternative information that generally is adverse to the exporting company.<sup>145</sup>

If both the dumping and injury investigations result in an affirmative determination, the national authority may impose a definitive antidumping duty. Virtually all countries except the United States use a "prospective" system, under which the authority imposes final or "definitive" duties on imports, on a prospective basis.<sup>146</sup> The United States, however, administers a retroactive system under which importers are responsible for paying deposits. Each year, exporters, importers or the U.S. domestic industry may request an "administrative review" of the imports in the prior year to determine the actual dumping duties owed.<sup>147</sup> If the determination in the retro-

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authorized to make both dumping and injury determinations. See Edwin A. Vermulst, *The Antidumping Systems of Australia, Canada, the EEC and the USA: Have Antidumping Laws Become A Problem in International Trade?* in ANTIDUMPING LAW AND PRACTICE: A COMPARATIVE STUDY 425-76 (John H. Jackson & Edwin A. Vermulst eds., 1989).

<sup>142</sup> Antidumping Agreement, *supra* note 17, art. 6.10.

<sup>143</sup> *Id.* art. 6.1. See also *id.* art. 2.2, n. 4. The U.S. ITC, for example, generally considers a three-year period in making its injury assessment. See, e.g., *Certain Brake Drums and Rotors*, USITC Pub. No. 3035, Inv. No. 731-TA-744, at 11 (Apr. 1997); *Melamine Institutional Dinnerware*, USITC Pub. No. 3016, Inv. No. 731-TA-741-743 (Feb. 1997); *Bicycles from China*, USITC Pub. No. 2968, Inv. No. 731-TA-73 (June 1996).

<sup>144</sup> See Antidumping Agreement, *supra* note 17, art. 6.7. See also *id.* at Annex I (Procedures for On-The-Spot Investigations pursuant to paragraph 7 of Article 6).

<sup>145</sup> See *id.* art. 6.8. See also *id.* at Annex II (Best Information Available in terms of paragraph 8 of Article 6). Although Annex II sets forth general guidelines intended to prevent the arbitrary imposition of punitive "facts available," particularly where the form rather than the substance of submitted information is at issue, the Annex nevertheless affords great discretion to the national authority to determine when a party is "cooperative" and thus whether to use facts available. *Id.*

<sup>146</sup> Under a prospective system, refunds may be requested through the conduct of a review, but importers generally are not liable for higher duties retroactively. See *id.* art. 9.3.2.

<sup>147</sup> See Tariff Act of 1930, as amended, § 751, 19 U.S.C. § 1675 (1994). The United States implemented the WTO Agreement commitments via the Uruguay Round Agreements Act (URAA), Pub. L. No. 103-465, § 108 Stat. 4809 (1994). U.S. obligations under the Antidumping Agreement were implemented in §§ 201-234 of the URAA, as an amendment to the Tariff Act of 1930. For an informative discussion of U.S. implementation of the Antidumping Agreement, see David Palmeter, *United States Implementation of the Uruguay Round Antidumping Code*, J. WORLD TRADE, June 1995, at 39.

active review is that the actual amount owed is more than the amount deposited, the importer must pay the difference with interest. The amount retroactively assessed can be huge — much higher than the deposited amount — enough to bankrupt a firm. The retroactive system thus has a unique and significant protectionist effect because at the time of import, the importer cannot know its actual liability for antidumping duties, and this uncertainty can effect its willingness to purchase from targeted suppliers. Surprisingly, the U.S. retroactive system was not challenged during the Uruguay Round negotiations, and no country has emulated this system, despite its protectionist effect.<sup>148</sup>

The Antidumping Agreement permits national authorities to settle antidumping complaints through “price undertakings.”<sup>149</sup> In these undertakings, exporters normally agree to comply with minimum export prices in exchange for the suspension or termination of the antidumping action.<sup>150</sup>

## 2. The Antidumping Methodology

### a. Comparison

The national authority determines whether dumping is occurring by comparing the export price of subject merchandise with the “normal value” of the merchandise (the exporter’s home market price, third country price or a constructed price).<sup>151</sup> In order to achieve an equitable comparison, the Antidumping Agreement mandates a comparison of ex-factory starting price for sales of the same or similar product<sup>152</sup> to the first unrelated cus-

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<sup>148</sup>The Antidumping Agreement contemplates and permits a retroactive system. See Antidumping Agreement, *supra* note 17, art. 9.3.1, 10. The administrative burden of conducting frequent reviews may explain why other countries have not emulated the U.S. system.

<sup>149</sup>*Id.* art. 8.

<sup>150</sup>*Id.* Some Members are more amenable to price undertakings than others. For instance, the United States has a policy discouraging price undertakings such as suspension agreements due to the drain on administrative resources, (although in certain high profile cases, such as those involving steel, the United States has accepted settlement agreements). The European Union, on the other hand, takes a more favorable view of possible settlement agreements, reflecting its more informal, conciliatory approach. Price undertakings normally require exporters to sell above certain floor prices, to avoid dumping, which are based on the exporter’s production costs, and are verified through the submission of periodic cost and price information to the national authority. These floor prices can be set on a country-wide basis, such as in the EC price undertaking with Japan concerning Dynamic Random Access Memory Semiconductors (DRAMs), or on a company-specific basis such as the EC price undertaking with Korea concerning DRAMs. The floor price also can be based on the domestic complainant’s prices, to avoid injury, such as in the U.S. Suspension Agreement with the Russian Federation concerning uranium. Settlement agreements are supposed to involve “price” undertakings, rather than quotas or limitations on the volume of exports. *But see supra* note 89 (discussing the possible interpretation of Article 8 to permit quantity based undertakings).

<sup>151</sup>Antidumping Agreement, *supra* note 17, art. 2.2.

<sup>152</sup>*Id.* art. 2.4.



tomers in the export market and the comparison market during the investigation period.<sup>153</sup> This requires the national authority to adjust prices by deducting transportation expenses, selling expenses and, if necessary, differences in physical characteristics between products and trade levels.<sup>154</sup> Selling expenses normally are distinguished between direct (those directly tied to the sale such as commissions, credit and royalty) and indirect (fixed expenses such as salaries and general warranty). The Antidumping Agreement requires these expenses to be calculated based on the actual records of the responding firm (*i.e.*, estimates or accruals generally are not acceptable).<sup>155</sup> Direct expenses generally are applied precisely on a sale-by-sale or customer-by-customer basis for all sales in the investigation period, whereas indirect expenses normally are allocated over revenue and then applied as an average. Such intricate, per-unit calculations involving myriad transactions generally would never be done for normal business purposes, and can be manipulated to inflate the antidumping margin.<sup>156</sup>

#### b. Export Price

The export price is the targeted exporting company's price to an unaffiliated customer for consumption in the domestic market of the importing country.<sup>157</sup> The export price may be the sales price to a purchasing agent or trading company in the exporting country for shipment to the importing country. More typically, it is the price to a buyer in the importing country. Because of the requirement that the customer must be unaffiliated, the export price may be based on the resale price of the exporter's sales subsidiary in the importing country (rather than the exporter's price to its subsidiary).<sup>158</sup> Sales through subsidiaries are deemed "constructed export price" transactions because all of the expenses of the subsidiary (including any further manufacturing and profit) must be deducted from its resale price in order to "construct" an ex-factory starting price.<sup>159</sup>

#### c. Normal Value

The benchmark to which the export price is compared is termed "normal value," and may be derived in several manners. The first priority under the Antidumping Agreement is to select comparable sales in the exporting company's domestic or "home" market. The home market will only be

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<sup>153</sup> *Id.* arts. 2.3, 2.4.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* art 2.2.1.1.

<sup>156</sup> Richard Wright, *Validity of Antidumping Remedies - Some Thoughts*, in ANTIDUMPING LAW AND PRACTICE, *supra* note 141, at 425, 451 (explaining that the calculation of antidumping adjustments has displayed "a tilt towards finding dumping").

<sup>157</sup> Antidumping Agreement, *supra* note 17, art. 2.3.

<sup>158</sup> *Id.*; see also GATT, *supra* note 14, Annex I, art. VI, para. 1.

<sup>159</sup> Antidumping Agreement, *supra* note 17, arts. 2.3, 2.4.

used, however, when there are sufficient sales (*i.e.*, at least five percent of the amount sold to the importing country)<sup>160</sup> of comparable or “like” merchandise (*i.e.* identical or similar models).<sup>161</sup> The national authority may investigate whether home market sales are made below the cost of producing the product.<sup>162</sup> Sales below cost in substantial quantities may be rejected as a basis for comparison.<sup>163</sup> If home market sales cannot serve as a basis for comparison, the national authority may elect either to use export sales to third countries or, alternatively, to calculate a constructed value of the value exported merchandise. In the case of “non-market economy” countries in which home market prices and costs are deemed unreliable, authorities may use special market-based “surrogate values”; market reforms in traditional non-market economies such as Russia and China, will cause these provisions gradually to fall into disuse.<sup>164</sup>

#### d. Cost of Production/Constructed Value

Cost of production is the total of the manufacturing cost (the “actual” cost of materials, labor and overhead incurred in producing the merchandise sold in the comparison market) plus selling, general and administrative expenses.<sup>165</sup> Net prices in the exporter’s home market are measured against this cost benchmark. If home market prices cannot be used for comparison, normal value may be “constructed” from the cost of production of the merchandise sold to the importing country plus the profit earned in selling the merchandise.<sup>166</sup>

National authorities normally require *actual* product-specific costs and profit, and generally will not accept standards or budgeted amounts.<sup>167</sup> As many manufacturers use a process cost accounting system and do not derive actual per-product costs, this requirement often means that a company must make a painstaking recalculation of product costs for antidumping purposes. Moreover, the Agreement’s requirement of “fully loaded” production costs (including fixed overhead), rather than variable or marginal costs,

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<sup>160</sup> *Id.* art. 2.2 n.2.

<sup>161</sup> *Id.* art. 2.6. (“[A] product which is identical, *i.e.*, alike in all respect 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.”).

<sup>162</sup> *Id.* art. 2.2.1.

<sup>163</sup> *Id.* See *infra* notes 227-30 and accompanying text.

<sup>164</sup> GATT, *supra* note 14, Annex I, art. VI para. 1 (permitting alternative “surrogate” methodologies for normal value when the state has a monopoly over trade and fixes prices). See *generally* 19 U.S.C. § 1677b(c) (1994) (providing an example of an NME provision in U.S. law).

<sup>165</sup> Antidumping Agreement, *supra* note 17, art. 2.2.1.

<sup>166</sup> *Id.* art. 2.2.2.

<sup>167</sup> *Id.* The use of actual profit was based on the practice previously in effect in the EU. See Wright, *supra* note 156, at 447. This provision was added by countries critical of the prior U.S. system which imposed a mandatory minimum amount for general and administrative expenses (ten percent) and profit (eight percent) even if actual amounts were lower.

contradicts normal business practices and may create dumping margins.<sup>168</sup> National authorities have substantial discretion to "adjust" an exporter's reported full costs, particularly where the exporter is forced to depart from its normal accounting system to derive per product costs. These adjustments can have a significant effect on the antidumping margin calculated.<sup>169</sup>

Because normal value can be based on home market price or constructed value, the exporter must bear in mind that it can still be found guilty of dumping even if (i) its export price is above home market price and (ii) its export price is above production cost.

### 3. *The Antidumping Margin Calculation*

After the national authority has determined the appropriate normal value and has derived the adjusted ex-factory unit prices, it will calculate the dumping margin. Export sales are compared to normal value, on an average or transaction-specific basis.<sup>170</sup> The foreign-denominated normal value then is converted to the currency of the export price using the exchange rate in effect on the date of the export sale.<sup>171</sup> To prevent currency exchange movements from creating dumping margins, the agreement allows for adjustments to compensate for significant short-term exchange rate fluctuations, or to lag for the sustained long-term appreciation of the currency of the exporting country.

Average unit export prices generally are subtracted from average unit normal value, on a product-by-product basis, to measure the dumping amount. When the net export price for a product is higher than the normal value, the margin amount for the product normally is set to zero (*i.e.*, the exporter is not given credit for a "negative" margin). When the net export price is less than normal value, a quantity-weighted dumping margin is calculated. The margins for sales of all product types are tallied to derive a total dumping margin. This margin serves as the basis for the antidumping duty, although the methodology for imposing the duty varies among the Members, who are afforded significant discretion. Some Members collect the duty on all subject entries, while others collect only on entries priced

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<sup>168</sup> Antidumping Agreement, *supra* note 17, art. 2.2.1; *see also* Alan V. Deardorff, *Economic Perspectives on Antidumping Law*, in ANTIDUMPING LAW AND PRACTICE, *supra* note 141, at 23, 33.

<sup>169</sup> *See* Wright, *supra* note 156, at 449 ("[I]t may be unrealistic to expect an economically rational cost of production/constructed value analysis for what has become, in essence, a subtle web of import protection decisions."). *See also id.* at 445-46 ("[W]hen the cost of production is calculated in an arbitrary manner ... antidumping rules can easily be abused for protectionist purposes and — by inflating the normal value — lead to establishment of dumping margins where none (should) exist.").

<sup>170</sup> Antidumping Agreement, *supra* note 17, art. 2.4.2.

<sup>171</sup> *Id.* art. 2.4.1.

above a minimum normal value.<sup>172</sup> The Antidumping Agreement requires that separate margin rates be derived for each exporting company where possible, but the authority has discretion to sample selected exporters when it cannot examine them all.<sup>173</sup> For those exporters in the targeted country that were not specifically investigated, an "all others" duty is applied.<sup>174</sup>

The national authority has discretion not to impose an antidumping duty, or to reduce the amount calculated, if it deems such measures appropriate.<sup>175</sup> The Antidumping Agreement encourages, but does not require, the national authority to impose a "lesser duty" than the full dumping rate calculated when a lesser amount is sufficient to offset the injurious effect of the dumping.<sup>176</sup> The Antidumping Agreement also permits the consideration of consumer and public interests in setting the antidumping duty amount.<sup>177</sup> This consideration can be an important part of the antidumping proceeding in certain countries, such as the Member States of the EU.<sup>178</sup>

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<sup>172</sup>For example, the EU collects an *ad valorem* duty amount as a percentage of the export price. Canada and Australia established a minimum normal value, and collect only when import prices exceed this minimum. The EU, Canada and Australia collect the duties on a prospective basis *i.e.*, the margins calculated for past imports during the investigation period serve as the basis for duties in the future. See Mark Koulen, *Some Problems of Interpretation & Implementation of the GATT Antidumping Code*, in *ANTIDUMPING LAW AND PRACTICE*, *supra* note 141, at 336, 371. The United States uses the antidumping margin from the investigation to calculate an *ad valorem* rate and collect "deposits" on imports. The actual antidumping margin for the specific entry may be determined later, if an "administrative review" is conducted. See *supra* note 147 and accompanying text. If no review is conducted, the duty is assessed at the deposit amount. *Id.*

<sup>173</sup>See Antidumping Agreement, *supra* note 17, arts. 6.10, 9.2.

<sup>174</sup>*Id.* art. 9.4.

<sup>175</sup>*Id.* art. 9.1. While the authority has discretion to reduce the antidumping duty, it cannot impose a duty exceeding the antidumping margin amount calculated. *Id.* art. 9.3.

<sup>176</sup>*Id.* art. 9.1. This "lesser duty" rule is merely "desirable" and is not a requirement under the Antidumping Agreement. Some Members, such as the United States, disregard this provision and routinely impose the full amount of the antidumping duty calculated, without considering whether a lesser amount would be sufficient to remove injury. Article 15 of the Antidumping Agreement requires that "special regard" be given to developing countries before applying antidumping duties, when the duties would affect their "essential interests"; however, there is no case on record in which this article was the basis for fashioning a "constructive remedy".

<sup>177</sup>*Id.* art. 6.1.2.

<sup>178</sup>EU antidumping regulations require the consideration of the "community interest." Council Regulation 384/96 of 22 December 1995 on Protection Against Dumped Imports from Countries not Members of the European Union, art. 21, 1996 O.J. (L 356) 1, 18. As EU Membership expands, the interests of its constituent Members diverge. The consideration of community interest can serve as an opportunity for EU countries opposed to an antidumping measure to seek to reduce or eliminate the margin. See Jean-François Bellis, *The EEC Antidumping System*, in *ANTIDUMPING LAW AND PRACTICE*, *supra* note 141, at 41, 61-62. The EU Commission decision not to impose antidumping duties on cotton imports from China, India, Pakistan, Egypt, Indonesia and Turkey serves as a "case study" in the politics of EU trade. *Id.* While France and other Mediterranean countries favored tariffs on behalf of the European cotton and weaver industries, Germany, Great Britain and other Northern European countries opposed duties on be-

The reader may observe that this calculation is rather hypothetical and not particularly realistic or fair. The comparison of "constructed" prices and costs can create dumping margins where none otherwise exist.

#### 4. Injury Analysis

##### a. Injury Standard

Under the Antidumping Agreement, the national authority must assess the impact of dumping on the domestic industry by examining both (i) the volume of subject imports deemed to have been dumped, and (ii) the effect of these imports on domestic prices and producers.<sup>179</sup> The national authority must examine the absolute and relative volume of subject imports as compared to domestic production or consumption. Where import volume from a particular country is "negligible," *i.e.*, accounting for less than three percent of total imports, the investigation must be terminated as to that country, unless there are a significant number of "negligible" countries.<sup>180</sup> In analyzing price effect, the national authority must consider a number of factors, including price undercutting and price depression by dumped imports. The factors for considering the effect of dumped imports on domestic producers include trends in sales, market share, capacity utilization, and profits, as well as employment and investment levels.<sup>181</sup> The national authority also may give consideration to the magnitude of the dumping margin in assessing the effect on domestic producers.<sup>182</sup>

The national authority conducts the investigation of injury on as narrow a product range as possible.<sup>183</sup> However, the Antidumping Agreement explicitly permits the national authority to "cumulate" the effect of dumped imports from more than one country under investigation.<sup>184</sup> This provision reflects U.S. policy, and has been criticized as attributing to all suppliers,

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half of downstream consumer industries. *See* Lionel Barber & Jenny Luesby, *France Reopens Wounds on Cotton Tariff*, FIN. TIMES, May 28, 1997, at 6.

<sup>179</sup> Antidumping Agreement, *supra* note 17, art. 3.

<sup>180</sup> *Id.* art. 5.8. Technically, countries lose their "negligible" status if imports from negligible sources account collectively for more than seven percent of total imports; the national authority may cumulate them with larger suppliers irrespective of the fact that individually they account for a small portion of the imports. This provision is intended to prevent "death from a thousand cuts."

<sup>181</sup> *Id.* art. 3.4.

<sup>182</sup> *Id.* This factor reflects the practice of certain commissioners of the ITC in the United States. *See, e.g., Certain Brake Drums and Rotors*, USITC Pub. No. 3035, Inv. No. 731-TA-744, at 16-17 (Apr. 1997); *Melamine Institutional Dinnerware*, USITC Pub. No. 3016, Inv. No. 731-TA-741-743, at 25 n. 160 (Feb. 1997); *Bicycles from China*, USITC Pub. No. 2968, Inv. No. 731-TA-731, at 12 n. 84 (June 1996).

<sup>183</sup> *See* Antidumping Agreement, *supra* note 17, art. 3.6.

<sup>184</sup> *Id.* art. 3.3.

even “innocent” ones, the bad act of a single significant “injurious” supplier.<sup>185</sup>

After assessing these factors, the national authority must determine whether the domestic industry is: (i) materially injured, (ii) threatened with material injury, or (iii) is materially retarded in its establishment.<sup>186</sup> Although not defined in the agreement, “material” injury is deemed injury that is consequential and unambiguous.<sup>187</sup> “Threat of material injury” is defined in the Antidumping Agreement to mean a situation where injury is “clearly foreseen and imminent” and not merely “conjecture or remote possibility.”<sup>188</sup> “Material Retardation,” the most nebulous standard, is not defined in the Agreement.<sup>189</sup>

#### b. Causation

In addition to analyzing the materiality of injury, the investigation also must assess whether dumped imports are *causing* the injury to the domestic industry. Before making an affirmative injury determination, the national authority must demonstrate the causal relationship “between the dumped imports and the injury to the domestic industry.”<sup>190</sup> The Antidumping Agreement also requires the national authority to examine “any known factors *other* than the dumped imports” which also may cause the injury, such as non-dumped import volumes and contraction of demand.<sup>191</sup> The national authority must not attribute these causes to dumped imports. The authorities must provide opportunities for persons other than interested parties, such as industrial users and consumer organizations, to provide information regarding injury and causality.<sup>192</sup>

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<sup>185</sup> *Id.* See 19 U.S.C. § 1677(7)(G) (1994). Many exporters criticize this provision because even if the exporters show that the exports from their country are not injurious, the exporters may be deemed to cause injury when they are “cumulatively” assessed with exports from other countries. See Vermulst, *supra* note 141, at 456-57.

<sup>186</sup> Antidumping Agreement, *supra* note 17, art. 3 n.9.

<sup>187</sup> See, e.g., 19 U.S.C. § 1677(7) (1994).

<sup>188</sup> Antidumping Agreement, *supra* note 17, art. 3.6.

<sup>189</sup> “Material retardation” is conceptually more nebulous than the “threat” standard, since it does not even require that a domestic industry exist as a condition precedent to an affirmative injury finding. *Id.* art. 3.

<sup>190</sup> *Id.* art. 3.5. However, national authorities such as the ITC in the United States read this provision to require that dumped imports must merely be “a” cause of injury among other factors, not the only cause. Certain commissioners at the ITC do not separately analyze the causation question, but rather consider material injury and causation together as part of a “unitary” econometric analysis. See, e.g., *Certain Brake Drums and Rotors*, USITC Pub. No. 3035, Inv. No. 731-TA-744, at 15 n.87 (Apr. 1997); *Melamine Institutional Dinnerware*, USITC Pub. No. 3016, Inv. No. 731-TA-741-743, at 23 n. 148 (Feb. 1997); *Bicycles from China*, USITC Pub. No. 2968, Inv. No. 731-TA-731, at 12 n. 88 (June 1996).

<sup>191</sup> Antidumping Agreement, *supra* note 17, art. 3.5 (emphasis added).

<sup>192</sup> *Id.* art. 6.12. However, from a cynical perspective, the Antidumping Agreement does not require the authority to give any weight to submissions by consumer interests.

The WTO Antidumping Agreement made a number of significant changes to the prior antidumping rules embodied in the GATT Antidumping Code. The significant changes are discussed below.

D. Major Substantive Changes and Clarifications Under the WTO  
Antidumping Agreement

1. *Notice, Standards and Participation*

One of the important changes wrought by the WTO Antidumping Agreement was the establishment, for the first time, of standards and time-tables to ensure procedural transparency. In addition to substantive standards for dumping and injury determinations, the Antidumping Agreement also sets forth minimum evidentiary prerequisites for initiation of an investigation.<sup>193</sup> Initiation must be supported by a detailed description of the targeted merchandise and evidence of dumping and injury.

The Antidumping Agreement also requires notification to interested parties of the initiation of the proceeding,<sup>194</sup> release to interested parties of the full text of the dumping complaint,<sup>195</sup> public notification of the preliminary and final determinations,<sup>196</sup> and disclosure to interested parties of the basis for the calculation of the antidumping margins.<sup>197</sup> When documents cannot be released to interested parties because of the confidentiality of the information contained in them, the Agreement provides that the parties submitting confidential documents must also submit non-confidential summaries.<sup>198</sup> This important provision enhances the participation of interested parties and allows respondents and complainants some idea of the arguments and information submitted against their interests during the proceeding so that they may prepare a response or defense.

The Antidumping Agreement provides interested parties with the opportunity to participate meaningfully in the proceeding. The Agreement requires that targeted exporters and importers be given a sufficient amount of time to respond to questionnaires from the national authority (at least thirty days)<sup>199</sup> and that exporters which did not receive a questionnaire be given an opportunity to provide the necessary information voluntarily if practica-

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<sup>193</sup> *Id.* art. 5.2.

<sup>194</sup> Article 5.5 of the Antidumping Agreement provides for notification to the Member government prior to initiation of an investigation against an exporter of the Member, and Article 12.1 provides for general notice to the public upon initiation. Antidumping Agreement, *supra* note 17. These provisions require that the notification set out in detail the basis for the initiation.

<sup>195</sup> *Id.* art. 6.1.3.

<sup>196</sup> *Id.* art. 12.2.

<sup>197</sup> *Id.* art. 6.9. The Antidumping Agreement also requires the authority to maintain the confidentiality of submitted proprietary information. *Id.* art. 6.5.

<sup>198</sup> *Id.* art. 6.5.1.

<sup>199</sup> *Id.* art. 6.1.1.

ble.<sup>200</sup> The Agreement also provides that the national authority must afford interested parties “ample opportunity” to present evidence in writing.<sup>201</sup> In particular, it affords interested parties opportunities to present argument and rebuttal, and to review all contrary evidence on the record.<sup>202</sup> The Agreement clarifies the procedures for on-site verification in the exporting country, including advance notification of the information the national authority seeks to review.<sup>203</sup>

The Antidumping Agreement also sets out mandatory timeframes for major decisions to ensure the timely and predictable conduct of the antidumping proceeding. National authorities may not impose preliminary or provisional measures sooner than two months after initiation and, once imposed, these measures may not apply for more than four months unless significant exporters request a two-month extension.<sup>204</sup> The final determination and definitive duties normally should be imposed within one year after initiation, and in no case may an investigation last longer than eighteen months.<sup>205</sup> Finally, the Agreement provides that all Members must maintain procedures for judicial or arbitral review of national antidumping determinations, to afford respondents recourse to a tribunal where they may appeal decisions of the national authority.<sup>206</sup>

## 2. *Standing*

A domestic interested party may file a complaint only if it acts on behalf of the domestic industry. The Antidumping Agreement specifies the requisite degree of domestic support. An antidumping complaint is deemed supported by the domestic industry only if: (i) it is supported by the producers who account for not less than twenty-five percent of the total domestic production, and (ii) the supporting producers constitute more than fifty percent of the producers expressing a position concerning the case.<sup>207</sup>

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<sup>200</sup> *Id.* art. 6.10.2. However, the Antidumping Agreement does not require the national authority to accept and use such voluntary questionnaire responses.

<sup>201</sup> *See id.* art. 6.1. Moreover, as discussed above, the Agreement also ensures that downstream industries and consumer representatives will have the opportunity to present information. *Id.* art. 6.12.

<sup>202</sup> *See id.* arts. 6.2, 6.4.

<sup>203</sup> *See id.* art. 6.7, annex I.

<sup>204</sup> *Id.* arts. 7.3, 7.4. If the national authority is considering whether to impose a lesser duty necessary to prevent injury, the provisional measures may be extended for an additional six and nine months, respectively. *Id.* art. 7.4.

<sup>205</sup> *Id.* art. 5.10.

<sup>206</sup> *Id.* art. 13.

<sup>207</sup> *Id.* art. 5.4. U.S. law gives labor an equal voice with management, allowing unions to support, or oppose a petition. 19 U.S.C. §§ 1673a(c)(4)(A), 1677(a)(D) (1994). When management and labor of a company are in direct opposition, the company will presumably be treated as neither in support of, nor in opposition to, the petition. For predominantly unionized industries, particularly those represented by a single union, this provision may provide petitioners with an otherwise unavailable basis for satisfying the new standing requirements.



Domestic producers related to subject foreign producers or who import subject merchandise may be disregarded in determining support or opposition, unless they demonstrate that their interests as domestic producers would be adversely affected by an antidumping order.<sup>208</sup>

The burden is on the complainants to demonstrate the requisite levels of support, to ensure that a prolonged, disruptive investigation is not initiated if it does not represent the wishes of the domestic industry.<sup>209</sup> This requirement was added primarily to reform prior U.S. practice, pursuant to which complainants were assumed to represent the domestic industry unless proven otherwise.<sup>210</sup>

### 3. *Sunset Provisions*

Under the prior GATT Antidumping Code, there was no mandatory duration or limit to antidumping measures. In their national laws, some Member countries provided for automatic termination of antidumping measures, but others provided no basis for elimination of antidumping duties once imposed.<sup>211</sup>

To remedy this problem, the Antidumping Agreement provides for a "sunset" review five years after the date of the imposition of antidumping duties. In a sunset review, the national authority must revoke an antidumping duty unless it determines that dumping would be likely to continue

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The WTO Antidumping Agreement recognizes, but does *not* explicitly approve, petitions by unions, merely stating that Members are "aware" of the practice. Antidumping Agreement, *supra* note 17, art. 5.4 n.14. This could lead to a WTO challenge of an initiation based on union support alone.

<sup>208</sup> See Antidumping Agreement, *supra* note 17, art. 4.1(i).

<sup>209</sup> *Id.* art. 5.4. The national authority must decide whether a complaint has been filed on behalf of an industry *before* initiating an investigation. *Id.* art. 5.1. The Antidumping Agreement does not mention whether (and how) potential respondents will be notified of their opportunity to comment on or challenge the claims of complainants. It therefore appears that in most cases, exporters will learn of the case only after it is initiated, and the opportunity to comment on standing has lapsed.

<sup>210</sup> Under pre-WTO practice, the U.S. national authority presumed that a petitioner represented the domestic industry unless the exporters could prove that a majority of the domestic industry opposed the case, a very difficult burden for the exporters to bear. This led to complaints by other GATT Members that U.S. actions were not properly supported. See, e.g. Unpublished GATT Panel Report, United States - Antidumping Duties on Imports of Stainless Steel late From Sweden, Committee on Antidumping Practices, ADP/117, 1994 GATTPD LEXIS 6 (Feb. 24, 1994) (in which a GATT panel ruled that the United States had initiated an antidumping case against steel from Sweden without sufficient industry support; the United States blocked adoption of the report).

<sup>211</sup> Some Members provided for the automatic termination of duties after a set period of time (three years in the case of Australia). See Vermulst, *supra* note 141, at 438 n.36. This was not, however, a requirement under the prior GATT Antidumping Code, and antidumping duties could continue indefinitely, particularly when the complainant industry was opposed to revocation of the duty. *Id.* at 438-39.

or recur, and that injury would be likely to continue or recur, in the event of revocation.<sup>212</sup>

In its analysis of the likely continuation or recurrence of injury, the national authority may analyze the likely volume and price effects of subject imports on the domestic industry if the antidumping duty is revoked. This economic analysis will be prospective and hypothetical, and will not involve a current injury analysis.<sup>213</sup> Significantly, mere improvement in the domestic industry will not necessarily mean injury is unlikely to recur.

In the analysis of the likely continuation or recurrence of dumping, the national authority may consider the weighted average dumping margin determined in the investigation, and low or improved margins will not automatically result in a decision to terminate. The authority has discretion to consider changes in economic conditions to determine whether dumping nevertheless may recur in the future. The fact that dumping existed at the time the duty was imposed five years before should not, by itself, indicate likely recurrence of dumping if the order is revoked.

Although sunset reviews will be mandatory, Members have discretion to administer them in a narrow manner that makes it difficult for respondents to establish that dumping and injury are not likely to recur. The sunset requirement nevertheless provides a new and significant opportunity for exporters to eliminate longstanding duties.<sup>214</sup>

#### 4. "New Shipper" Reviews

The WTO Antidumping Agreement, for the first time, provides exporters which did not export during the period of investigation (and which are not related to such exporters), with the right to request an accelerated review in order to receive an individual dumping margin.<sup>215</sup> The new "accelerated" process will allow new suppliers to request a review twice annually, and pending the results of the review, the new shippers need only post a bond rather than pay definitive duties.<sup>216</sup> This procedure affords new suppliers time to prepare for, and obtain, a favorable antidumping decision, relative to "old" exporters which may have been locked out of the market due to high margins. New shippers normally must have some imports before a review will be conducted.

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<sup>212</sup> Antidumping Agreement, *supra* note 17, art. 11.3.

<sup>213</sup> The national authority has discretion to consider a variety of factors in issuing this determination, including whether any improvement in the state of the industry is related to the antidumping duty, the magnitude of the margin, and unused production capacity, existing inventories, and potential product-shifting. *Id.* art. 3.4.

<sup>214</sup> Sunset determinations must be made quickly, within one year of initiation. *Id.* art. 11.4. These time limits may be extended for not more than six months. *Id.*

<sup>215</sup> *Id.* art. 9.5.

<sup>216</sup> *Id.*

### 5. *Minimum Thresholds*

The Antidumping Agreement also provides important new minimum thresholds for imposing antidumping duties.

#### a. *De Minimis Dumping*

The Antidumping Agreement for the first time enumerates a de minimis dumping level, below which products are deemed to be "fairly" priced. That level is two percent of export value.<sup>217</sup> Antidumping margins must be two percent or higher in order for dumping duties to be imposed.<sup>218</sup> The national authority must terminate a case as to exporters with de minimis margins.

#### b. *Negligibility*

The Agreement delineates a specific negligibility standard for injury determinations. When the import volume from a country is three percent or less of total imports, that country's imports are deemed "negligible." The national authority normally must terminate cases as to countries with negligible import levels.<sup>219</sup>

### 6. *Equitable Price Comparisons*

The Antidumping Agreement specifies that export and normal value price comparisons must be made on an apples-to-apples basis — either average price-to-average price, or transaction price-to-transaction price.<sup>220</sup> The purpose is to ensure a fair comparison of prices on the same basis. Using average prices for a product category also allows exporters the benefit of offsetting dumped export sales prices with export prices that are above normal value within the same averaging category.<sup>221</sup> When different prod-

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<sup>217</sup> *Id.* art. 5.8. The U.S. Department of Commerce ("DOC") has taken the position that it will apply the new rule only in investigations. Because actual dumping liability is determined in administrative reviews and not investigations, this restriction effectively ensures that a lower de minimis threshold — 0.5% — will apply in U.S. proceedings to determine the definitive duty. 19 C.F.R. § 353.106(c). This DOC position, based on a questionable interpretation of language in the WTO Agreement, almost certainly will be challenged under the new WTO dispute resolution procedures.

<sup>218</sup> Antidumping Agreement, *supra* note 17, art. 5.8.

<sup>219</sup> *Id.* As discussed *supra* note 180, this exclusion does not apply when negligible import sources collectively account for more than seven percent of imports.

<sup>220</sup> *Id.* art. 2.4.2. However, the national authority may disregard the new rule when it finds a pattern of export prices which differs significantly among purchasers, regions or time periods. As free market prices often quite naturally vary between regions or time periods, national authorities have substantial discretion to disregard the "apples-to-apples" price reform.

<sup>221</sup> As with the de minimis standard, the United States has taken the position that it will apply the average-to-average comparison only in investigations, not administrative reviews. See *supra* note 217. In reviews, the United States will use its preexisting methodology of comparing aver-

uct categories exist, however, authorities may decide not to permit the offsetting of dumping in one product group with negative margins on the other.<sup>222</sup> A negative margin exists when normal value is lower than the export price. Nevertheless, while subject to certain exceptions, the new WTO rules on comparison methodology will add fairness to the calculation of antidumping margins.

### 7. Start-Up Operations

During the negotiation of the WTO Antidumping Agreement, countries with significant semiconductor industries such as Japan and Korea argued for an adjustment for distortions in production costs due to capital intensive start-up operations. The start-up of a new production line or facility normally involves unusually high costs and low production quantities which are temporary and do not reflect normal production. The prior GATT Code did not provide for a start-up adjustment, and the consequent use of high start-up costs in the dumping calculations would inflate antidumping margins.

While the Antidumping Agreement does not define "start-up," to obtain an adjustment<sup>223</sup> a producer normally must be using a new production facility or producing a new product line requires substantial additional investment.<sup>224</sup> Improvements to existing facilities or products generally will not be sufficient.

The startup period normally will end at the point when commercial production reaches a level that is characteristic of the merchandise, producer or industry, and not necessarily when production is at optimum capacity utilization. Measurement of the end of start-up can be critical, and is highly discretionary. Developed countries such as the United States have taken a restrictive, reluctant approach to this adjustment.<sup>225</sup>

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age normal value with individual export transaction prices. This method can create or inflate antidumping margins, and is arguably at odds with the express language of article 2.42 of the Antidumping Agreement.

<sup>222</sup> Authorities may calculate weighted average antidumping duties on a product-by-product basis, instead of a product-line by product-line basis. For example, in the case of 13 inch and 21 inch televisions, average normal values would be calculated for each size of television, not a single average for sales of both sizes of televisions. Color Picture Tubes from Japan, 52 Fed. Reg. 44171, 44172 (1987). Negative margins on one type of television may not offset dumping margins on the other type.

<sup>223</sup> Antidumping Agreement, *supra* note 17, art. 2.2.1.1.

<sup>224</sup> See, e.g., 19 U.S.C. § 1677b(f)(1)(C)(ii) (1994).

<sup>225</sup> For example, the United States will not consider sales expenses, such as advertising costs, to be start-up costs, 19 C.F.R. § 351.402(d)(4)(iii), despite the fact that the Antidumping Agreement does not limit the adjustment for start-up costs to production costs. Antidumping Agreement, *supra* note 17, art. 2.2.1.1. In fact, the Antidumping Agreement instead speaks in terms of "costs associated with the *production and sale* of the product under consideration." *Id.* (emphasis added). See also 19 U.S.C. § 1677b(f)(1)(A) (1994). The U.S. law also limits this adjustment by requiring that the difference between the actual and

If all the start-up requirements are met, the national authority normally will substitute the unit fixed and variable production costs incurred at the end of the start-up period for the unit costs incurred during the actual start-up. In this way, the higher unit costs, low production, yield problems and high depreciation normally characteristic of start-up operations are disregarded.<sup>226</sup>

#### 8. *Constructed Export Price ("CEP") Profit Deduction*

When export price is "constructed,"<sup>227</sup> the Antidumping Agreement allows for the deduction, in addition to selling expenses, of an amount of "total profit" allocable to the selling, distribution, and further manufacturing costs incurred by the exporter's subsidiary in the importing country.<sup>228</sup>

This provision is one-sided because it does not permit a corresponding adjustment for profit in the home market when home market sales are made through an affiliate.<sup>229</sup> Depending on the profit margin in a particular industry, this additional deduction from export price can create or worsen dumping margins, and thus should be of concern to companies which sell through subsidiaries in the export market. While some Members such as the EU Member States applied this deduction even before the Antidumping Agreement, its inclusion in the Antidumping Agreement means that it now may be used by all WTO Members.<sup>230</sup>

Because of this change, exporters seeking to limit their antidumping liability should, where possible, avoid sales in the importing country from an affiliate's inventory, and instead should focus on direct export sales.

#### 9. *Below-Cost Sales*

The Antidumping Agreement provides for the first time that sales in the exporter's home market may be excluded when they are below full production cost.<sup>231</sup> Below-cost sales will only be excluded when they are

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adjusted cost of production must be amortized over a "reasonable period of time subsequent to the startup period...." 19 U.S.C. § 1677b(f)(1)(C); 19 C.F.R. § 351.407(d)(4)(ii). This requirement is arguably inconsistent with the WTO Agreement, and has been criticized as such by Canada in its comments on the U.S. proposed implementing regulations of May 15, 1996. See *supra* note 221.

<sup>226</sup> Antidumping Agreement, *supra* note 17, art. 2.2.1.1 n.6.

<sup>227</sup> See *supra* note 166 and accompanying text.

<sup>228</sup> Antidumping Agreement, *supra* note 17, art. 2.3.

<sup>229</sup> See also Koulen, *supra* note 172, at 366, 369; Vermulst, *supra* note 141, at 425, 450.

<sup>230</sup> See Council Regulation 384/96 of 22 December 1995 on Protecting Against Dumped Imports from Countries not Members of the European Union, art. 2(9), 1996 O.J. (L 056) 1, 5. See also Council Regulation 2423/88 of 11 July 1988 on Protection Against Dumped or Subsidized Imports from Countries not Members of the European Economic Community, art. 2, 1988 O.J. (L 209) 1, 5.

<sup>231</sup> Antidumping Agreement, *supra* note 17, art. 2.2.1. Full production cost includes fixed as well as variable expenses and selling, general and administrative expenses. *Id.* The Anti-

made: (i) in “substantial quantities”, (ii) “within an extended period of time”, and (iii) at prices that “do not permit the recovery of all costs within a reasonable period of time”.<sup>232</sup>

Below-cost sales will be considered to be in “substantial quantities” if: the volume of sales is not less than twenty percent of the total volume under consideration, or the weighted average per unit price of all sales under consideration is less than the weighted-average unit cost of production for all sales.<sup>233</sup> The requirement that below-cost sales occur “within” an extended period of time means only that such sales must occur within one year, which appears meaningless since any below-cost sale in the investigation period would satisfy the standard.<sup>234</sup> The third requirement, that prices permit no cost recovery over a reasonable time, is satisfied when the price that is below cost at the time of sale also is below the average production cost for the entire investigation period.<sup>235</sup>

This provision can have three significant, disadvantageous effects on the antidumping calculation for exporters. First, when below-cost home market sales are excluded, the dumping comparison will be based on remaining above-cost sales.<sup>236</sup> Depending on how the cost of production is calculated, the home market sales which are above the “full” production cost may be aberrationally high and lead to significant dumping margins. Second, the cost test may force a comparison with constructed value. When all home market prices are below cost, the antidumping comparison will be based on the constructed value, which is the fully loaded production cost, *plus* any profit.<sup>237</sup> This hypothetical calculation could create or enhance dumping margins. Third, the cost test may result in an inflated profit amount that will skew the margin calculation. When, for particular types of the subject merchandise, there are no home market sales, the export price also will be compared to the constructed value.<sup>238</sup> In these instances, when other types of subject products sold in the home market are above cost, the

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dumping Agreement thus requires firms to sell above full, rather than marginal cost despite the accepted business imperative to sell at marginal cost in certain circumstances.

<sup>232</sup> *Id.* This language largely mirrored the preexisting U.S. language. See 19 U.S.C. § 1677b (b)(1) (1994).

<sup>233</sup> Antidumping Agreement, *supra* note 17, art. 2.2.1 n.5.

<sup>234</sup> *Id.* at n. 4.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* art. 2.2.1.

<sup>237</sup> *Id.* art. 2.2.

<sup>238</sup> *Id.* In other words, constructed value (including profit) may be used for comparison, rather than home market price, whenever either (i) all home market sales of subject products are below cost (in which case profits normally will be based on some alternative methodology such as the company’s financial statement, although arguably there should be no profit in the calculation), or (ii) there simply are no sales in the home market of a particular type of subject merchandise (in which case, profit on sales of other types of above-cost subject merchandise may be used).

profit amount will be based only on these above-cost sales, potentially resulting in high margins.

The below-cost provision thus can increase the dumping margin in several ways. Application of the cost test means that exporters can be found guilty of dumping even when their export prices are higher than their home market prices.

### 10. Affiliation

The question of whether parties are related is important to the anti-dumping calculation in several respects. First, it determines who can support or oppose a dumping complaint as a member of the domestic industry.<sup>239</sup> It also determines whether export price sales are made through a related party in the importing country.<sup>240</sup> Finally, it determines whether companies supplying parts and services to the exporters are related.<sup>241</sup> Under the broad definition in the Antidumping Agreement, companies may be deemed to be "affiliated" through corporate groupings or close supplier relationships.

Affiliation between parties can be based either on direct or indirect control.<sup>242</sup> One party can control another either by legal relationship, *i.e.*, through stock or equity ownership, or "operationally."<sup>243</sup> This latter provision has created significant uncertainty, and has left the door open to anti-dumping complainants to assert that parties are related "operationally" even where there is no direct stock relationship or control.<sup>244</sup> A finding that two parties are affiliated generally is unfavorable to the exporter, because it means that sympathetic producers in the importing country can be denied standing to oppose an antidumping complaint, and that the export price will

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<sup>239</sup> See *id.* art. 4.1(i) (defining "domestic industry" as excluding related parties); *Id.* at n.11 (defining "related party").

<sup>240</sup> *Id.* art. 2.3. When resellers are related, export price may be constructed. See *supra* note 166 and accompanying text. When home market resellers are related, that price will be disregarded in favor of the reseller's price to unaffiliated customers.

<sup>241</sup> When suppliers are related, some national authorities base the value of the component supplied on production cost if it is higher than the selling price. See, *e.g.*, 19 U.S.C. § 1677b(f)(3) (1994).

<sup>242</sup> Antidumping Agreement, *supra* note 17, art. 2.3 n.11. This provision provides that parties will be related "if (a) one of them directly or indirectly controls the other; or (b) both of them are directly or indirectly controlled by a third person; or (c) together they directly or indirectly control a third person...."

<sup>243</sup> *Id.*

<sup>244</sup> For example, in the United States, the U.S. Department of Commerce investigates whether a supplier is related to a producer if it sells the majority of its production to such producer, even if there is no legal relationship between the two parties. See, *e.g.*, Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Product, 62 Fed. Reg. 18404, 18417 (1997).

be “constructed” using adjustments that reduce the export price and thereby increase the risk of dumping.<sup>245</sup>

## *11. Provisions Left Out of the Agreement*

### a. Anti-Circumvention

Anti-circumvention issues arise when an exporter subject to an anti-dumping duty: (i) sends components of the subject product to the importing country for assembly into a finished product that otherwise would be subject to the dumping duty, or (ii) sends the components to a non-subject third country for assembly and then re-exportation to the importing country as a product of the third country. The EU and the United States have implemented regulations to cover such “screwdriver operations” within the scope of a preexisting dumping duty.<sup>246</sup> These anti-circumvention provisions were controversial, particularly with regard to Asian exporters, their most common target. The controversy was understandable as these provisions called for the extension of duties to parts or countries that were never covered by the dumping investigation. Moreover, the application of duties to products assembled in third countries raises questions of consistency with customs origin rules. For example, in a U.S. case involving dumping duties on certain Korean semiconductors, the United States applied the duty to Korea-fabricated dies that were encapsulated in non-subject third countries and exported to the United States, even though the U.S. Customs Service origin rules deemed the imported semiconductors to be products of the third countries, not products of Korea.<sup>247</sup>

This controversy carried over into the Uruguay Round negotiations. The United States and the EU both sought to include in the WTO Anti-dumping Agreement a provision permitting use of anti-circumvention provisions. These provisions were strongly opposed by Asian countries and developing countries, however, and at the end of the negotiations, the United States opted to eliminate any reference to anti-circumvention, rather

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<sup>245</sup> Antidumping Agreement, *supra* note 17, art. 4.1(i). See *supra* notes 207-10 and accompanying text for a discussion of who may oppose an antidumping complaint, and see *supra* notes 158-59 and accompanying text for a discussion of the reduction to export price for sales through subsidiaries in the importing country. Also, in countries such as the United States, supplies provided by affiliated parties may be valued at production cost, when the production cost is higher than the transfer price between the parties. See 19 U.S.C. § 1677b(f)(3) (1994).

<sup>246</sup> Anti-circumvention legislation was first implemented in the late 1980s via the “screw-driver” amendment to EU antidumping law. Under this provision, components will be subject to the dumping order on the finished product if the value of the imported components is significant. See Council Regulation 2423/88 of 11 July 1988 on Protection Against Dumped or Subsidized Imports from Countries not Members of the European Economic Community, art. 13, 1988 O.J. (L 209) 1, 13. U.S. law contains a similar provision. See 19 U.S.C. § 1677j (1994).

<sup>247</sup> See *Dynamic Random Access Memory Semiconductors of One Megabit and Above from the Republic of Korea*, 58 Fed. Reg. 15467, 15468 (1993), as amended by 58 Fed. Reg. 27520 (1993).



than include a provision it deemed not sufficiently tough. Consequently, the only reference to anti-circumvention in the WTO Agreement is a simple ministerial decision stating that the negotiators were "unable to agree on specific text" and that the issue would be referred to the Antidumping Practices Committee of the WTO for "resolution."<sup>248</sup>

Despite the absence of any allowance for anti-circumvention measures in the Antidumping Agreement, the United States and EU continue to implement their anti-circumvention provisions.<sup>249</sup> Continued application of these anti-circumvention provisions almost certainly will result in a WTO challenge on the grounds that the deliberate silence of the Antidumping Agreement should be interpreted as a decision not to authorize such actions. Further application of antidumping orders to third country products assembled from subject parts could be contested as a violation of the WTO Agreement on Rules of Origin.<sup>250</sup> At the meeting of the Antidumping Practices Committee on April 29, 1997, in which the anti-circumvention issue was raised, Japan complained against EC third country anti-circumvention investigations.<sup>251</sup> Korea filed a WTO challenge against a U.S. anti-circumvention action concerning televisions assembled in Mexico and Thailand from Korean components, which the United States later rescinded.<sup>252</sup>

#### b. Duty as a Cost

The WTO Antidumping Agreement does not provide explicitly for the deduction from the constructed export price of any antidumping duties paid upon importation. However, the Agreement contains a provision permitting

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<sup>248</sup> Statement on Anti-Circumvention, Dec. 15, 1993, Ministerial Decisions and Declarations Agreement on Implementation of Article VI of GATT 1994.

<sup>249</sup> After implementation of the WTO antidumping legislation, the EU initiated two anti-circumvention investigations concerning Asian suppliers of electronic weighing scales which are assembled either in the EU or Indonesia. See *Japan Protests To WTO Dumping Committee About U.S. Action on NEC Supercomputers*, Daily Executive (BNA), at A-4 (Apr. 30, 1997) [hereinafter *Japan Protests*].

<sup>250</sup> Agreement on Rules of Origin, Multilateral Agreements on Trade in Goods, *supra* note 1.

<sup>251</sup> See *Japan Protests*, *supra* note 248.

<sup>252</sup> The United States initiated several high profile anti-circumvention inquiries including one concerning Korean televisions assembled in Thailand and Mexico. The Mexican government complained that if the United States were to treat televisions assembled in Mexico from Korean parts as Korean televisions subject to an antidumping order, despite the fact that under NAFTA origin rules the televisions are of Mexican origin, the United States would be violating the NAFTA. See *Color Television Receivers from Korea*, 61 Fed. Reg. 1339, 1343 (1996). The Korean government requested WTO dispute resolution. See 62 Fed. Reg. 65843 (Dec. 16, 1997). The United States rescinded the case shortly thereafter. 62 Fed. Reg. 68255 (Dec. 31, 1997). It did not indicate whether the Mexican and Korean protests, or the questions regarding WTO consistency, influenced the U.S. decision.

adjustment to constructed export price for “duties and taxes,” among other expenses.<sup>253</sup>

The EU in practice has deducted antidumping duties from the constructed export price prior to calculating the dumping margin.<sup>254</sup> Arguably, deducting antidumping duties from the constructed export price would unfairly double count the antidumping duties and inflate the dumping margin, as an importer could not avoid dumping liability by raising its resale price by the amount of the antidumping duty. The EU’s continued use of this deduction could result in a WTO challenge.<sup>255</sup> When the U.S. Congress was drafting Uruguay Round implementing legislation, there was great controversy regarding this provision, which was supported by elements of the U.S. domestic industry. Ultimately, it was stricken from the U.S. implementing legislation.<sup>256</sup>

#### E. Criticisms of Antidumping Enforcement and Calls for Reform

Despite the growing popularity of antidumping actions, the theoretical underpinning for antidumping actions has been derided almost universally by economists and scholars. Respected government bodies also have severely criticized the enforcement of antidumping laws.

##### 1. *Widespread Criticism*

The WTO Antidumping Agreement defines “dumping” as selling a good in an export market at less than “normal value” — that is, at less than the price in the exporter’s home market or at below the cost of the good plus profit.<sup>257</sup> Dumping is actionable when it causes or threatens material

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<sup>253</sup> Antidumping Agreement, *supra* note 17, art. 2.4.

<sup>254</sup> Prior to the issuance of regulations implementing the WTO Agreement, the European Commission routinely deducted dumping duties from export price in refund and review proceedings. The Commission moderated the general rules slightly by adding a narrow exception in the 1996 regulation, providing that dumping duties will not be deducted when there is “conclusive evidence” that the duty is passed on in the resale price to the ultimate purchaser. Council Regulation 384/96 of 22 December 1995 on Protecting Against Dumped Imports from Countries not Members of the European Union, arts. 2(9) and 11(10), 1996 O.J. (L 056) 1, 5 and 15; *see also* Van Bael & Jean-François Bellis, *ANTI-DUMPING AND OTHER TRADE PROTECTION LAWS OF THE EEC* 81(2d ed. 1990).

<sup>255</sup> Under Article 2.4 of the Antidumping Agreement, *supra* note 17, the national authority must provide for a fair comparison between export price and the normal value. Moreover, note 7 to Article 2.4 provides that national authorities should not “duplicate” adjustments.

<sup>256</sup> The Statement of Administrative Action accompanying the U.S. legislation implementing the Antidumping Agreement provided that certain duty calculation provisions were “not intended to provide for the treatment of antidumping duties as a cost.” H. Doc. No. 103-316, Vol. 1, at 885 (1994)

<sup>257</sup> Antidumping Agreement, *supra* note 17, art. 2.1. Normal value is the price of identical or similar goods in the home market. Such prices, however, must be above the cost of production of the product. When there are insufficient above-cost prices in the home market, normal value may be based either on prices from third countries, or on the cost of producing the good, plus profit. *Id.* art. 2.2; *see also supra* notes 160-64 and accompanying text.

injury to the domestic industry producing the good.<sup>258</sup> In other words, dumping normally occurs when there is injurious international price discrimination. Antidumping theory holds that price discrimination is an invidious practice whereby predatory exporters attack markets by shipping at unfairly low prices, driving local competitors out of business, and accumulating monopoly or oligopoly power. Antidumping duties, under this theory, are necessary to counteract predatory price discrimination by exporters.

Economists, academics and government organizations roundly criticize this justification for antidumping duties, for a variety of reasons, discussed below.

a. Price Discrimination Alone Not Objectionable

Many economists argue that price discrimination alone — selling at different prices in different markets — is a natural and acceptable result of free market forces because the structure and price elasticity of each market drives the price in that market.<sup>259</sup> Under this line of argument, there is no justification for condemning certain export prices simply because they happen to be lower than prices in other markets.<sup>260</sup> Domestic price discrimination — that is, differences in pricing between one country's domestic regional markets — normally is not penalized.<sup>261</sup> There arguably is no economic reason for treating "international" price discrimination any more harshly by imposing dumping duties.

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<sup>258</sup> Antidumping Agreement, *supra* note 17, art. 3 n.9.

<sup>259</sup> See generally Jorge Miranda, *Should Antidumping Laws Be Dumped?* 28 LAW & POL'Y INT'L BUS. 255 (1996). See also Deardoff, *supra* note 168, at 24-27.

<sup>260</sup> Dumping is only concerned when the export price is lower than the comparison price. When the price discrepancy is in the opposite direction, *i.e.* when the export price is higher than the domestic or comparison price, dumping law is not concerned. Deardoff, *supra* note 168, at 26. Indeed, in many antidumping cases, inevitable price fluctuations between markets naturally occurs in both directions. In such instances, exporters are penalized for "negative" margins (when export price is below home market price), but are not given credit for "positive" margins (when export price is higher than the home market price). See *supra* notes 172-74 and accompanying text. See Bryan T. Johnson, *A Guide to Antidumping Laws: America's Unfair Trade Practice*, Background (Heritage Found.) No. 906, July 21, 1992, at 13 ("[I]t is a common business practice to sell products at a loss. For example, if a product is not selling [sic] well, a business owner might sell below cost in order to recoup at least some of his investment in the product. Yet when a foreign firm sells below cost in the U.S. market, it is considered to be abnormal and unfair.").

<sup>261</sup> In the United States, there is a law, the Robinson-Patman Antidiscrimination Act which prohibits domestic price discrimination, but *only* if such pricing is anticompetitive and predatory. 15 U.S.C. § 13(a) (1994). This law, in any event, is very rarely enforced. The United States enacted an antidumping law expressly linked to predatory intent — the Antidumping Duty Act of 1916. 15 U.S.C. § 72 (1994). This law also has been used very rarely. The infrequent use of these provisions is due to the difficulty of proving predatory intent or, perhaps more simply, to the infrequency of predatory actions.

b. Absence of Anticompetitive Effect

The primary economic complaint is that dumping is harmful only when it involves anticompetitive or predatory intent to gain monopoly or oligopoly power in a foreign market, and that in practice this very rarely, if ever, occurs. Studies by the U.S. Congressional Budget Office found that:

[N]early all economists would agree that [predatory pricing] is substantially less common than price discrimination and selling below cost and that, correspondingly, most price discrimination and selling below cost do not constitute predatory pricing.<sup>262</sup>

A study by the OECD found that antidumping law does not distinguish between "legitimate" market strategies and anticompetitive monopolization, and that less than ten percent of antidumping cases initiated even involved "potential" monopolizing dumping.<sup>263</sup> The OECD study concluded that "efficiency-based criteria would condemn most, if not all, [antidumping] export restraints."<sup>264</sup> The U.S. General Accounting Office made a similar finding.<sup>265</sup> Indeed, in today's trade environment, characterized by increasing competition among a variety of export suppliers from different countries, predatory pricing practices arguably are futile because market domination and monopolistic pricing are not attainable.<sup>266</sup> Economists, therefore, generally take the view that frequent use of antidumping action cannot be justified as necessary to prevent predatory pricing.<sup>267</sup>

To the extent that predatory pricing does occur, this reasoning continues, it can be counteracted through existing competition and antitrust laws on the books in many WTO Member countries.<sup>268</sup> This controversy has

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<sup>262</sup> CONGRESSIONAL BUDGET OFFICE, HOW THE GATT AFFECTS U.S. ANTIDUMPING AND COUNTERVAILING DUTY POLICY, app. A at 79 (Sept. 1994) [hereinafter CBO STUDY].

<sup>263</sup> INTERNATIONAL TRADE AND INVESTMENT DIVISION, ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, TRADE AND COMPETITION: FRICTIONS AFTER THE URUGUAY ROUND, 8 (1996) [hereinafter OECD REPORT], citing ROBERT D. WILLIG, ANTIDUMPING AND COMPETITION (1996).

<sup>264</sup> *Id.*

<sup>265</sup> UNITED STATES GENERAL ACCOUNTING OFFICE, INTERNATIONAL TRADE: COMPARISON OF U.S. AND FOREIGN ANTIDUMPING PRACTICES 8 (Nov. 1990) ("Economists generally view dumping as harmful only when it involves 'predation,' that is, intent by the dumping party to eliminate competition and gain monopoly power in a market. In practice, such predatory dumping has rarely been documented.").

<sup>266</sup> See Johnson, *supra* note 260, at 13 ("But the world market today is so integrated and competitive [sic] that it is virtually impossible for a company to exploit a dominant share of a market for long, if at all. Thanks to freer trade in recent decades, there is little chance of an exporter achieving the power to charge a monopoly price.").

<sup>267</sup> See generally Bernard M. Hoekman & Petros C. Wavroidis, *Dumping, Antidumping and Antitrust*, J. WORLD TRADE, Feb. 1996, at 27. See also Michael Cartland, *Antidumping and Competition Policy*, 28 LAW & POL'Y INT'L BUS. 289 (1996).

<sup>268</sup> See CBO Study, *supra* note 262, at 5-22 (comparing antidumping law unfavorably to U.S. antitrust law); see also OECD REPORT, *supra* note 263. Safeguard provisions, discussed *supra*, also are available to offset injurious price discrimination. See Deardorff, *su-*

found its way into WTO negotiations. Member States traditionally critical of overzealous use of antidumping laws have requested the WTO to analyze the interaction between trade and competition law.

One contentious issue is whether antidumping laws are necessary, given that competition laws address the issue of predatory pricing, and there arguably is no other justification for antidumping laws. Another issue is whether the antidumping laws themselves constitute an anticompetitive practice. Advocates of tabling this contentious issue as a talking point for negotiation include Japan and Korea.<sup>269</sup> The United States has opposed all efforts to bring trade remedy laws into the WTO discussions of international competition policy.<sup>270</sup>

### c. Ineffective and Costly

Another common criticism of antidumping measures is that they do not afford effective assistance to the domestic industry they are intended to protect. A Congressional Budget Office study found that uncompetitive industries in the United States are more likely than others to receive protection, and are not likely to benefit from it in the long term.<sup>271</sup> Further, because of the expansion of international suppliers, a complainant's failure to target all possible suppliers could mean that antidumping duties against only some suppliers, even if significant, would merely divert the source of exports to non-targeted countries, without an appreciable price effect in the import market.<sup>272</sup>

The antidumping protections often come at a substantial cost to consumers. In a highly controversial study, the U.S. International Trade Commission concluded that the cost to the U.S. economy of antidumping measures was significantly higher than the benefit to the protected U.S. industry.<sup>273</sup> Overbroad antidumping duties may curtail importation of products not even produced by domestic companies.<sup>274</sup> The burden and damage

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*pra* note 168, at 28. Antitrust laws may not reach exporters with no property in, or contacts to, the importing country, however.

<sup>269</sup> *WTO Members Poised For Fight Over AD CVD Law in Competition Group*, INSIDE U.S. TRADE, June 27, 1997, at 13.

<sup>270</sup> *Id.* The United States presently is opposed to any WTO antitrust agreement. *U.S. Opposes Plans to Negotiate Antitrust Agreement in WTO, Officials Say*, Daily Executive (BNA), at A-8 (Nov. 24, 1997).

<sup>271</sup> See CBO Study, *supra* note 262, at 43.

<sup>272</sup> See Deardorff, *supra* note 168, at 29.

<sup>273</sup> See ECONOMIC EFFECTS OF ANTIDUMPING AND COUNTERVAILING DUTY ORDERS AND SUSPENSION AGREEMENTS, USITC Pub. No. 2900, Inv. No. 332-344, at 4-13 (June 1995). The study found that the cost of antidumping orders, with respect to their effect on consumers and downstream industries, was at least \$1.59 billion greater than any benefit conferred on the protected U.S. industry. *Id.*

<sup>274</sup> In the United States, attempts by consumer industries to add a regulation providing for a temporary removal of antidumping duties when there was no domestic production or domestic production was in "short supply," were rejected due to opposition from domestic in-

to consumer industries dependent on the imported product can be significant and can outweigh any benefits to the upstream complainant industry.<sup>275</sup>

d. Substantive and Procedural Unfairness

Critics also complain that antidumping rules have been implemented and applied by national authorities in an unfair manner, both procedurally and substantively. For example, the OECD study concluded that antidumping measures "can be abused for protectionist purposes."<sup>276</sup> Despite the liberalizing changes agreed upon during the Uruguay Round negotiations and adopted in the WTO Antidumping Agreement, the study found that "antidumping procedures can still serve as a protectionist tool."<sup>277</sup> The CBO study lodged similar complaints against the administration of U.S. law, which it characterized as "slanted against foreign persons," and increasingly protectionist and biased.<sup>278</sup> The U.S. General Accounting Office surveyed pre-Uruguay Round administration of antidumping measures by Australia, United States, Canada, EU and Mexico, and found that the EU, along with the United States and Mexico, had been accused of having low evidentiary thresholds for initiating antidumping actions.<sup>279</sup> This study found that the EU and Mexico had the least transparent systems for administering the antidumping laws, and that the transparency and scope of judicial review in the United States was broader than in the other countries.<sup>280</sup>

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dustries that make frequent use of the antidumping law, such as steel. *Short Supply Comes Up Short*, AM. METAL MARKET, May 7, 1997, at 1.

<sup>275</sup> See *Dumping Wars*, J. COM., Apr. 28, 1997, at 6A (discussing U.S. antidumping duties on 4 and 6 inch televisions, which are not made by the U.S. industry, and the decision of a U.S. computer maker to move offshore when an antidumping duty barred imports of displays not produced by the domestic industry).

<sup>276</sup> See OECD Study, *supra* note 263, at 7. This study noted the use of "asymmetrical or unfair price comparisons" and use of "arbitrary exchange rates". Both would have the effect of inflating antidumping margins.

<sup>277</sup> *Id.* Indeed, many have observed that antidumping laws are becoming increasingly protectionist. See generally Francis G. Jacobs, *Observations on the Antidumping Law and Practice of the European Community, and some Possible Reforms*, in ANTIDUMPING LAW AND PRACTICE, *supra* note 141, at 354-57. The pre-WTO practice of the parties to the Antidumping Code has led increasingly, in all jurisdictions considered, to an inflation of dumping margins by the cumulative effect of increasingly strict interpretations of the various components of the dumping calculations. *Id.*

<sup>278</sup> CBO Study, *supra* note 262, at 41-50; see also Johnson, *supra* note 268, at 1 ("The antidumping laws are confusing and arbitrary, and in many instances merely allow American firms to secure punitive tariffs against competing importers where no unfair trade practices are involved."). The study expressed particular concern for subjective price comparisons and asymmetric adjustments. *Id.*

<sup>279</sup> The Antidumping Agreement, however, set forth more detailed requirements for initiation of an antidumping action. See *supra* note 141. Although national authorities still have substantial discretion in determining when to initiate an antidumping investigation, the tighter standard under the WTO Antidumping Agreement should reduce the number of complaints on this issue.

<sup>280</sup> CBO STUDY, *supra* note 262, at 41-50.

## 2. Controversy

These criticisms of antidumping measures inevitably collide with the widespread and growing political support for antidumping measures. Two of the studies referenced above serve as interesting illustrations. First, the OECD Report, which took five years to complete and reflected the views of eminent economists, former government officials and scholars, was released to OECD member countries in confidential draft form in late 1995. The EU and the United States, both substantial users of antidumping measures, attacked the portions of the Report that were critical of antidumping measures and demanded revisions.<sup>281</sup> Before the Report was released in 1996, they reportedly were successful.<sup>282</sup>

Second, the U.S. International Trade Commission report on the cost of U.S. antidumping measures originally was requested by Bush Administration United States Trade Representative ("USTR") Carla Hills in 1992. Before the study was commenced, however, amid severe political criticism, Clinton Administration USTR Mickey Kantor broadened the parameters of the study in 1993 to include the benefit of antidumping measures to the domestic industry.<sup>283</sup> When the Report was completed in 1995, it created a firestorm within the International Trade Commission which had difficulty even agreeing to release the Report, and was met by protest from both domestic industry and free trade advocates.<sup>284</sup>

The controversy surrounding antidumping measures is certain to grow. On the one hand, antidumping measures have strong political support in Member countries as the most effective import protection for struggling domestic industries. On the other hand, there is established opposition to antidumping measures, which is gaining gradual support from exporting interests concerned about global proliferation of antidumping measures.

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<sup>281</sup> See Guy de Jonquieres, *Report Counts Cost of Antidumping*, FIN. TIMES (London), Sept. 21, 1995, at 5 (The U.S. and EU "have vigorously attacked its findings in the OECD, and are intent on watering the report down before allowing it to be published later this year"); Guy de Jonquieres, *US and EU Attack Anti-dumping Report*, FIN. TIMES (London), Sept. 21, 1995, at 5.

<sup>282</sup> See Jonquieres, *US and EU Attack Anti-dumping Report*, *supra* note 281 (stating that "[t]he draft report, submitted to the OECD in March, is understood already to have been amended under U.S. and EU pressure.").

<sup>283</sup> See Kantor Approves Antidumping Study, FACTS ON FILE, WORLD NEWS DIGEST, July 8, 1993, at 506 F1.

<sup>284</sup> For an interesting discussion of the in-fighting at the ITC caused by the Report, see *Cracking Up*, NAT'L J., Oct. 28, 1995, at 2636 and Nancy Dunne, *U.S. Antidumping Study Raises Political Hackles: Report questioning countervailing duties becomes focus of ITC dissension*, FIN. POST, Aug. 23, 1995, at 10. While former International Trade Commissioner Alfred Eckes, a proponent of import protections, criticized the Report as being the result of "cooking the books at the ITC," Carla Hills stated that it was a narrow study that did not reflect the pervasive effects of antidumping measures. Dunne *infra*; Alfred E. Eckes, *Cooking the Books at the ITC*, J. COM., July 14, 1995, at 6A;

This controversy, and the expected increase in antidumping actions, will lead to calls for reform of the antidumping regime in the future.<sup>285</sup>

There are other, more engaging justifications for the antidumping regime, beyond the political self-interest in protecting domestic industries. In particular, antidumping measures may serve as a necessary trade-off to achieve further liberalization in reducing global tariffs and duties. Many countries may have been willing and able to agree to the dramatic liberalizations that have rolled back import tariffs over the past twenty years only if they were allowed discretionary use of antidumping measures as a fall-back.<sup>286</sup> Further, the antidumping regime constitutes a quasi-judicial "interface" that may enable countries with very different economic systems to warily open their markets to one another under a common, enforceable regulatory framework.<sup>287</sup>

Notwithstanding the growing concerns regarding the proliferation of antidumping measures, the vigorous and entrenched political support for these measures, as illustrated by the recent reaction to the OECD and ITC Reports, will ensure that antidumping measures are with us for the foreseeable future.

#### IV. A FACT OF LIFE FOR FUTURE EXPORTERS – COMPLIANCE MEASURES

Industries in developed countries in many sectors have demonstrated a readiness to employ antidumping laws as a weapon to protect them from their competitors abroad. Developing countries are getting into the dumping game with remarkable speed. This trend will continue. An antidumping case can result in the imposition of prohibitive company-specific import duties, placing an exporting company at a competitive disadvantage (relative to domestic companies, as well as exporters from non-targeted countries, or even exporters from the same country receiving more favorable duty rates). If the dumping duties are high enough, exporters can be excluded from the market entirely. Moreover, each percentage point of an antidumping margin can represent a significant annual cost to the company,

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<sup>285</sup>In the European Union, this conflict is manifested between the southern countries which tend to favor antidumping action, and the northern countries which generally do not. Conflict is most acute with regard to the European Commission's consideration of the "community interest" before initiating an antidumping action. This procedure was added as a reform to require analysis of the effect of duties on user industries. See *Dumping Folly*, FIN. TIMES, Apr. 1, 1997, at 21. In North America, Canada and Mexico have sought to convince the United States to drop or reform its antidumping measures within the North America Free Trade Agreement — so far without success. See *Mexico, Canada to Seek Halt to U.S. Antidumping Action*, Daily Executive (BNA), at A-4 (Dec. 24, 1996). The Heritage Foundation report sets forth a bold, if unrealistic proposal for the phase-out of antidumping laws. See generally Johnson, *supra* note 268.

<sup>286</sup>See generally JAGDISH BHAGWATI, PROTECTIONISM 485-530 (1988).

<sup>287</sup>See Vermulst, *supra* note 141, at 460 (citing JOHN. H. JACKSON & WILLIAM DAVEY, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 650-1 (2d ed. 1986)).



so that even a partial improvement in a company's dumping liability could save the company substantial revenues. For example, if a company with annual exports of \$50 million to a particular country acted to reduce its dumping margins on sales to that country by only four percentage points, from say, seven to three percent, it would save \$2 million annually.

It is therefore essential for an exporting company, whether from a developed or a developing country,<sup>288</sup> to consider the implementation of an antidumping compliance program, in order to assess antidumping risks, and take measures to avoid or diminish them.<sup>289</sup> The same holds true for companies dependant on imported inputs or finished goods. Creation of such a program entails four basic steps, discussed below.

#### A. Development of Working Knowledge of Antidumping Rules

Because of the complexity of the antidumping rules and the various options for establishing a compliance program, it is essential for key decision-makers in the exporting company to become generally familiar with the WTO antidumping rules as implemented in their main export markets, so that they can make informed tactical decisions regarding compliance. Other management and support personnel should be given the task of becoming more closely informed about the rules. They should keep in mind that the antidumping rules, which were written by lawyers and politicians and are enforced by bureaucrats of the importing countries, may not reflect "real world" business practices or commonly held economic principles.<sup>290</sup> If the exporting company has a significant share of its own domestic market, it also may find it prudent to have a working knowledge of its home country's dumping rules, to assess whether to employ them against foreign competitors.

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<sup>288</sup> BUSINESS GUIDE TO THE URUGUAY ROUND, *supra* note 8, at 199 ("Enterprises in many developing countries are finding that as their exports of manufactured products rise, there are increasing pressures from industries in the importing countries for the levy of such duties, on the grounds that the goods are being dumped...").

<sup>289</sup> *Id.* ("For business persons, knowledge of the complex rules on the levy of anti-dumping ... duties is essential in their capacities as exporters and producers.... An understanding of the rules could, for instance, enable an exporting enterprise to take precautionary steps to avoid anti-dumping actions in foreign markets where there are increasing pressures from industrial and other groups for such actions.").

<sup>290</sup> Antidumping calculations entail many accounting methodologies which often ignore the way most businesses normally keep their books. The antidumping rules require respondents to report a per-product "fully loaded" cost, as discussed *supra* note 168 and accompanying text, although many businesses do not require or record costs on a product-specific basis, or do so at a variable cost level only. See Antidumping Agreement, *supra* note 17, art. 2.4. Similarly, the antidumping rules define the date of sale as the contract date, although businesses generally record sales by invoice date. See *id.* at n.8.

B. Assessment of the Exporting Company's Operations and Activities

1. Degree of Exposure

An analysis of an exporting company's antidumping liability should begin with a review of the company's products and markets (bearing in mind that the antidumping law applies only to sales of goods not services). An important threshold question is the significance the company attaches to each of its export markets, both presently and in the future, as the answer affects the resources the company may wish to devote to antidumping compliance in a particular market. While antidumping rules and procedures vary among WTO Member countries, the basic principles are the same; hence, an antidumping compliance program structured for one export market can readily be adapted for other export markets as well.

Because an antidumping complaint in a given market is dependent upon a showing of injury to the domestic industry in that market,<sup>291</sup> other important considerations in assessing possible antidumping liability are the price sensitivity of the products shipped by the exporter, as well as the recent performance of competing industries based in the importing country. Where the competing domestic industry has experienced difficulties in the recent past (e.g., diminished profits, decreasing market share or lay-offs) in a price sensitive market sector, the risks of a possible dumping action are greatly enhanced. The exporting company must realize that these circumstances increase its vulnerability to antidumping action, even if the company believes that the reason for these difficulties has nothing to do with its own exports (*i.e.*, they are the result of a down cycle in the market, competition from other suppliers, or poor management). Conversely, when there is no apparent domestic industry producing a particular product in the importing country, the antidumping risks will be negligible.<sup>292</sup>

Companies already subject to a dumping duty also should consider a compliance program. Implementation of an effective price guideline could enable the exporter or importer to lower the applicable duty amount, which in many Member States would allow the exporter to request a refund of duties deposited, and may improve its position in a future sunset proceeding.<sup>293</sup>

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<sup>291</sup> See *id.* art. 3.1.

<sup>292</sup> See BUSINESS GUIDE TO THE URUGUAY ROUND *supra* note 8, at 199 ("while it may continue to charge export prices that are lower than its domestic prices in markets where it faces no threat, it should avoid doing so in markets where anti-dumping actions are possible.").

<sup>293</sup> See *supra* notes 172 and 253 for a discussion of refund and review proceedings, and notes 211-19 for a discussion of sunset proceedings. The need for a compliance program is particularly strong in U.S. dumping cases, when the amount of duties owed is determined retroactively, after a dumping order is imposed and deposits are paid. *Id.*

## 2. *Corporate Structure*

In deciding upon a suitable compliance program, the company should consider its capacity to implement compliance measures, as well as the amount of resources the company wishes to devote to the task. In addition to the dumping risks discussed *supra*, this decision must be based on the size and resources of the company, and the types, quantity and value of products exported which must be monitored.

Generally, in managing antidumping liability, an exporting company must utilize sales personnel (to enforce price guidelines and review sales and selling expense information), accounting personnel from the corporate, divisional and factory levels (to collect and derive the necessary cost, expense and sales information), and computer personnel (to arrange and maintain necessary data, and to run the dumping margin analysis). A company will need to decide the extent to which it can devote personnel from each of these departments to antidumping compliance.

### C. Determining a Suitable Compliance Program for the Company

At the most general level, the question of compliance may appear rather simple — to avoid antidumping liability the company's export price should be above the home market price, as well as the fully-loaded cost. A closer look, however, reveals that this may not be sufficient, and that there are many considerations and options in determining an appropriate program, which can vary in terms of detail, focus and coverage.

At the outset, the company must realize that regardless of the program it chooses, it is often very difficult to implement a program that will guarantee that it will never be found to be dumping; this is due to the complexity of the antidumping rules described above, the administrative discretion afforded to national authorities in calculating antidumping margins, and the difficulty of employing a comprehensive and precise price monitoring discipline in a dynamic and rapidly fluctuating marketplace. Nevertheless, a company can take measures to *substantially* lower the risk of an affirmative antidumping finding by implementing an antidumping compliance program. In deciding upon an appropriate program, the company must balance the risk of antidumping liability against the burden imposed by a compliance program. The burden includes not only the resources devoted to compliance efforts, but also the pricing restraints that a program would impose upon a company. The two major factors the company will need to consider in deciding upon a program are the program's prospective or retroactive focus, and its degree of detail.

#### 1. *Prospective and/or Retroactive Program*

A company wishing to avoid dumping liability must ensure that future sales are appropriately priced. This generally will require the exporting company to prospectively set minimum export prices or price ranges, based

on estimated costs and sales expenses. Companies also will have to establish minimum and maximum home market (and or third country) price levels for the same period of time, to ensure they are above cost, but below U.S. price levels. These price levels will have to be adjusted periodically, monthly or quarterly, as the company deems appropriate, using a forward exchange rate. To add to the complexity, the price guidelines should be determined on an ex-factory basis, using estimates for applicable movement and selling expenses in both the export and domestic markets.<sup>294</sup>

The establishment of acceptable price levels is of extraordinary importance and sensitivity, involving sales, cost and marketing estimates. The price guidelines must be accurate to ensure antidumping compliance on the one hand, but must also be flexible to ensure competitive and realistic pricing on the other. A company's selling division also should take these levels into consideration when developing new marketing programs which will affect ex-factory pricing (*e.g.*, rebates, promotions).

In addition to price guidelines, the company can adopt other strategic measures to limit liability. It may simplify and reduce the type of selling programs/expenses in its focus markets to make monitoring more effective and simple. The company also can ship directly to unrelated customers in its key export markets and its domestic market, rather than through affiliates, to simplify the price adjustments that will need to be estimated. It can adjust its information management system to track expenses, costs, returns and credits on a per-product and per-sale basis which simplifies collection and monitoring. Further, it can adopt a cost accounting system that allows for the simple collection of actual per-unit costs.

A company also may wish to include in the program a retroactive analysis of sales in a prior period as would be done in an actual antidumping case. While a retroactive analysis does not protect against future antidumping liability, it is an important complement to a prospective price guideline system because it can provide a more accurate analysis of antidumping liability, based on actual prices and expenses recorded in a prior period (rather than estimates), and can serve to "test" the sufficiency of the system for setting price levels. The retroactive approach requires the collection of product specific price, sales and cost information, to be used in a detailed dumping margin simulation. Because a simultaneous prospective and retroactive monitoring system will be burdensome, the company may wish to conduct a retroactive analysis only intermittently, depending on the degree of risk it perceives and the importance of the export market.

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<sup>294</sup> See *supra* notes 170-71 and accompanying text for a discussion of the dumping calculations, which are performed on the basis of ex-factory prices. The price guidelines thus require that the net export price be above the above-cost net home market price for the same or similar merchandise.

## 2. Degree of Detail

The company also will need to decide how much precision it desires in collecting and adjusting sales price and cost information. The accuracy of the program obviously corresponds to the detail of the record-keeping. However, it is not realistic for most companies to collect data with the precision that would be required in an actual dumping case<sup>295</sup> because the complexity of the data and the need to depart from normal business practice would impose too great a burden. A company therefore must find some balance between a realistic, administrable data collection system, and one that provides an acceptable degree of accuracy.

Some examples may illustrate the point: (i) While the antidumping rules generally require actual product-specific cost data,<sup>296</sup> most companies utilizing a process cost accounting system do not maintain data in that manner; it may be more pragmatic for companies to implement a system that utilizes the company's standard costs or budget figures, adjusted by the appropriate variance, to establish an "approximate" product cost. (ii) Similarly, although antidumping rules generally require the recording of direct selling expenses on a sale and customer-specific basis, businesses generally do not; it therefore may be more practical for the company to implement a system whereby it calculates expenses on a more generalized aggregated basis. (iii) If the company has significant sales in its home market, it may wish to exclude third-country sales from the scope of its program as unnecessary.<sup>297</sup>

### D. Implementation of the Compliance Program

Once the company decides upon an appropriate compliance program, it must take measures to ensure the program will be adequately and effectively implemented. This normally will entail the formation of an antidumping team from the selling, accounting and computer departments, as appropriate. The team will need to be trained to conduct the data collection analysis tasks required by the program in the most effective and least burdensome manner. These tasks would include the periodic establishment of minimum and maximum price levels based on projected expenses and costs, and the dissemination of this information to appropriate sales personnel on a timely basis. The tasks also may include the collection of actual prior

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<sup>295</sup> For instance, in an actual case a respondent normally would be required to collect prices for all sales in the investigation period, net of movement and selling adjustments on a per transaction and per unit basis. It must also collect fully loaded unit costs for each product sold. See *supra* notes 170-92 and accompanying text for a discussion of the antidumping calculation.

<sup>296</sup> See *supra* note 167 and accompanying text.

<sup>297</sup> See *supra* notes 160-64 and accompanying text, discussing when the home market sales will be used. If the company has negligible home market sales, however, third-country prices can serve as a comparison for dumping purposes. Using export prices to one market as a comparison base for another export market often enables exporters to avoid antidumping liability.

data for a retroactive dumping margin analysis, and the production of a report on the results of such analysis, with recommendations for changes or modifications to the compliance program as necessary.

It is usually essential to involve top management of the company in the initial implementation phase, given the importance of the compliance measures (*e.g.*, setting minimum price levels). Further, the program may impose new responsibilities or burdens on personnel throughout the company, who may benefit from a clear message from management on the importance and priority of the program.

As with other compliance programs, the antidumping system must provide for periodic education and training to keep personnel abreast of important changes in antidumping rules and procedures (*e.g.*, recent changes regarding the Uruguay Round antidumping rules). This takes on added significance as company personnel are transferred to other departments over time because the company's "institutional memory" on antidumping compliance will be essential if a dumping complaint is filed or a review is conducted. The system also should provide for periodic audits to ensure the company's objectives are being adequately carried out. In this respect, the company may wish to consult with outside antidumping experts, at least in the beginning phases of the implementation program.

The establishment and implementation of an antidumping compliance program is a major commitment, and does not necessarily guarantee that a case will never be brought against a company, or that it will never be subject to a dumping margin. Nevertheless, a company that has taken appropriate steps to minimize its antidumping liability can substantially improve its ability to survive an antidumping case with its important export market position intact. This fact can prove crucial not only regarding the company's competitive position relative to rival companies in the importing country, but also relative to other exporters whose competitive position may depend upon the results of the case. Any company that is a significant exporter of goods, therefore, should review the steps outlined above to determine if some type of antidumping compliance program is in its interest.

## V. CONCLUSION

The WTO Agreement ensures that antidumping actions will proliferate. On the one hand, it calls for a significant reduction in tariffs and proscribes or limits other import protections, thereby exposing industries throughout the world to international competition as never before. On the other hand, it requires signatories to ratify legislation consistent with the Antidumping Agreement, resulting in an exponential increase in the number of countries possessing the dumping weapon, the most potent remaining tool for import protection. The result, an increase in antidumping actions, is manifest. As more countries target one another, there will be a consequent drag on international trade, particularly in sensitive sectors such as steel, chemicals, textiles and electronics.

The increase in antidumping actions undoubtedly will give rise to calls for reform from multinational corporations that are the frequent targets of antidumping actions, as well as end user industries dependent upon international suppliers, economists and consumer groups. These critics, and their government supporters, will call for further disciplines on initiation of antidumping actions, and the roll-back of the current trend in litigation, forcing the issue onto the agenda of future rounds of multinational trade negotiations, possibly in connection with competition policy.<sup>298</sup> The proponents of the antidumping laws will fiercely resist any perceived weakening of the Antidumping Agreement, however. The antidumping laws have served as a "safety valve," arguably assisting in trade liberalization in the sense that they allow Members a political fall-back, enabling them to agree to further tariff reductions. The domestic industries traditionally supporting strong antidumping laws throughout the world tend to be politically powerful and economically significant, thus assuring a constituency for strong antidumping protections in future multinational negotiations.

Regardless of how the antidumping issue is raised and addressed in future rounds of multinational negotiations, it is clear that it will be with us for the foreseeable future, posing a risk and challenge to exporting industries. In the era of the ascendancy of antidumping laws, exporting companies must familiarize themselves with the WTO Antidumping Agreement and applicable national antidumping laws, so that they may assess their vulnerability to antidumping action and decide upon a strategy to survive and prosper.

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<sup>298</sup> WTO Members will seek to initiate a new "Millennium Round" of multinational trade negotiations in 2000. See *Chances Good for New Round of WTO Talks in Millenium, Brittan Says*, Daily Executive (BNA), at A-19 (Nov. 24, 1997); *WTO Members to Set Out Approach to New Negotiations Next Year*, INSIDE U.S. TRADE, Dec. 26, 1997, at 14, 15 (negotiations "have not begun to tackle the more controversial issues, such as antidumping as it relates to competition policy."). See *supra* notes 262-70 for a further discussion of antidumping and competition law.