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# Amendments to the Antidumping and Countervailing Duty Laws Under the Omnibus Trade and Competitiveness Act of 1988

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*In this article, the authors review the changes that the Omnibus Trade Bill would make to current antidumping and countervailing duty law. Ms. Barshefsky and Ms. Zucker give a background of the law as enacted in the Trade Agreements Act of 1979 and the Trade and Tariff Act of 1984. The authors then provide a detailed legislative history of the Omnibus Trade Bill's principal amendments to the existing law of antidumping and countervailing duties.*

## I. Introduction

The antidumping (AD) and countervailing duty (CVD) laws are regularly invoked by U.S. producers seeking relief from unfair trade practices.<sup>1</sup> Although generally viewed as the most effective of the trade law remedies against unfair foreign competition,<sup>2</sup> there have

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<sup>1</sup> Between 1980 and 1986, 658 antidumping (AD) and countervailing duty (CVD) petitions had been filed; 219 AD and CVD orders and suspension agreements were in effect as of February 1987. See *Comprehensive Trade Legislation: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 100th Cong., 1st Sess. 652 (1987) [hereinafter *1987 House Hearings*].

<sup>2</sup> Other trade law remedies include section 337 of the Tariff Act of 1930 (codified at 19 U.S.C. §§ 1337, 1337a (1982 & Supp. IV 1986)), section 201 of the Trade Act of 1974 (codified at 19 U.S.C. §§ 2251-2253 (1982 & Supp. IV 1986)), section 406(a) of the Trade Act of 1974 (codified at 19 U.S.C. § 2436 (1982)), section 232 of the Trade Expansion Act of 1962 (codified at 19 U.S.C. § 1862 (1982)), and section 301 of the Trade Act of 1974 (codified at 19 U.S.C. §§ 2411-2416 (1982 & Supp. IV 1986)).

Section 337 prohibits unfair methods of competition and unfair acts in the importation or sale of merchandise which either substantially injures or destroys a healthy U.S. industry, prevents its establishment, or restrains or monopolizes U.S. trade. The International Trade Commission (ITC) investigates the allegations, unless the acts are within the purview of the AD/CVD laws, in which case it will not institute or will terminate its investigation. It may exclude articles from entry or issue cease and desist orders, subject to Presidential disapproval. Section 337 is most typically used to halt the importation of articles in violation of a valid U.S. patent or copyright. Section 337 has been amended by section 1342 of the Omnibus Trade and Competitiveness Act of 1988, see *infra* note 5, at H1895, in order to improve its effectiveness in cases involving intellectual property protection. Among the changes are deletion of the injury requirement, authorization to issue

been numerous attempts by U.S. industries to amend and strengthen the laws. United States industry activity was particularly evident during consideration of the Trade Agreements Act of 1979,<sup>3</sup> the Trade and Tariff Act of 1984,<sup>4</sup> and the present Omnibus Trade and Competitiveness Act of 1988.<sup>5</sup> Debate on all three Acts focused to varying degrees on specific provisions of the then-existing laws and the manner in which those provisions might more effectively protect U.S.

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cease and desist and consent orders for a single violation, and the availability of default procedures.

Under section 201 (the "escape clause"), the ITC investigates allegations that articles are being imported into the U.S. in such "increased quantities" as to be a "substantial cause" or threat of "serious injury" to domestic producers of a like or directly competitive article. Following an affirmative ITC determination and recommendation for relief, the President must decide what relief, if any, is to be provided to the U.S. industry. His action is subject to disapproval under a joint resolution of Congress (which requires a two-thirds majority in both Houses). Under the Omnibus Act, section 201 has been amended to encourage efforts by the domestic industry to "adjust" to import competition. In addition, provisional relief for perishable agricultural commodities is authorized, certain ITC investigative and postinvestigative procedures are altered, and Presidential action is modified. Omnibus Act, *infra* note 5, § 1401, at H1899.

Section 232 authorizes restraints on articles imported in such quantities or under such circumstances as to threaten to impair national security. The Secretary of Commerce, in consultation with the Secretary of Defense, must investigate and report his findings and recommendations to the President within one year of receiving a petition or otherwise initiating an investigation under section 232. Under present law, there is no time limit for Presidential action. The Omnibus Act amends section 232 by, *inter alia*, reducing the investigatory period from twelve to six months, enhancing the role of the Secretary of Defense, and requiring the President to decide whether to take action within 90 days of receiving the Secretary's report. Omnibus Act, *infra* note 5, § 1501, at H1908-09.

Section 406 provides for an ITC investigation and discretionary Presidential relief in cases involving imports from Communist countries which are causing "market disruption." Market disruption exists when rapidly increasing imports are a significant cause of material injury to the domestic producer of a "like" or directly competitive article. Under the Omnibus Act, section 406 has been amended to define the terms "rapidly" and "significant cause," and to clarify the factors which the ITC must consider in determining market disruption. Omnibus Act, *infra* note 5, § 1411, at H1904.

Section 301 authorizes the President to enforce U.S. rights under trade agreements and to respond to foreign acts or practices which are unjustifiable, unreasonable, or discriminatory, and which burden or restrict U.S. commerce. Under the Omnibus Act, section 301 has been amended by transferring the authority to make determinations, to engage in decision-making, and to implement relief from the President to the United States Trade Representative (USTR). Other section 301 amendments include mandatory action for foreign trade agreements violations and other unjustifiable practices, subject to certain exceptions; a reduction in and imposition of time limits for action; an expansion of actionable practices; the addition of modification, termination, and monitoring authority; and the addition of a "super 301" provision as a way to identify and respond to trade liberalization priorities. Omnibus Act, *infra* note 5, §§ 1301-1304, at H1881-87.

<sup>3</sup> The Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979) (codified at 19 U.S.C. §§ 1671-1677g (1982) and elsewhere in 19 U.S.C.) [hereinafter 1979 Act].

<sup>4</sup> The Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948 (1984) (codified at 19 U.S.C. §§ 1671-1677h (Supp. IV 1986)) [hereinafter 1984 Act].

<sup>5</sup> The Omnibus Trade and Competitiveness Act of 1988, H.R. 3, 100th Cong., 2d Sess. § 1342, 133 CONG. REC. H1883-2008 (daily ed. Apr. 20, 1988) [hereinafter Omnibus Act].

industry competitiveness without violating U.S. international obligations.

As with previous trade law legislation, the current Omnibus Act spawned much debate among U.S. industries, the Administration, and the Congress as to the precise types and extent of trade law changes necessary to further increase the effectiveness of the AD and CVD laws. Even more so than its predecessor legislation, however, the Act ultimately accepted by Congress reflects, in the authors' views, first, a general belief that the AD and CVD laws are already, by and large, effective tools against unfair foreign practices; and, second, that U.S. trade law changes must be GATT<sup>6</sup> compatible. As a result, more contentious amendments, many of which were considered and rejected by Congress in 1984, were either again defeated or substantially modified. The concerns that mitigated against their passage in 1984, persisted: certain provisions would have allegedly violated U.S. international obligations under the GATT, and the Subsidies<sup>7</sup> or Antidumping<sup>8</sup> Codes; some were thought likely to provoke retaliation against U.S. exports or the enactment of mirror legislation by various trading partners;<sup>9</sup> and some were viewed as too special-interest oriented.<sup>10</sup> By contrast, the provisions which remain in the Omnibus Act tend to shore up various aspects of the AD and CVD laws without altering their fundamental thrust.

This article will review the principal AD and CVD amendments proposed in the House and Senate bills, both those which survived Conference Committee action for ultimate inclusion in the final Omnibus Act, and those which did not.<sup>11</sup> It will describe the genesis of

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<sup>6</sup> General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

<sup>7</sup> Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, *done* Apr. 12, 1979, 31 U.S.T. 513, 530, T.I.A.S. No. 9619 (entered into force Jan. 1, 1980) [hereinafter Subsidies Code].

<sup>8</sup> Agreement on Interpretation of Article VI of the General Agreement on Tariffs and Trade, *done* Apr. 12, 1979, 31 U.S.T. 4919, T.I.A.S. No. 9650 (entered into force Jan. 1, 1980) [hereinafter Antidumping Code].

<sup>9</sup> See *Mastering The World Economy: Hearings Before the Senate Comm. on Finance*, 100th Cong., 1st Sess. 67 (1987) (statement by United States Trade Representative (USTR) Clayton Yeutter).

<sup>10</sup> For example, among the proposals considered by the conferees was the "Domenici amendment" which created a new cause of action under section 301 for "subsidized foreign excess capacity." See 133 CONG. REC. S9367 (daily ed. July 8, 1987). While the amendment attracted support from various industrial sectors, the conferees ultimately rejected its inclusion in the Omnibus Act as, *inter alia*, too special-interest oriented. The provision was viewed as the "copper amendment." See Senate Offer on Phase II Issues (Mar. 15, 1988).

<sup>11</sup> H.R. 4800, 99th Cong., 2d Sess. (1986), which was passed by the House of Representatives in 1986, was reintroduced as H.R. 3, the "Trade and International Economic Policy Reform Act," on January 6, 1987. Following markup by several House Committees and consideration on the floor, the full House passed H.R. 3 on May 5, 1987. The provisions of S. 490, 100th Cong., 1st Sess., 132 CONG. REC. S1852 (daily ed. Feb. 5 1987), as reported by the Senate Finance Committee on June 11, 1987, and those of other Senate committees were reintroduced as S. 1420, "The Omnibus Trade Act of 1987," on June 23,

the debate surrounding each of these provisions, the views of congressional and Administration officials, and, where the issue was particularly controversial, the concerns expressed by interested business groups and labor organizations. The article then reviews relevant Conference Committee activity and highlights areas of compromise. The authors conclude that the AD and CVD provisions contained in the Omnibus Act tend to reflect a reasoned and measured response to the problems of dumping and subsidization.

## II. Background

As a predicate to reviewing the trade law proposals at issue, it is helpful briefly to outline the scope of the U.S. antidumping and countervailing duty laws.

### A. *The Antidumping Law*

Dumping is traditionally defined as price discrimination between national markets,<sup>12</sup> that is, the practice of selling the same or similar merchandise at different prices in different regions. This term applies both to price discrimination between a producer's home and export markets as well as to discrimination among the producer's export markets. The exporter that dumps its merchandise in foreign markets seeks to maximize its profits or gain a competitive advantage in the marketplace by charging different prices in different countries for the same or similar merchandise.<sup>13</sup> The U.S. antidumping law also encompasses import pricing which, even though not lower than prices charged by the exporter in other countries, is below the exporter's cost of producing the merchandise.

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1987. This bill [hereinafter Senate Bill], with floor amendments, was passed and inserted as an amendment to H.R. 3 [hereinafter House Bill] by the Senate on July 21, 1987. The Conference Committee met intermittently beginning in September 1987, and then actively throughout March and April of 1988, to reconcile differences between the House and Senate versions of the trade bill. The final Omnibus Act was passed by the House on April 21, 1988, by a vote of 312 to 107, and by the Senate on April 27, 1988, by a vote of 63 to 36, with one abstention.

<sup>12</sup> The standard work in this area is J. VINER, *DUMPING: A PROBLEM IN INTERNATIONAL TRADE* (1923 & reprinted 1966).

For a comprehensive treatment of dumping, from which the instant discussion and footnotes were excerpted, see Barshefsky & Cunningham, *The Prosecution of Antidumping Actions Under the Trade Agreements Act of 1979*, 6 N.C.J. INT'L L. & COM. REG. 307 (1981).

<sup>13</sup> C. KINDLEBERGER & P. LINDERT, *INTERNATIONAL ECONOMICS* 166-67 (6th ed. 1978). Although dumping is often described as selling at a lower price in one national market than in another, this description is both over- and under-inclusive. A lower export price, compared to the home market price, may well be justified by more favorable credit terms, sales conditions, and the like, for export transactions. On the other hand, a producer that sells at a higher price abroad than at home may still be vulnerable to dumping charges if the export price does not fully reflect the extra costs of the export transaction. Cf. Viner, Memorandum on Dumping, *annexed to DUMPING: A PROBLEM IN INTERNATIONAL TRADE* 347 (1966). The underlying concept is that the prices compared must be adjusted to compensate for differences in the costs of manufacturing and marketing before adequate price comparisons among national markets can be made.

While dumping is often synonymous with price discrimination, the prosecution of an antidumping action consists of two elements:<sup>14</sup> first, assuming the simplest case, a determination by the Department of Commerce (Commerce) that the foreign exporter has, in fact, discriminated in price between its home market sales and sales to the United States;<sup>15</sup> and second, a determination by the International Trade Commission (ITC or Commission) that a domestic industry has been materially injured or threatened with material injury or that an industry in the United States has been materially retarded by reason of the alleged sales at less than fair value (LTFV).

### B. *The Countervailing Duty Law*

The U.S. countervailing duty law is intended to offset the competitive advantage conferred on imported merchandise whenever a foreign government (or a person, corporation, or association within that country) directly or indirectly subsidizes the manufacture, production, or exportation of that merchandise.<sup>16</sup> The CVD law proscribes two forms of assistance: export subsidies and domestic subsidies. Export subsidies are tied to or are contingent upon the export performance of an industry in the foreign country, and typically consist of financial, tax, or other incentives designed to foster the exportation of merchandise to the United States. Under U.S. law, export subsidies are essentially countervailable *per se*.

Domestic subsidies, on the other hand, are not contingent upon

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<sup>14</sup> 19 U.S.C. § 1673 (1982).

<sup>15</sup> To the extent home market sales are inadequate in number to form a basis for price comparison, whether by reason of a simple dearth of home market sales or because a significant portion of those sales have been made at prices below the cost of production, the computation of a true home market price may not be possible. In such a case, Commerce examines sales to third countries, or utilizes a constructed value approach. See 19 U.S.C. § 1677b(a)(1), (2) (1982 & Supp. IV 1986).

<sup>16</sup> The 1979 Act, *supra* note 3, was enacted to implement the Agreement on Subsidies and Countervailing Measures reached during the Tokyo Round of Multilateral Trade Negotiations. The current version of section 1671 states that if:

(1) the administering authority determines that—

(A) a country under the Agreement, or

(B) a person who is a citizen or national of such a country, or a corporation . . . organized in such a country, is providing, directly or indirectly, a subsidy with respect to the manufacture, production, or exportation of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States, and

(2) the Commission determines that—

(A) an industry in the United States—

(i) is materially injured, or

(ii) is threatened with material injury, or

(B) the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise, or by reason of sales (or the likelihood of sales) of that merchandise for importation then there shall be imposed upon such merchandise a countervailing duty, in addition to any other duty imposed, equal to the amount of the net subsidy.

19 U.S.C. § 1671 (1982 & Supp. IV 1986).

export performance, but are provided to exporters and nonexporters alike as a means of reducing overall production costs.<sup>17</sup> Unlike export subsidies, in order to be actionable, a domestic subsidy must be "sector specific"—that is, provided to "a specific enterprise or industry or group of enterprises or industries." It must also be paid or bestowed, directly or indirectly on the "manufacture, production or export" of the product at issue.<sup>18</sup> Examples of domestic subsidies include the provision by government of equity or debt financing to a specific enterprise on terms inconsistent with commercial considerations, the making up of a company's net operating losses, or the assumption by the government of specific contractual obligations previously held by a corporation.

As in the case of dumping, evidence of subsidization is evaluated by the Department of Commerce. Unlike the AD law, however, there is no blanket entitlement to a material injury test.<sup>19</sup> An ITC injury finding is only required for those countries which are signatories to the GATT Subsidies Code or which provide reciprocal benefits to the United States.<sup>20</sup>

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<sup>17</sup> 19 U.S.C. § 1677(5) (1982) provides as follows:

(5) Subsidy. The term "subsidy" has the same meaning as the term "bounty or grant" as that term is used in section 1303 of this title, and includes, but is not limited to, the following:

(A) Any export subsidy described in Annex A to the Agreement (relating to illustrative list of export subsidies).

(B) The following domestic subsidies, if provided or required by government action to a specific enterprise or industry, or group of enterprises or industries, whether publicly or privately owned, and whether paid or bestowed directly or indirectly on the manufacture, production, or export of any class or kind of merchandise:

(i) The provision of capital, loans, or loan guarantees on terms inconsistent with commercial considerations.

(ii) The provision of goods or services at preferential rates.

(iii) The grant of funds or forgiveness of debt to cover operating losses sustained by a specific industry.

(iv) The assumption of any costs or expenses of manufacture, production, or distribution.

<sup>18</sup> See *id.* § 1677(5)(B).

<sup>19</sup> The term "material injury" is defined in the Trade Agreements Act as a harm which is not "inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A) (1982).

<sup>20</sup> See *supra* notes 16-17. The 1979 Act, *supra* note 3, added a new Title VII, 19 U.S.C. §§ 1671-1677g, to the countervailing duty law, which previously had consisted of the Tariff Act of 1930, § 303, 46 Stat. 590, 687, as amended by the Trade Act of 1974, Pub. L. No. 93-618 § 331, 88 Stat. 1978, 2049-52 (1975). Section 303 provides for the imposition of countervailing duties to offset "bounties or grants" provided by a foreign government to products made within its nation that are imported into the United States. Section 303 contains no injury test requirement. Although the GATT requires such a determination before countervailing duties may be levied, it exempts preexisting legislation from this rule. The Subsidies Code, however, prohibits the imposition of countervailing duties on signatories in the absence of an injury determination. Subsidies Code, *supra* note 7, pt. II, arts. 4(4), 6.

In response to this (along with other provisions of the agreements reached in the Tokyo Round), section 303 was restricted to products from countries that are not "countries under the Agreement" as defined in section 701(b) of the 1979 Act, *supra* note 3, 19

With this brief overview in mind, the following sections will address the principal amendments to the antidumping and countervailing duty laws contained in the Omnibus Act,<sup>21</sup> as well as those proposed but not accepted. As will be seen, the provisions ultimately approved by the conferees are substantially more moderate in reach than those contained in either the original Senate or House bills.

### III. Antidumping Provisions

A number of proposed amendments to the antidumping statute would have significantly altered its substance and administration.

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U.S.C. § 1671(b) (1982). Title VII, which contains an injury requirement, governs imports from Subsidies Code signatory nations and from nations that have reached an agreement with the United States with obligations substantially equivalent to those imposed by the Subsidies Code, or that have met the requirements of section 701(b)(3) of the Act, 19 U.S.C. § 1671(b)(3) (1982) (concerning preexisting unconditional most-favored-nation agreements).

Note that the House and Senate conferees agreed to section 334 of the Senate Bill, *supra* note 11, which permits the USTR to revoke the injury test for any country that violates a Subsidies Code commitment it has undertaken with respect to the United States, if the foreign country does not honor, or announces it does not intend to honor, its obligations. Omnibus Act, *supra* note 5, § 1314, at H1888. See also *Joint Explanatory Statement of the Committee of Conference*, 133 CONG. REC. H2013-43, at 2031 (daily ed. Apr. 20, 1988) [hereinafter *Joint Conference Statement*]. The conferees also agreed to section 169(b) of the House Bill, *supra* note 11, which requires the USTR to review Subsidies Code commitments made to the United States, and to report to Congress on whether such commitments have been met, the time frames for compliance, and any recommendations on how to improve commitments policy. Omnibus Act, *supra* note 5, § 1336(b), at H1895; see also *Joint Conference Statement*, at H2041-42. Section 168 of the House Bill, *supra* note 11, which was dropped in conference, would have retroactively applied the injury test to imports from countries which assumed Subsidies Code or equivalent obligations after a CVD order was issued, or during pending investigations.

<sup>21</sup> The conferees agreed to three provisions of general applicability to the antidumping and countervailing duty laws. The first requires any person submitting factual information in an antidumping or countervailing duty proceeding to certify that such information is accurate and complete to the best of that person's knowledge. House Bill, *supra* note 11, § 161; Senate Bill, *supra* note 11, § 328; Omnibus Act, *supra* note 5, § 1331, at H1894; see also *Joint Conference Statement*, *supra* note 20, at H2040. The second provision requires (current law permits) that Commerce and the ITC release to parties, under administrative protective order, all business proprietary information presented to or obtained by it in the course of an antidumping or countervailing duty proceeding, with a limited exception for privileged or classified information, or information for which there is a clear and compelling need to withhold disclosure. House Bill, *supra* note 11, § 158; Senate Bill, *supra* note 11, § 327; Omnibus Act, *supra* note 5, § 1332, at H1894; see also *Joint Conference Statement*, *supra* note 20, at H2040. The third requires Commerce to establish procedures for the correction of ministerial errors within a reasonable time. House Bill, *supra* note 11, § 163; Omnibus Act, *supra* note 5, § 1333, at H1894; see also *Joint Conference Statement*, *supra* note 20, at H2041. Commerce has recently published draft regulations establishing such procedures. 50 Fed. Reg. 24,207 (Int'l Trade Admin. 1985), 51 Fed. Reg. 29,046 (Int'l Trade Admin. 1986). A fourth general provision would have required Commerce to explain, in its decisions, any significant deviation from established administrative precedent. House Bill, *supra* note 11, § 162. This House proposal was dropped in conference; it is the view of the conferees, however, that Commerce and the ITC should provide a full explanation of the rationale for their determinations. See *Joint Conference Statement*, *supra* note 20, at H2043.



Examples include provisions that would have changed the manner in which certain antidumping price comparisons were to be made (Hollings ESP amendment); imposed responsibility on U.S. end purchasers for duty liability in certain cases; instituted broad-scale monitoring of multiple dumping offenders, coupled with the self-initiation by Commerce of expedited antidumping investigations; and created a more effective private right of action for dumping under the Antidumping Act of 1916. Ultimately, the conferees rejected such radical alterations to the law, and instead confined their activity to making certain clarifications in the law, as well as to responding to perceived deficiencies in applying present antidumping methodology to nonmarket economy imports and imports of short life cycle products.

*A. Measuring Dumping Margins of Nonmarket Economy Imports*

As noted earlier,<sup>22</sup> in the simplest antidumping case Commerce must determine whether the foreign producer has discriminated in price between its home market and export sales. To this end, Commerce will compare (after appropriate adjustments) a foreign producer's home market prices with the prices at which the merchandise is sold by that producer in the United States.<sup>23</sup> If, after making the appropriate price comparisons, Commerce determines that dumping has occurred, and if the ITC finds that the U.S. industry producing comparable merchandise is being injured by reason of the dumping, Commerce will issue an antidumping duty order.<sup>24</sup> The order directs Customs to assess duties on the imported product equal to the difference between the producer's adjusted foreign market value and its U.S. prices (the dumping margin).<sup>25</sup>

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<sup>22</sup> See *supra* notes 12-15 and accompanying text.

<sup>23</sup> Under current law, Commerce cannot take into account in determining the foreign market value of the imported goods any sale or offer for sale that is intended to establish a fictitious market. 19 U.S.C. § 1677b(a) (1982 and Supp. IV 1986); 19 C.F.R. § 353.18 (1987). The House receded to section 336 of the Senate Bill which provides that Commerce may consider as evidence of the establishment of a fictitious market the occurrence of different home market price movements for different forms of a product subject to an antidumping duty order if the movements appear to reduce the dumping margin. Omnibus Act, *supra* note 5, § 1319, at H1889; see also *Joint Conference Statement, supra* note 20, at H2033.

<sup>24</sup> 19 U.S.C. § 1673d(c)(2) (1982).

<sup>25</sup> The amount of duties owing on imported merchandise is determined in the context of annual reviews conducted pursuant to section 751 of the 1979 Act (codified as amended at 19 U.S.C. § 1675 (1982 & Supp. IV 1986)). Prior to the first review, the cash deposit to be posted on all entries of the merchandise is based upon the dumping margin found in the case. After the first review, the weighted average margin computed on the basis of actual duties assessed on the merchandise will form the amount of the cash deposit to be posted in the ensuing year, and so forth. Under present law, Commerce is authorized, in certain instances, to review an antidumping order within 90 days of its issuance rather than await the annual review. 19 U.S.C. § 1673e (1982 & Supp. IV 1986). The results of the expedited review would then serve as the basis of the estimated antidumping duties that must be deposited, until the next annual review, if one is requested. Section

Cases involving dumped imports from nonmarket economy countries (NMEs) are unique because domestic costs and prices in an NME are not based upon market factors, and thus do not provide a proper basis of comparison with an NME's U.S. sales prices. The nonconvertibility of an NME's currency also prevents Commerce from making antidumping price comparisons on a U.S.-dollar basis, as is necessary for dumping computation and duty assessment purposes. Therefore, to determine whether NME imports are being dumped, Commerce uses a "surrogate country" methodology in which prices of the merchandise in or from a market economy country are used to determine the foreign market value of the subject imports.<sup>26</sup> Under this methodology, Commerce will examine domestic prices or export prices (domestic prices are preferred) from a market economy country at a stage of economic development comparable to that of the NME under investigation.<sup>27</sup> The relevant prices in that market economy are used as a substitute for NME home market prices, and it is against these surrogate prices that the NME's U.S. sales are measured in order to determine whether dumping has occurred.

When actual verifiable domestic or export prices are not available from a comparable surrogate country,<sup>28</sup> Commerce may use a standard constructed value approach as a substitute for home market pricing data, based upon costs of production in the surrogate country (costs of materials, labor, and general expenses) plus a minimum eight percent profit and ten percent overhead factor.<sup>29</sup> If the merchandise is not produced in a comparable market economy, Commerce may use constructed value based on the "factors of

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331 of the Senate Bill, *supra* note 11, to which the House receded, limits the circumstances under which Commerce may institute expedited reviews, to cases in which:

- (1) the original investigation was not designated as extraordinarily complicated;
- (2) the final antidumping duty determination was not postponed because of a request by the exporters;
- (3) the foreign manufacturer or exporter provides credible evidence that the dumping margin will decline as a result of the review; and
- (4) the review would be based on representative sales that are sufficient for purposes of comparison.

*Joint Conference Statement, supra* note 20, at H2038; *see also* Omnibus Act, *supra* note 5, § 1325, at H1892; Senate Bill, *supra* note 11, § 331.

<sup>26</sup> The relevant statutory provision, 19 U.S.C. § 1677b(c) (1982), entitled "State-controlled economies," provides that when the economy of such a country is controlled to the extent that fair market value cannot be determined, Commerce is to use either a surrogate country or constructed value methodology. *See also* 19 C.F.R. § 353.8 (1987).

<sup>27</sup> 19 U.S.C. § 1677b(c)(1) (1982).

<sup>28</sup> This is often the case since third country producers, which are under no legal compulsion to provide data to Commerce, are generally reluctant to divulge pricing and other sensitive data to the U.S. Government for use in a trade action in which they have no involvement or interest. *See* S. REP. NO. 71, 100th Cong., 1st Sess. 106 (1987) [hereinafter S. REP.] (report of the Senate Finance Committee on S. 490).

<sup>29</sup> 19 C.F.R. § 353.6 (1987).

production"<sup>30</sup> incurred in producing the merchandise in the NME, valued according to costs and prices in a market economy that is "reasonably comparable" in economic development to the NME.<sup>31</sup> Alternatively, Commerce may use prices or constructed value based upon a market economy's sales to or costs of production in the United States. Whatever the surrogate value chosen (domestic prices, export prices, or constructed value), Commerce will compare that value to the NME's sales prices to the United States in assessing whether and to what extent a dumping margin exists.

For many years, it has been recognized that the surrogate country methodology creates unpredictability for both nonmarket suppliers (and their U.S. importers), and for the competing domestic industry.<sup>32</sup> Because Commerce's method for establishing foreign market value is largely discretionary and precedent is of limited use, an exporter cannot typically gauge in advance whether a particular export price will trigger an antidumping action. Nor, by the same token, is the potential petitioner able to predict with any certainty the probable outcome of its case.<sup>33</sup> As a result of these deficiencies, numerous proposals have been advanced in previous Congresses as well as in the current session to make administration of the NME antidumping provisions more predictable.<sup>34</sup>

While the House bill did not contain an NME dumping provision, the Senate, the Administration, and various business groups put forward several alternative pricing formulations to replace the surrogate country methodology. The Senate proposed a pricing benchmark test.<sup>35</sup> If Commerce determined that foreign market value (FMV) in the NME could not be accurately determined under the normal methodology, the calculation of FMV would be made using a pricing benchmark based on the trade-weighted average price of arms-length sales in the United States of comparable<sup>36</sup> merchan-

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<sup>30</sup> *Id.* § 353.8(c).

<sup>31</sup> *See, e.g.*, Barium Carbonate from the PRC, 49 Fed. Reg. 33,913 (Int'l Trade Admin. 1984) (final determination); Barium Chloride from the PRC, 49 Fed. Reg. 13,728 (Int'l Trade Admin. 1984) (preliminary determination); Potassium Permanganate from the PRC, 48 Fed. Reg. 57,347 (1983) (final determination) (where a comparable surrogate was uncooperative and no other comparable country manufactured the product).

<sup>32</sup> S. REP., *supra* note 28, at 108; *see also* H.R. REP. NO. 725, 98th Cong., 2d Sess. 41 (1984).

<sup>33</sup> S. REP., *supra* note 28, at 108; *see also* H.R. REP. NO. 725, 98th Cong., 2d Sess. 41 (1984).

<sup>34</sup> For example, in 1984, an "artificial pricing provision" was proposed under which Commerce was to determine foreign market value on the basis of the "lowest free market price" of the imported article in the U.S. market, if that price was a competitive free market price, as an alternative to the statutory "surrogate country" test. *See* H.R. REP. NO. 725, 98th Cong., 2d Sess. 40 (1984).

<sup>35</sup> Senate Bill, *supra* note 11, § 325.

<sup>36</sup> "Comparable" merchandise is defined more broadly than "such or similar" merchandise in the present statute. Because quality differences might account for price differences, Commerce was to make appropriate quality adjustments to compensate for

dise produced in an eligible<sup>37</sup> market economy country accounting for the largest volume of United States imports in the most recent period. If Commerce were to find no such eligible market economy country, constructed value of comparable merchandise in a market economy would be used in establishing the FMV with which to compare the NME's U.S. prices.<sup>38</sup>

The Administration also proposed a benchmark test, but insisted that the benchmark measure of dumping be the lowest import price to the United States from an eligible market economy country.<sup>39</sup> Some business groups opposed this formulation and supported instead the use of the average price for the largest volume exporter;<sup>40</sup> others, rejecting pricing tests altogether, proposed that a finding of injury be sufficient to impose duties on NME imports.<sup>41</sup> Still others favored a "factors of production" approach in lieu of a benchmark test, if petitioner so requested.<sup>42</sup> Representatives of NMEs, such as the People's Republic of China,<sup>43</sup> objected to any benchmark based upon largest volume, and proposed instead the

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differences between the benchmark and the NME merchandise subject to investigation. See S. REP., *supra* note 28, at 106.

<sup>37</sup> The Senate Bill, *supra* note 11, defined the term "eligible market economy country," as any country that is not a nonmarket economy country, where comparable goods are produced and exported, and which Commerce determines is appropriate, taking into account factors including, but not limited to:

- (1) whether comparable goods from that country are subject to an antidumping or countervailing duty order (or agreement suspending any such investigation);
- (2) whether any international agreement affecting the price or quantity of imports is in effect; or,
- (3) whether the level of imports is *de minimis*.

*Joint Conference Statement, supra* note 20, at H2032. The Senate provision was struck in conference. *Id.*

<sup>38</sup> If such merchandise was subject to an antidumping order or there was reason to believe it was usually sold at less than fair value, Commerce would calculate foreign market value from the "factors of production" incurred in producing the merchandise plus those amounts specified in 19 U.S.C. § 1677b(e) (1982), for profits, expenses, and packing. Factors of production would include hours of labor, quantities of raw materials, utilities, capital costs, and other relevant factors. This provision may be particularly apt in the context of commodity or fungible product cases where factors of production (*e.g.*, through-put rates) are typically publicly available.

<sup>39</sup> See 1987 House Hearings, *supra* note 1, at 652-53 (statement of Commerce Deputy Assistant Secretary G. Kaplan).

<sup>40</sup> *Id.* at 559 (for example, statement of Labor Industry Coalition for International Trade (LICIT)).

<sup>41</sup> *Id.* at 581 (statement of U.S. Council for International Business); *id.* at 281 (statement of U.S. Chamber of Commerce Task Force).

<sup>42</sup> *Id.* at 1131 (statement of Trade Reform Action Coalition (TRAC) supporting either a factors of production approach or, alternatively, use of average price of all free world (including U.S.) producers as a benchmark).

<sup>43</sup> See *id.* at 612 (statement of Committee for Fair Trade with China). The conferees retained a provision to require the Secretary of Commerce to study and report to Congress within 12 months "on the new market orientation" of the P.R.C., including the effect of this orientation on the application of U.S. trade laws to China. In this regard, the Secretary is to address "any possible need for changes in . . . [the AD law] to deal more appropriately with countries in transition to more market-oriented economies." House Bill,

creation of a special country status that would enable the exporter to prove that its costs of production were low. Most observers tended to agree that while some objective benchmark would indeed create predictability in the administration of the law, the choice of any benchmark was an essentially arbitrary exercise. Virtually any benchmark formulation could be justified in one way or another.<sup>44</sup>

Recognizing the arbitrariness of the exercise, the House and Senate conferees agreed to an NME antidumping provision that replaces the surrogate country methodology with a constructed value approach based upon the "factors of production" incurred in producing the merchandise in the NME, as valued in a comparable market economy country.<sup>45</sup> The factors of production examined in any given case are to include, but are not limited to, labor, raw materials, energy and other utilities, and representative capital costs, including depreciation. They are to be valued<sup>46</sup> using the best available information in a market economy country, or countries.<sup>47</sup> In this regard, Commerce is to use a country which is at a level of economic development comparable to that of the NME under investigation, and is also a significant producer<sup>48</sup> of the same class or kind of merchandise as that at issue in the case. If adequate information to value the factors is not available, Commerce is to base FMV on the prices at which such or similar merchandise of comparable quality is sold for export from an appropriate market economy country or countries, to other countries, including the United States.<sup>49</sup> Omitted, therefore,

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*supra* note 11, § 169; Senate Bill, *supra* note 11, § 973; Omnibus Act, *supra* note 5, § 1336, at H1895; see also *Joint Conference Statement*, *supra* note 20, at H2041.

<sup>44</sup> For example, proponents of the *lowest price* test argued, *inter alia*, that NME product quality is typically poor by Western standards thus justifying a low price. Proponents of the *largest volume* concept argued, *inter alia*, that NMEs should not be able to price undercut key suppliers to the United States.

<sup>45</sup> Omnibus Act, *supra* note 5, § 1316, at H1888; see also *Joint Conference Statement*, *supra* note 20, at H2032.

<sup>46</sup> In valuing factors, Commerce should seek to use, if possible, data based on the production of the same general class or kind of merchandise at a production scale and level of technology similar to producers under investigation. *Joint Conference Statement*, *supra* note 20, at H2032.

<sup>47</sup> Commerce shall avoid using dumped or subsidized prices. See *Joint Conference Statement*, *supra* note 20, at H2032. The House had wanted additional language to indicate that the prices used should be "market-driven," but the reference was deleted. See HOUSE COUNTEROFFER ON AMENDMENTS TO THE COUNTERVAILING DUTY AND ANTIDUMPING LAWS AND MARKET DISRUPTION IMPORT RELIEF LAW 2 (Mar. 23, 1988) [hereinafter March 23 HOUSE OFFER].

<sup>48</sup> The term "significant producer" includes any country that is a significant net exporter and, if appropriate, Commerce may use a significant net exporting country in valuing factors. *Joint Conference Statement*, *supra* note 20, at H2032.

<sup>49</sup> *Id.* Commerce is to avoid export prices which are distorted, and should attempt to ensure that adjustments be made for quality differences in the merchandise compared, as practicable. *Id.* The new legislation also defines an NME as any foreign country that Commerce determines does not operate on market principles of cost or pricing such that sales do not reflect the fair value of the merchandise. Commerce's determination will not be subject to judicial review, or otherwise contestable in any investigation conducted under

from the present NME antidumping methodology are the use of surrogate home market prices in determining FMV and the standard constructed value approach.

*B. Calculation of Exporter's Sales Price*

One of the more controversial amendments considered by the conferees involved proposed changes to the manner in which Commerce computes margins of dumping in cases in which the foreign exporter and U.S. importer are related parties. While ultimately defeated in conference, the amendment, originally introduced by Senator Hollings, reflected the frustration that even in successfully prosecuted cases, the dumping law was simply not affording a sufficient degree of protection—as measured by the size of the dumping margin—to injured U.S. industries. Before discussing the specifics of the Hollings amendment, a brief review of dumping price computation is necessary.

In comparing a foreign producer's home market and U.S. prices, Commerce will make certain adjustments in order to arrive at an ex-factory price comparison for the merchandise involved. Adjustments which Commerce typically makes to observable market prices in order to derive ex-factory prices include adjustments for physical differences in the merchandise sold in the two markets, differences in quantities sold, and other differences in the circumstances of sale; packing and delivery costs; and applicable taxes and duties.<sup>50</sup> The statute and regulations prescribe the manner in which these adjustments are to be made to the "United States price" (USP) and to FMV.

Before making its computation, Commerce must first investigate the structure of the transaction in order to determine the appropriate USP to utilize as a starting point. United States price may be based either on "purchase price"<sup>51</sup> or on "exporter's sales price" (ESP).<sup>52</sup> Purchase price is defined as the price at which the exported merchandise is purchased by the first unrelated buyer *prior to* importation into the United States. It is used, most typically, when the

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the law. Factors which Commerce must consider in assessing whether the country is an NME include the extent of government ownership or control of the means of production; government control over the allocation of resources, price and output decisions of enterprises and international transactions; and the extent of currency convertibility, freely bargained wages, and openness to joint ventures and foreign investment. *Id.*

A special rule for suspension of NME AD investigations was also added to 19 U.S.C. § 1673c (1982 & Supp. IV 1986). Commerce may suspend an investigation based on a quantitative restraint agreement if: (1) it is in the public interest, (2) effective monitoring is practicable, and (3) it will prevent the suppression or undercutting of domestic prices caused by the subject imports. Omnibus Act, *supra* note 5, § 1316, at H1888; *Joint Conference Statement, supra* note 20, at H2032.

<sup>50</sup> See 19 U.S.C. § 1677a(d) (1982); 19 C.F.R. §§ 353.10, 353.14-16 (1987).

<sup>51</sup> 19 U.S.C. § 1677a(b) (Supp. IV 1986).

<sup>52</sup> *Id.* § 1677a(c) (1982).

foreign exporter and U.S. importer are unrelated parties and where no imported inventory of the merchandise is held for later sale. As a consequence, the final sales price is agreed to between the parties prior to importation of the merchandise into the United States. ESP, on the other hand, is typically used when an exporter and importer are related parties (such as a parent/subsidiary relationship), and where inventorying of the merchandise in the United States for later sale is contemplated. It is thus the price at which the merchandise is purchased by the first *unrelated* buyer *after* importation into the United States.

To arrive at an ex-factory price in ESP cases, Commerce will take into account, in addition to the adjustments noted above, direct and indirect selling expenses incurred in the United States by the related party. While Commerce will reduce the home market price by the full amount of direct selling expenses incurred in the United States,<sup>53</sup> it will only deduct indirect selling expenses allocated to home market sales up to the amount of indirect selling expenses allocated to the U.S. sales.<sup>54</sup> The amount of indirect selling expenses deducted from the home market price is known as the "ESP offset."<sup>55</sup> Apart from selling expense deductions in ESP situations, Commerce has never deducted profit attributable to the ultimate sale of the merchandise either from FMV or USP.<sup>56</sup>

While not provided for in the statute, Commerce promulgated the ESP offset rule in its regulations in 1980.<sup>57</sup> It maintained that in order to ensure a fair pricing comparison, indirect selling expenses deducted from the U.S. price should be offset by similar deductions from foreign market value.<sup>58</sup> "Not to take into account any indirect selling expenses incurred on behalf of foreign market sales would be patently unfair, as it would result in the comparison of incomparable prices."<sup>59</sup> In *Smith-Corona v. United States*, the Court of Appeals for the Federal Circuit stated that, without the ESP offset, comparisons based on the ESP would be skewed to create a higher dumping margin; the offset was an attempt to achieve the fair comparison required

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<sup>53</sup> 19 C.F.R. § 353.15(a) (1987) defines direct selling expenses as those which bear a direct relationship to the sales under consideration. See also U.S. DEP'T OF COMMERCE, STUDY OF ANTIDUMPING ADJUSTMENTS METHODOLOGY AND RECOMMENDATIONS FOR STATUTORY CHANGE 34 (Nov. 1985) [hereinafter 1985 COMMERCE STUDY] (direct selling expenses include, *e.g.*, credit expenses incurred on the specific merchandise at issue, or certain advertising expenses associated with the product).

<sup>54</sup> 19 C.F.R. § 353.15(c) (1987). See also 1985 COMMERCE STUDY, *supra* note 53, at 34 (indirect selling expenses are those expenses allocated to the sales under consideration, from a general pool of expenses related to those sales and to other sales).

<sup>55</sup> 1985 COMMERCE STUDY, *supra* note 53, at 42.

<sup>56</sup> A profit component is deducted, however, where further processing of the product is accomplished in the United States prior to ultimate sale. See *id.*

<sup>57</sup> 45 Fed. Reg. 8192, 8192-93 (Int'l Trade Admin. 1980).

<sup>58</sup> *Id.*

<sup>59</sup> 1985 COMMERCE STUDY, *supra* note 53, at 58.

by the statute.<sup>60</sup>

The Hollings amendment<sup>61</sup> to the Senate bill would have eliminated the ESP offset by prohibiting any deduction for indirect selling expenses from foreign market value, while retaining the deduction from ESP. The net effect would have been to increase the dumping margin. In addition, the amendment would have required that profit be deducted from ESP without a corresponding deduction from foreign market value. Here again, the effect would have been to increase the dumping margin. In this latter connection, Commerce stated: "We believe that to deduct profit from the U.S. price—be it a purchase price or an exporter's sales price—while not deducting it from foreign market value would result in the comparison of incomparable prices."<sup>62</sup>

Proponents of the Hollings amendment<sup>63</sup> attempted to justify its passage by arguing that the European Community (EC) does not have an ESP offset rule, and that, under the EC Antidumping Regulation,<sup>64</sup> profit is deducted from the European equivalent of the ESP in dumping cases brought against U.S. products.<sup>65</sup> Therefore, it was argued, a similar provision would merely bring U.S. law into conformity with current international practice<sup>66</sup> and would not provoke retaliatory measures.

Opponents contended,<sup>67</sup> on the other hand, that there is a fundamental difference in the structure and administration of the U.S. and EC antidumping laws. United States law requires Commerce to impose dumping margins in full, even if they exceed the duty level needed to eliminate injury. In the EC, however, margins are reduced to a level adequate to ameliorate the injurious impact of the dumping.<sup>68</sup> The effect of the Hollings amendment in the United States

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<sup>60</sup> *Smith-Corona Group v. United States*, 713 F.2d 1568 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984).

<sup>61</sup> See 133 CONG. REC. S8982 (daily ed. June 30, 1987) (statement by Sen. Hollings introducing the ESP amendment, section 339 of the Senate Bill, *supra* note 11).

<sup>62</sup> 1985 COMMERCE STUDY, *supra* note 53, at 59.

<sup>63</sup> See Letter from Trade Reform Action Coalition (TRAC) to the House Ways and Means Comm. (Oct. 28, 1987); Statement of National Association of Manufacturers 18 (Sept. 9, 1987).

<sup>64</sup> Community antidumping proceedings are governed by Council Regulation No. 2176/84. 27 O.J. EUR. COMM. (No. L 201/1, L 227/35) (1984) (corr.) [hereinafter EC Regulation].

<sup>65</sup> Article 2(8)(b) of the EC Regulation, *supra* note 64, provides for the deduction from the export price, defined as the price at which the imported product is first resold to an independent buyer, of a "reasonable profit margin." See also Antidumping Code, *supra* note 8, art. 2:6, which provides that in an ESP comparison "allowance for costs, including duties and taxes, incurred between reimportation and resale, and for profits accruing, should also be made."

<sup>66</sup> See 133 CONG. REC. S8982 (daily ed. June 30, 1987) (statement of Sen. Hollings).

<sup>67</sup> See *infra* notes 71-75.

<sup>68</sup> Article 13(3) of the EC Regulation, *supra* note 64, provides that the amount of duty not exceed the margin; "it should be less if such lesser duty would be adequate to remove the injury." See also Antidumping Code, *supra* note 8, art 8(a): "It is desirable . . . that the



would have been to increase existing margins by the full amount of the computation, whereas inflated margins have little or no effect under EC law. And as to profit deduction, opponents of the amendment claimed that EC law requires deduction only for that portion of a subsidiary's profits attributable to an independent importer—which is often below a subsidiary's actual profits.<sup>69</sup> It would thus be inaccurate to say that the Hollings amendment would merely bring U.S. law into conformity with EC practice. Finally, it was argued that the amendment was not limited to imports from EC countries. It was made expressly applicable to all GATT signatories in order to include imports from Japan.<sup>70</sup>

The Administration vigorously opposed the Hollings amendment, describing it as “a major shift in U.S. antidumping practice and an attempt to unfairly stack the deck against importers.”<sup>71</sup> Likewise, free trade groups opposed the amendment, contending that its discriminatory application of adjustments would result in wider, artificially high margins.<sup>72</sup> An array of consumer<sup>73</sup> and industry<sup>74</sup> groups adamantly opposed the amendment as well because, they argued, its application would increase retail prices, close U.S. subsidiaries of foreign producers, and impede foreign investment in the United States.<sup>75</sup> While proponents nonetheless claimed that additional protections were needed under the antidumping law, the provision was struck in conference.<sup>76</sup> Although the House reserved the right at that time to comment on the ESP offset in the Joint Conference Statement, none was included.

### C. *Transactions to Evade the Payment of Antidumping Duties*

Under current law, the “importer of record” is liable for the payment of antidumping duties assessed against the merchandise in

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duty be less than the margin, if such lesser duty would be adequate to remove the injury to the domestic industry.”

<sup>69</sup> I.V. Bael & J.F. Bellis, *INTERNATIONAL TRADE LAW AND PRACTICE OF THE EUROPEAN COMMUNITY, EEC ANTI-DUMPING AND OTHER TRADE PROTECTION LAWS* 53 (1985).

<sup>70</sup> See 133 CONG. REC. S8986 (daily ed. June 30, 1987) (statement of Sen. Packwood).

<sup>71</sup> See Letter from Office of Management and Budget, U.S. Trade Representative, and Secretaries of Treasury, Commerce, Labor, and Agriculture to Senate Committee on Finance 13-16 (Oct. 30, 1987) [hereinafter Administration Position].

<sup>72</sup> See, e.g., NATIONAL FOREIGN TRADE COUNCIL, *RECOMMENDATIONS ON KEY ISSUES OF H.R. 3*, at 12 (1987); see also Pro Trade Group Comments on the Omnibus Trade Bill of 1987 (Sept. 21, 1987).

<sup>73</sup> See Letter from Consumers Union to House Ways and Means Comm. Chairman Rostenkowski and House Conferees (Aug. 12, 1987).

<sup>74</sup> See Letter from American Express, IBM, AT&T, Exxon, and others to Chairman Rostenkowski and House Conferees (Nov. 6, 1987).

<sup>75</sup> R.Z. Lawrence, *Dangers of the ESP Amendment* (study commissioned by opponents of the ESP provision including the American Business Conference, American Retail Federation, Automobile Importers of America, and the National Foreign Trade Council).

<sup>76</sup> March 23 HOUSE OFFER, *supra* note 47.

question.<sup>77</sup> Where the manufacturer or exporter of the product directly or indirectly pays or refunds the duty to the importer, current law deducts the amount of the payment from the U.S. price, thus increasing the dumping margin by doubling it.<sup>78</sup> The prohibition against duty absorption by the foreign exporter in the antidumping context—a prohibition not contained in the CVD law<sup>79</sup>—has to do with the purpose of the dumping statute. The law is intended to rectify injurious price discrimination by increasing the level of observable market prices in the United States and, thereby, to offset the deleterious effects of dumping on the U.S. industry. If the foreign producer or exporter were to absorb the duty, that goal would be defeated.

Because a number of U.S. industries believe that foreign exporters are not increasing their U.S. price levels by the full amount of the AD duty, the Senate bill contained a measure<sup>80</sup> which would have enabled Commerce to declare a “sham transaction” and direct Customs to treat the U.S. end purchaser as the importer of record solely liable for AD duties. End purchaser liability was established whenever Commerce determined that a manufacturer, producer, seller, or exporter was purposely absorbing duties rather than increasing its U.S. prices.<sup>81</sup>

The Administration opposed the Senate amendment on essentially two grounds: (1) that the provision was unadministerable since entry documents reflect the identity of the importer of record and not the identity of the end purchaser; and (2) that the end purchaser would be unfairly penalized for actions on the part of the foreign exporter of which it had no knowledge. As a result of these objections, the Senate proposal was dropped in conference. The conferees expressed the view, however, that Commerce already “has authority under current law and proposed regulations on the reimbursement of antidumping duties to address the concerns that gave rise to this Senate amendment.”<sup>82</sup>

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<sup>77</sup> 19 C.F.R. § 141.1(b) (1987).

<sup>78</sup> See 19 C.F.R. § 353.55 (1987).

<sup>79</sup> However, duty absorption in the CVD context could give rise to an export subsidy allegation and the imposition of duties to offset the benefit.

<sup>80</sup> Senate Bill, *supra* note 11, § 322; there was no comparable House provision.

<sup>81</sup> In determining whether a transaction is a sham, the Senate Report states that Commerce shall look to, among other factors: (1) whether the manufacturer, seller or exporter had actual notice of an antidumping proceeding; (2) whether the transaction was accomplished through an unusual method of importation by or for the account of the manufacturer, seller or exporter; and (3) whether the size and nature of the exporter's U.S. commercial operations is insignificant. S. REP., *supra* note 28, at 95. The Report further states that the U.S. purchaser will be required to pay antidumping duties “only when there is a clear indication that a foreign manufacturer or exporter is knowingly taking steps to allow it to absorb antidumping duties, rather than increase its price to the U.S. purchaser.” *Id.* at 96.

<sup>82</sup> HOUSE OFFER, *supra* note 47. See also *Joint Conference Statement*, *supra* note 20, at

*D. Monitoring Multiple Offenders; Private Remedy for Dumping; Compensation Award*

The conferees considered two closely allied provisions designed to target multiple dumping offenders. The first would have expanded Commerce's authority under the AD law to deal with recidivist dumping; the second would have created a more accessible private right of action for dumping by amending the Antidumping Act of 1916.<sup>83</sup> The conferees also considered whether a fund should be established from duties collected under AD orders to compensate individual domestic producers for injury caused by dumping. As will be seen from the actions ultimately taken, the conferees moved very cautiously in the multiple offender area, and, in addition, struck both the amendment of the 1916 Act as well as the proposed compensation fund.

*1. Persistent Dumping by Multiple Offenders*

In an effort to make the antidumping law more effective in responding to the dumping of a product from a wide variety of countries, Congress enacted a provision in 1984 which authorized Commerce to monitor imports of the same class or kind of merchandise from "additional supplier countries" if there was more than one antidumping order in effect for that merchandise, reason to suspect a persistent pattern of injurious dumping, and the pattern was causing a serious commercial problem for the domestic industry.<sup>84</sup> While this provision concerned the monitoring of imports of the same product from different sources, there was no provision aimed at monitoring imports of different products from an entity already found to be dumping.<sup>85</sup>

Proposals by the House and Senate to address so-called persistent dumping would have permitted an eligible domestic industry<sup>86</sup> to petition Commerce to monitor imports<sup>87</sup> of related products pro-

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H2042. The proposed regulation, which will appear at 19 C.F.R. § 353.26, will clarify the current regulation. 51 Fed. Reg. 29,046, 29,067 (Int'l Trade Admin. 1986).

<sup>83</sup> Act of Sept. 8, 1916, § 801, 15 U.S.C. § 72 (1982) [hereinafter 1916 Act].

<sup>84</sup> 1984 Act, *supra* note 4, § 609 (codified at 19 U.S.C. § 1673a(a)(2) (Supp. IV 1986)). Although Commerce has discretion to monitor imports, thus far it has declined to accept any of the petitions submitted under this provision.

<sup>85</sup> The report of the House Ways and Means Committee on H.R. 3 states that a number of U.S. industrial sectors have been injured as a result of repeated dumping by certain foreign manufacturers. Examples included the U.S. electronics, steel, and semiconductor industries. H.R. REP. No. 40, 100th Cong., 1st Sess., pt. 1, at 148 (1987) [hereinafter H.R. REP.].

<sup>86</sup> An eligible domestic industry was defined as a U.S. manufacturer or producer of merchandise "like" or directly competitive with merchandise subject to an affirmative determination, or "similar enough" in terms of process of production and uses to be included in the product monitoring category. S. REP., *supra* note 28, at 103.

<sup>87</sup> Under section 165 of the House Bill, *supra* note 11, if Commerce believed, based upon product monitoring, that there was a reasonable likelihood such products may be

duced by a foreign manufacturer if that manufacturer had previously been subject to an affirmative dumping determination. The ITC would have determined the scope of the products to be monitored, with authority to include a wider variety of products than would ordinarily be encompassed within the Commission's traditional "like product" definition.<sup>88</sup> Both the Senate and House measures would have required that Commerce initiate expedited AD investigations of the imports whenever the monitoring demonstrated a reasonable likelihood that the products were being dumped.

The House and Senate Committee Reports accompanying these provisions indicated congressional concern with the serious injury that had resulted from persistent dumping by multiple offenders.<sup>89</sup> The Administration agreed that "recidivist dumping ha[d] to be handled differently from the normal dumping case and that more severe penalties could be put on unilaterally and without retaliation by any country that is suffering from recidivist dumping."<sup>90</sup> However, it believed that persistent dumping should be addressed by international consensus, and therefore opposed enactment of any unilateral measures, including monitoring provisions for multiple offenders.<sup>91</sup>

Largely due to Administration opposition, the House and Senate conferees struck all of the monitoring provisions in the multiple offender legislation. The conferees, however, preserved the concept of expedited AD investigations in the case of multiple offenders, but

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dumped, it would monitor imports from a first offender. If the dumping of a particular product was indicated, Commerce would be required to self-initiate an expedited antidumping investigation, unless, in the case of a first offender, the domestic industry objected. An automatic finding of critical circumstances would also be required. *See infra* notes 293-302 and accompanying text. Automatic monitoring would be initiated in the case of a second offender, although the monitoring would encompass all imports from that manufacturer; self-initiated cases would then result if dumping is in evidence. As to multiple offenders, automatic monitoring within the same product category and related product categories would be required, and expedited self-initiated cases could result. In addition, a rebuttable presumption of "intent to injure or destroy" would arise in a civil damage action under the 1916 Antidumping Act. H.R. REP., *supra* note 85, at 146. Section 324 of the Senate Bill, *supra* note 11, contained similar measures for monitoring multiple dumping offenders except that the number of offenses required to qualify for monitoring was increased by one. *Id.* at 147. The Senate Bill did not contain any revisions to the 1916 Antidumping Act.

<sup>88</sup> 19 U.S.C. § 1677(10) (1982) defines "like product" as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation." The House Report provided examples of particular product categories, which were to be based upon "a common primary manufacturing process"; all steel mill products, all semiconductors, and all land mobile radio products were cited as examples of product categories. H.R. REP., *supra* note 85, at 147.

<sup>89</sup> *See* H.R. REP., *supra* note 85, at 148 (noting that persistent dumping in the semiconductor industry and in other electronics sectors, including telecommunications and television receivers has caused certain segments of the domestic industry to cease production); *see also* S. REP., *supra* note 28, at 105 (stating that repeated dumping to gain increased market share is seriously injuring identifiable industrial sectors).

<sup>90</sup> 1987 House Hearings, *supra* note 1, at 650 (statement of Gilbert Kaplan, Deputy Assistant Secretary for Import Administration, Department of Commerce).

<sup>91</sup> Administration Position, *supra* note 71.

limited such investigations to imports of short life cycle products.<sup>92</sup> In this connection, a multiple offender is defined as one with at least two affirmative dumping findings of margins of fifteen percent or more within an eight-year period in the same product category.<sup>93</sup> Short life cycle products are those that become obsolete within four years.<sup>94</sup>

Procedurally, an eligible domestic entity<sup>95</sup> may file a petition to establish a product category with respect to short life cycle merchandise after two affirmative dumping determinations have been issued against an offender. The ITC is to then determine the scope of the product category within ninety days of filing. Thereafter, to the extent the merchandise at issue falls within the scope of the short life cycle product category, Commerce must expedite an AD investigation when a significant percentage of the imports in that product category are produced by a multiple offender. In cases involving a third offense in the same product category, for example, Commerce must make its preliminary AD determination within 120 days of the filing of the petition.<sup>96</sup> No extension of time for making a preliminary determination normally available for "extraordinarily complicated" cases<sup>97</sup> is permitted without the domestic industry's consent. In addition, Commerce is to make an affirmative preliminary finding of "critical circumstances,"<sup>98</sup> such that duties may ultimately be as-

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<sup>92</sup> Omnibus Act, *supra* note 5, § 1323, at H1891-92.

<sup>93</sup> *Id.*; see also *Joint Conference Statement*, *supra* note 20, at H2036-37.

<sup>94</sup> "Short life cycle merchandise is defined as 'any product that the Commission determines is likely to become outmoded within four years, by reason of technological advances, after the product is commercially available.' For purposes of this provision, the term 'outmoded' refers to a kind or style no longer state-of-the-art." *Joint Conference Statement*, *supra* note 20, at H2036. The conferees stated that a "product's life cycle should not be determined by reference to the entire time period over which a product may be sold, but should be considered to end at the point at which the emergence on the market of a new product with superior cost or performance characteristics begins to affect adversely the sales of the earlier product." *Id.*

<sup>95</sup> The term "eligible domestic entity" is defined as a manufacturer or producer in the United States, or a union or group of workers representative of an industry in the United States, that manufactures or produces merchandise that is like the merchandise subject to an AD order or suspension agreement, or is similar enough to such merchandise to be considered for inclusion in the same product monitoring category including such merchandise. S. REP., *supra* note 28, at 103; *Joint Conference Statement*, *supra* note 20, at H2037.

<sup>96</sup> For an offender with three or more offenses the determination must be made within 100 days. The standard statutory deadline is 160 days from filing. See 19 U.S.C. § 1673b(b)(1) (1982).

<sup>97</sup> Omnibus Act, *supra* note 5, § 1323, at H1891; see also *Joint Conference Statement*, *supra* note 20, at H2036. The deadline for a preliminary determination in an extraordinarily complicated case is 210 days from the date on which the petition was first filed. 19 U.S.C. § 1673b(c)(1) (1982).

<sup>98</sup> Critical circumstances are treated at 19 U.S.C. § 1673b(e) (1982). A petitioner may allege "critical circumstances," defined in the AD context as injury by reason of massive imports over a short period of time. Upon a finding of critical circumstances by Commerce and the ITC, the law permits the retroactive imposition of duties on unliquidated entries of the merchandise entered or withdrawn from warehouse for consumption 90

essed on a retroactive basis.

## 2. *Antidumping Act of 1916 and Compensation Awards*

In addition to reassessing and ultimately narrowing the scope of legislation directed at persistent dumping by multiple offenders, the conferees considered a House proposal that would have amended the Antidumping Act of 1916<sup>99</sup> in order to make the law more accessible to U.S. industries seeking a private right of action for dumping against multiple offenders.<sup>100</sup> The 1916 Act permits injured U.S. producers to bring private treble damage actions in federal district court against foreign exporters and U.S. importers who commonly and systematically import or sell merchandise at substantially less than its actual market value with specific intent to destroy or injure the U.S. industry, or to prevent the establishment of a U.S. industry, or to restrain or monopolize trade in the United States. While various civil actions have been brought under the Act, no plaintiff has ever recovered damages largely because of the burden of proving intent.<sup>101</sup> As a result, the House proposal would have amended the 1916 Act by establishing, among other things,<sup>102</sup> a rebuttable presumption of intent in a suit against a multiple offender.<sup>103</sup> Only single, not treble, damages would have been recoverable in such a case.

Failed attempts in the past five Congresses<sup>104</sup> to amend the 1916 Act provoked equally intense opposition from members of the legal and business community when the issue was again raised. Opponents contended that the 1916 Act is essentially an antitrust law, designed to redress unfair competition originating abroad, which was not within the purview of section 2 of the Clayton Act.<sup>105</sup> As an antitrust law, it was argued, the 1916 Act has a number of characteristics not shared by the antidumping law. The 1916 Act is intended to protect competition, not individual competitors; the AD law is

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days prior to the date on which liquidation was first suspended (*i.e.*, 90 days prior to Commerce's preliminary affirmative AD determination). See *infra* notes 296-305 and accompanying text. A similar critical circumstances provision is contained in the CVD law. 19 U.S.C. § 1671b(e) (1982).

<sup>99</sup> 1916 Act, *supra* note 83.

<sup>100</sup> House Bill, *supra* note 11, § 166; H.R. REP., *supra* note 85, at 148.

<sup>101</sup> H.R. REP., *supra* note 85, at 149.

<sup>102</sup> Criminal sanctions would also have been repealed and "actual market value" would have been clarified to mean "foreign market value." *Id.*

<sup>103</sup> The House "multiple offender" monitoring provision had defined a multiple offender as one against which there had been three affirmative dumping findings within a 10 year period. *Id.* at 147. The Report states that in the case of a multiple offender, a strong *prima facie* case that the defendant clearly intended to injure or destroy a U.S. industry would be established. The burden would then be "on the manufacturer-defendant to overcome this presumption with compelling evidence." *Id.* at 149.

<sup>104</sup> For a comprehensive discussion of attempts to amend the 1916 Act, see *Remedies Against Dumping of Imports: Hearing Before Subcomm. on Int'l Trade of the Senate Comm. on Finance*, 99th Cong., 2d Sess. 212 (1986) (statement of C. Barshefsky).

<sup>105</sup> *Id.*

designed to protect individual competitors from low-priced competition.<sup>106</sup> The 1916 Act provides for civil and criminal penalties for past prohibited acts of dumping; the AD law does not make dumping illegal and relief is typically prospective in nature.<sup>107</sup> The 1916 Act condemns predatory price discrimination, not competitively neutral price discrimination; under the AD law, price discrimination is determined without considering competitive market effects or balance of harm.

Apart from the substantive differences between the 1916 Act and the AD law, the Administration strongly opposed the House amendment as a clear violation of the GATT and the Antidumping Code. Article VI of the GATT<sup>108</sup> limits the response to dumping to the imposition of duties in an amount no greater than the margin of dumping; Article XVI(1) of the Antidumping Code<sup>109</sup> states that "no specific action against dumping of exports . . . can be taken except in accordance with the provisions of the General Agreement." By permitting an additional unilateral response to dumping, the Administration argued, U.S. international obligations would be violated.<sup>110</sup> In addition, while the 1916 Act is itself GATT compatible because of its status as pre-existing "grandfathered" legislation, such a drastic change in the law as that proposed by the House would arguably create new legislation, thus jeopardizing the Act's grandfathered status. "If we adopt draconian GATT-illegal antidumping remedies, our trading partners will simply enact mirror legislation to apply the same penalties to U.S. companies."<sup>111</sup>

The private remedy provision was dropped in conference, as was a closely related House proposal to create a fund from duties collected under each AD order to compensate individual domestic producers injured by dumping.<sup>112</sup> Under the current antidumping law, duties are paid directly to the Treasury Department and not to the domestic industry. The defeated House proposal would have required the ITC to determine whether there had been injury and, if so, the amount of compensation to be paid to each U.S. producer.<sup>113</sup>

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<sup>106</sup> *Id.* at 160 (statement of the Antitrust Section of the ABA).

<sup>107</sup> The limited exception to prospective relief is triggered by an affirmative final critical circumstances determination. See *infra* notes 296-305 and accompanying text.

<sup>108</sup> The GATT, *supra* note 6, art. VI, para. 2, provides in pertinent part: "In order to offset or prevent dumping, a contracting party may levy on any dumped product an antidumping duty not greater in amount than the margin of dumping in respect of such product."

<sup>109</sup> Antidumping Code, *supra* note 8, art. XVI(1).

<sup>110</sup> Administration Position, *supra* note 71. Some business groups also found a private remedy ill-advised for the same reason. See *1987 House Hearings, supra* note 1, at 84 (statement on behalf of Retail Industry Trade Action Coalition (RITAC)); The Business Coalition on Trade 9, Positions on H.R. 3, (Oct. 9, 1987).

<sup>111</sup> Administration Position, *supra* note 71.

<sup>112</sup> 133 CONG. REC. H2042 (daily ed. Apr. 20, 1988).

<sup>113</sup> The Secretary of the Treasury would distribute the proceeds to certified injured

Proponents supported adoption of the private remedy provision as a deterrent to dumping, and the compensation fund provision as fair to injured producers, which must bear the high cost of pursuing cases.<sup>114</sup> Administration opposition to both provisions, however, was largely responsible for their deletion in conference.

#### IV. Countervailing Duty Provisions

Two far-reaching House proposals ultimately rejected by the conferees would have applied the CVD law to imports from non-market economy countries and would have radically altered the manner in which Commerce was to define and value certain domestic subsidies (so-called "natural resource subsidies"). Other than these provisions, both the House and Senate bills were generally limited to clarifying existing law, or to strengthening the law where clear subsidy practices arguably fell outside the purview of the statute only because of the unique form of the transaction rather than its substance. Examples of the former included a clarification of the manner in which present upstream subsidy provisions were to be applied in the case of processed agricultural products; examples of the latter included the treatment of international consortia and certain leasing arrangements under the CVD law. It is to these types of provisions that the conferees agreed, rejecting more radical changes to the statute.

##### A. Application of the CVD Law to Nonmarket Economy Countries

One of the more controversial issues under the countervailing duty statute has been whether the law should apply to imports from nonmarket economy countries. The question springs from the very nature of the CVD law itself.<sup>115</sup> Generally speaking, the prerequisites for a subsidy finding include the following elements: (1) the government activity under investigation provides a special preference to an industry,<sup>116</sup> or a benefit contingent on exportation<sup>117</sup>;

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parties. H.R. REP., *supra* note 85, at 150. Difficulties with the compensation proposal included the fact that the ITC does not calculate injury on a producer-by-producer basis; rather, it aggregates data to determine whether there is injury to the U.S. industry as a whole. In addition, it does not now measure what percentage of the injury is due to factors other than dumping. The Administration opposed the compensation award provision because it would "compromise the impartiality of the investigative process and be inconsistent with budget practices." Administration Position, *supra* note 71.

<sup>114</sup> See Letter from Trade Reform Action Coalition to the Committee on Ways and Means (Oct. 28, 1987); see also 1987 House Hearings, *supra* note 1, at 1130 (statement of TRAC).

<sup>115</sup> H.R. REP., *supra* note 85, at 138.

<sup>116</sup> *Cabot Corp. v. United States*, 620 F. Supp. 722 (Ct. Int'l Trade 1985), *appeal dismissed*, 788 F.2d 1539 (Fed. Cir. 1986); *United States Steel Corp. v. United States*, 566 F. Supp. 1529, 1537, *modified*, 569 F. Supp. 874 (Ct. Int'l Trade 1983); *Carlisle Tire & Rubber Co. v. United States*, 564 F. Supp. 834, 838 (Ct. Int'l Trade 1983).

<sup>117</sup> *G.S. Nicholas & Co. v. United States*, 249 U.S. 34, 37 (1919).



(2) the special preference or benefit provides a competitive advantage,<sup>118</sup> or an inducement to export<sup>119</sup>; and (3) the extent of the special preference or benefit is measurable.<sup>120</sup> In an NME, however, the state's pervasive intervention in all sectors of the economy, including ownership of all significant means of production, renders it difficult to discern any norm of economic behavior against which a special preference or benefit could be identified or measured. Application of the CVD law is premised on market-oriented principles; the essential characteristics of an NME are antithetical to those norms.

The statute itself provides no guidance concerning its application to NMEs,<sup>121</sup> and the Commerce Department has historically refused to find a countervailable subsidy in investigations involving imports from NMEs. The first CVD case against an NME involved textile imports from the People's Republic of China.<sup>122</sup> In the course of that investigation, Commerce held special conferences on whether the CVD law should apply.<sup>123</sup> When in this and subsequent cases Commerce refused to apply the CVD law to NME imports,<sup>124</sup> the Court of International Trade (CIT) reversed and remanded Commerce's determinations holding that the CVD law does not distinguish between types of economies and that Commerce must apply the law to NMEs.<sup>125</sup> The United States Court of Appeals for the Federal Circuit (CAFC) reversed the lower court ruling and thus sustained the Commerce position.<sup>126</sup>

In light of the court's ruling, the House proposed a measure requiring that Commerce apply the CVD law to NMEs, to the extent a subsidy could reasonably be identified and measured.<sup>127</sup> The legisla-

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<sup>118</sup> *Zenith Radio Corp. v. United States*, 437 U.S. 443, 456 (1978); *British Steel Corp. v. United States*, 605 F. Supp. 286, 294 (Ct. Int'l Trade 1985).

<sup>119</sup> *G.S. Nicholas & Co.*, 249 U.S. at 37.

<sup>120</sup> *United States v. Hammond Lead Prods.*, 440 F.2d 1024 (C.C.P.A.), *cert. denied*, 404 U.S. 1005 (1971); *Energetic Worsted Corp. v. United States*, 53 C.C.P.A. 36 (1966).

<sup>121</sup> In contrast, there is a special provision in the antidumping law that applies to NMEs. See 19 U.S.C. § 1677b(c) (1982); see also *supra* notes 22-49 and accompanying text for a discussion of amendments to that provision.

<sup>122</sup> *Textiles, Apparel and Related Products from the People's Republic of China, Termination of Countervailing Duty Investigation*, 48 Fed. Reg. 46,600 (Int'l Trade Admin. 1983) (petition withdrawn and investigation terminated prior to preliminary determination).

<sup>123</sup> *Conference on Novel Issues*, 48 Fed. Reg. 46,092 (1983).

<sup>124</sup> *Carbon Steel Wire Rod from Czechoslovakia*, 49 Fed. Reg. 19,371-74 (Int'l Trade Admin. 1984) (final determination); *Carbon Steel Wire Rod from Poland*, 49 Fed. Reg. 19,375-78 (Int'l Trade Admin. 1984) (final determination); *Potassium Chloride from the German Democratic Republic*, 49 Fed. Reg. 23,428 (Int'l Trade Admin. 1984) (rescission of initiation); *Potassium Chloride from the Soviet Union*, 49 Fed. Reg. 23,428 (Int'l Trade Admin. 1984) (rescission of initiation).

<sup>125</sup> *Continental Steel Corp. v. United States*, 614 F. Supp. 548 (Ct. Int'l Trade 1985), *rev'd sub nom. Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986).

<sup>126</sup> *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986).

<sup>127</sup> House Bill, *supra* note 11, § 157; there was no comparable Senate provision. See also H.R. REP., *supra* note 85, at 138-39.

tion was intended to ensure Commerce's application of the law where possible, so that NMEs were not completely exempt from operation of the statute.<sup>128</sup> The probable consequence of enactment of this provision would have been an increase in CVD petitions against NME imports, and because NMEs are not entitled to an injury test, a greater likelihood that petitioners would prevail in these cases.

The Administration opposed the House provision, but did not propose alternative language to afford the protection to U.S. industry it agreed was needed.<sup>129</sup> A number of business interests likewise opposed the provision, maintaining that government benefits provided to NME industries do not have the pernicious effect the CVD law is designed to offset; *i.e.*, they neither provide an economic incentive to export, nor do they provide the NME exporter with a competitive advantage.<sup>130</sup> To proponents of the legislation for whom "a subsidy is a subsidy," applying the CVD law to NME imports would protect the domestic industry from the effects of NME subsidies, which, they believed, could, in fact, be measured with reasonable certainty.<sup>131</sup>

The House proposal was rejected in conference.<sup>132</sup> In receding to the Senate, which had no such provision, however, the House insisted on strengthening section 406 of the Trade Act of 1974.<sup>133</sup> Section 406 provides for an ITC investigation of and discretionary Presidential action to remedy market disruption caused by imports from Communist countries. Under the statute, market disruption exists when "rapidly" increasing imports from Communist countries are a "significant cause" of material injury to the U.S. industry.

Since 1974, only eleven section 406 cases have been prosecuted;<sup>134</sup> in only one case was relief provided to the U.S. industry.<sup>135</sup> Recognizing that the law did not adequately protect U.S. interests, the House and Senate compromise effected three changes to section 406.<sup>136</sup> First, "rapidly" was defined to mean a significant increase during a recent period of time. Second, "significant cause" was defined as "a cause which contributes significantly to the material injury to the industry, but need not be equal to or greater than any

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<sup>128</sup> See H.R. REP., *supra* note 85, at 138.

<sup>129</sup> See Administration Position, *supra* note 71.

<sup>130</sup> Statement of Occidental Chemical Corporation before the Senate Finance Committee (Apr. 22, 1987).

<sup>131</sup> See Letter from Trade Reform Action Coalition to House Ways and Means Comm. Chairman Dan Rostenkowski (Oct. 28, 1987).

<sup>132</sup> *Joint Conference Statement*, *supra* note 20, at H2042.

<sup>133</sup> 19 U.S.C. § 2436 (1982).

<sup>134</sup> United States International Trade Commission, Annual Report 1987, at 22.

<sup>135</sup> *Id.* In 1987, the United States and the People's Republic of China concluded an Orderly Marketing Agreement restricting P.R.C. exports of ammonium paratungstate and tungstic oxide for a five year period.

<sup>136</sup> Omnibus Act, *supra* note 5, § 1411, at H1904.

other cause."<sup>137</sup> Last, the conferees enumerated several factors for the ITC to consider in evaluating market disruption.<sup>138</sup> The strengthening of section 406 in such a way as to increase its accessibility to U.S. industries was ultimately deemed by the conferees preferable to the substantive and administrative difficulties inherent in applying the CVD law to NMEs.

### B. Domestic Subsidies

Perhaps the most controversial of the antidumping and countervailing duty amendments considered by the conferees involved the question whether the provision by a government of low cost natural resource inputs to local industries constitutes a countervailable subsidy.<sup>139</sup> Under the "natural resource subsidy" debate, a subsidy arises, it is argued, when a government provides to its local producers a natural resource used in the production of merchandise at a price lower than that at which the resource is available to purchasers abroad, and, at the same time, denies access to U.S. producers to the low price. This pricing of the natural resource is claimed to allow local users to manufacture downstream products more cheaply than their foreign competitors and hence, the theory goes, enables those producers to undersell products made with higher priced inputs. The result is a perceived weakening of the competitive position of the U.S. industry in relation to that of its foreign counterpart. In order to more fully place the natural resource debate in perspective, a brief review of the CVD law and the historic Commerce position on the issue is necessary.

The present countervailing duty law authorizes the imposition of duties on goods imported into the United States that have benefited from either export or domestic subsidies.<sup>140</sup> As noted earlier, export subsidies are countervailable, with only limited exception, under both United States law and international accords. In contrast, domestic subsidies are not tied to the export activities of the enterprise receiving the benefit; rather, they are provided to a specific industry or group of industries and may be said to encompass myriad government activities that benefit firms by directly or indirectly lowering costs of production—activities ranging from the development of infrastructure to the establishment of an investment tax credit.

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

<sup>138</sup> The ITC is to consider "(i) the volume of imports, (ii) the effect of imports on U.S. prices for like products, (iii) the impact of imports on domestic producers of like products, and (iv) evidence of disruptive pricing practices or other efforts to unfairly manage trade patterns." Omnibus Act, *supra* note 5, § 1411, at H1904.

<sup>139</sup> This discussion is excerpted from a more exhaustive treatment of natural resource subsidies. See Barshefsky, Diamond & Ellis, *Foreign Government Regulation of National Resources: Problems and Remedies Under United States International Trade Laws*, 21 STAN. J. INT'L L. 29, 38-47 (1985).

<sup>140</sup> See *supra* notes 16-20 and accompanying text.

Many of our trading partners view domestic subsidies as useful and legitimate means of promoting the general welfare and enhancing social and economic development within an economy. At the same time, however, the GATT Subsidies Code acknowledges that certain domestic subsidies may have potentially harmful trade distorting effects.<sup>141</sup> Thus, as previously outlined,<sup>142</sup> in enacting the Trade Agreements Act of 1979 to implement the Subsidies Code, the United States specifically made certain forms of domestic subsidization countervailable.

Before one of the enumerated domestic subsidies can be countervailed, however, the Trade Agreements Act requires a finding that the government program in question is one that is "provided . . . to a specific enterprise or industry, or group of enterprises or industries."<sup>143</sup> The Commerce Department has interpreted this language to mean that government programs that are generally available—for example, infrastructure development or the investment tax credit mentioned above—are not countervailable. So, too, to the extent equivalent benefits are made available to a number of different user industries in an economy without government restriction on the universe of potential participants, no countervailable domestic subsidy would arise. The law thus requires that a particular government benefit be sector specific in scope before a countervailing duty may be imposed.<sup>144</sup>

Although there are many kinds of domestic subsidies, no CVD issue has aroused more controversy in recent years than the question whether a subsidy arises when a government regulates the sale of natural resources to its domestic industries at below market (although not below cost) prices.<sup>145</sup> In a number of cases, Commerce has refused to find such government activity countervailable because the benefits of government regulation were not provided to a specific industry or group of industries. In addition, Commerce has held that the existence of a price differential between a foreign government's domestic sales and export sales (known as "dual" or "two-tiered" pricing), or the existence of a higher world price for the natural resource in question, does not, in and of itself, give rise to a

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<sup>141</sup> Subsidies Code, *supra* note 7, art. 11:2.

<sup>142</sup> See *supra* notes 17-18 and accompanying text for an enumeration of the types of countervailable domestic subsidies listed in 19 U.S.C. § 1677(5)(B) (1982).

<sup>143</sup> 19 U.S.C. § 1677(5)(B) (1982).

<sup>144</sup> The rationale for the sector-specificity requirement is that governments intervene in the marketplace in myriad ways. The sector specificity test is one way in which to distinguish acceptable (*i.e.* noncountervailable) government interventions from unacceptable (*i.e.* countervailable) activity. Without such a distinction, it is argued, virtually every product entering the stream of commerce would be countervailable. *Carlisle Tire & Rubber Co. v. United States*, 564 F. Supp. 834, 838 (Ct. Int'l Trade 1983).

<sup>145</sup> In many cases, natural resources constitute the major portion of the value of a product. For example, natural gas constitutes well over 50% of the cost of producing nitrogen-based fertilizers such as ammonia.

countervailable subsidy. Commerce's interpretation of the statute thus resulted in controversial negative countervailing duty rulings involving energy-intensive exports from Mexico<sup>146</sup> (e.g., ammonia, carbon black, cement and float glass), and Canadian softwood lumber.<sup>147</sup>

Dissatisfied with the Commerce Department's interpretation of the sector-specificity test and its rejection of dual or two-tiered pricing as a basis upon which to find a countervailable subsidy, United States ammonia, cement, and carbon black producers turned their efforts to Congress seeking a legislative reversal of Commerce's rulings. A number of natural resource subsidy bills were thus introduced in 1983-84 and have, in various forms, been introduced in every subsequent year.<sup>148</sup> The thrust of those bills<sup>149</sup> has been to find generally available government programs countervailable.

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<sup>146</sup> See, e.g., Anhydrous and Aqua Ammonia from Mexico, 48 Fed. Reg. 28,522 (Int'l Trade Admin. 1983) (final determination) (domestic price for natural gas in Mexico, although lower than the Mexican export price or U.S. price, not a countervailable subsidy because not provided at preferential rates to a specific industry); Carbon Black from Mexico, 48 Fed. Reg. 29,564, (Int'l Trade Admin. 1983) (final determination) (price differential between export and domestic Mexican petroleum feedstock available to all industrial users not considered a benefit to a specific industry and, therefore, not countervailable). The *Carbon Black* decision was subsequently reversed by the CIT in *Cabot Corp. v. United States*, 620 F. Supp. 722 (Ct. Int'l Trade 1985), *appeal dismissed*, 788 F.2d 1539 (Fed. Cir. 1986).

<sup>147</sup> Certain Softwood Lumber Products from Canada, 48 Fed. Reg. 24,159 (Int'l Trade Admin. 1983) (final determination) (Canadian stumpage program under which rights to standing timber were sold held not countervailable because program was available to wide array of industries in Canada on equal terms and was not targeted to a specific industry). Following the *Cabot* decision, Commerce reached a contrary result in a subsequent Canadian lumber case. See *Certain Softwood Lumber Products From Canada*, 51 Fed. Reg. 37,453 (Int'l Trade Admin. 1986) (preliminary determination).

<sup>148</sup> H.R. 4784, 98th Cong., 2d Sess., 130 CONG. REC. H7939 (daily ed. July 26, 1984), introduced by Congressman Gibbons of Florida, would have imposed countervailing duties on products that incorporated significant natural resource inputs if those inputs were provided by a government to the foreign exporter at less than the export price of the resource and if the natural resource was not freely available to U.S. producers for export to the United States. The subsidy would have equalled the difference between the domestic price of the natural resource and the export price and would have been applied to the finished merchandise as imported into the United States. In 1985, Senators Long and Baucus introduced a similar proposal in S. 1292, 99th Cong., 1st Sess. (1985). These proposals formed the basis for legislation reintroduced in the ensuing years, including H.R. 4800, *supra* note 11. See Barshefsky, *supra* note 139, at 47-58.

<sup>149</sup> Apart from such legislative initiatives, in October 1985, the Court of International Trade in *Cabot Corp.*, 620 F. Supp. at 730, ruled that Commerce had misapplied the sector specificity test when it found that Mexican carbon black, which was a one-use product provided to only two users in Mexico, was generally available and thus not a subsidy. Subsequently, in 1987, the CIT issued two major opinions on the sector specificity test: *PPG Indus. Inc. v. United States*, 662 F. Supp. 258 (Ct. Int'l Trade 1987); *Can-Am Corp. v. United States*, 664 F. Supp. 1444 (Ct. Int'l Trade 1987). In those decisions, the Court stated that the sector specificity test required that in every case Commerce had to examine the de facto availability of a government program in the country, and not merely its de jure or legal availability. Applied to the carbon black situation, for example, this meant that even though *in law* carbon black feedstock was available to all users in Mexico, *in fact* only two companies in Mexico made carbon black and the feedstock had no other use. A sector specific subsidy therefore existed to the extent the feedstock cost was less than the cost of

Economy-wide regulation of a natural resource, as is the case with energy inputs in many countries, would constitute countervailable government activity even though such regulation pervaded prices in a uniform manner throughout the foreign economy. The only exception to countervailability of such broadly available government programs would have been for access: if U.S. producers were provided equal access to the natural resource at the low internal price for export of the resource to the United States, no subsidy would arise.

The House version of the natural resource subsidy provision considered in this session of Congress deleted the words "natural resources" from the earlier proposals, thereby creating a generic domestic subsidy provision, and, in effect, substituted instead the words "goods and services," which significantly broadened the scope of the original proposals.<sup>150</sup> The House provision was divided into two distinct parts: (1) sector specificity and (2) preferentiality.

The sector-specificity statutory language of the House provision stated that, in determining the countervailability of a foreign government program, Commerce must undertake a case-by-case analysis to determine whether government benefits are actually paid to or bestowed on specific enterprises. Nominal general availability—that is, general availability of a program under *law*, but not *in fact* utilized by more than a limited industrial sector—would not shield a government program from countervailability. The Senate bill also contained *de jure/de facto* statutory language to this effect.<sup>151</sup>

While the statutory language of both bills attempted to codify the *de jure/de facto* concept, the House Report language made clear that, as the original natural resource subsidy proposals, the current amendment would find all industrial inputs potentially countervailable regardless of their broad availability in the foreign country.<sup>152</sup> The Senate Report language,<sup>153</sup> on the other hand, was narrowly drawn and essentially codified current Commerce practice in analyzing domestic subsidies—a practice chastened by previous natural resource legislative initiatives and court rulings.<sup>154</sup>

The House, but not the Senate, also proposed a method for valuing certain subsidies; *viz.*, whether goods and services were provided by a foreign government to a local industry at "preferential"

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comparable fuel oils utilized by other Mexican industries. These 1987 CIT opinions were issued after House action on H.R. 3.

<sup>150</sup> House Bill, *supra* note 11, § 153; this measure "substitutes" for section 153 (defining domestic subsidies) and section 155 (resource input subsidies) of H.R. 3 as introduced. See H.R. REP., *supra* note 85, at 126.

<sup>151</sup> Senate Bill, *supra* note 11, § 133.

<sup>152</sup> H.R. REP. *supra* note 85, at 123-24.

<sup>153</sup> S. REP., *supra* note 28, at 112-23.

<sup>154</sup> See *supra* notes 148-49.

rates. Assuming a countervailable subsidy is found, current Commerce practice for the valuation of that subsidy relies, in the main, on a comparison between the prices charged the "favored" industry with those available to other industries *within* the country under investigation. Under the House proposal, however, the value of the subsidy would generally be calculated on the basis of prices *outside* the exporting country—so-called "external pricing benchmarks."<sup>155</sup> Thus, for example, assuming that the provision of low-cost Mexican natural gas to industrial users constituted a countervailable subsidy, one would compare Mexico's internal price for natural gas with world prices, U.S. producer prices, or export prices in valuing the degree of subsidization for duty assessment purposes. Mexican costs of production for the resource in question, or the fact that it might have a cost advantage in resource development and allocation over other world producers, would be irrelevant to the computation.

Proponents of the House domestic subsidy provision argued that absent a change in the law, U.S. industries would operate at a competitive disadvantage vis-à-vis their foreign counterparts. As is the case with many natural resources, particularly energy, U.S. producers are forced to pay world market prices for their industrial inputs while industries located in resource rich countries which regulate natural resource pricing do not face this disability.<sup>156</sup>

Opponents of the measure,<sup>157</sup> including the Administration,<sup>158</sup> maintained that its enactment (1) would unilaterally redefine the concept of unfairness by countervailing natural cost advantage—a radical departure from international trading norms; (2) would engender retaliation and/or mirror legislation against U.S. exports; and (3) would violate the GATT Subsidies Code.<sup>159</sup> They argued

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<sup>155</sup> H.R. REP., *supra* note 85, at 125. While there appears to be a hierarchy of valuation standards—one of which allows for a comparison of the government's price with a freely available and market-determined rate *within* the country at issue—in practice, in cases in which a foreign government has any substantial involvement whatever in the good or service (for example, in natural resource development and allocation), such that "market-determined" rates either do not exist or are distorted, an external pricing benchmark will govern the amount of the duty to be imposed.

<sup>156</sup> See *Natural Resource Subsidies: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means*, H. REP., 99th Cong., 1st Sess. 26 (1985) [hereinafter *Natural Resource Subsidies Hearings*] (statement of T. Bronson, Pres. & CEO of the American Cement Trade Alliance: "The tremendous artificial advantage created by Mexico's fuel price subsidy enables Mexican industries to enter markets in which they could ordinarily not compete."); see also Barshefsky, *supra* note 139, for a more detailed discussion of proponents' views.

<sup>157</sup> *Natural Resource Subsidies Hearings*, *supra* note 156, at 405 (statement of C. Barshefsky). Pro Trade Group, Comments on the Omnibus Trade Bill of 1987, at 27-30 (Sept. 21, 1987); The Business Coalition on Trade, Positions on H.R. 3, at 13 (Oct. 9, 1987); Coalition to Promote American Trade, Objections to the Domestic Subsidy Amendment in H.R. 3 (1987).

<sup>158</sup> Administration Position, *supra* note 71.

<sup>159</sup> The Subsidies Code states, for example, that "(s)ignatories recognize that the objectives mentioned in paragraph 1 above may be achieved, *inter alia*, by means of subsidies granted with the aim of giving an advantage to certain enterprises. . . . Signatories

further that section 301 of the Trade Act of 1974 could be used to address the issue at the heart of the natural resource debate—access of U.S. producers to low cost foreign natural resources.<sup>160</sup>

As the most controversial of the AD/CVD amendments, the natural resource proposal engendered numerous offers and counteroffers between the conferees,<sup>161</sup> largely characterized by the words “House recedes” (as offered by the Senate) and “Senate recedes” (as offered by the House). Because of its highly controversial nature and fears of retaliation or the implementation of foreign mirror legislation, however, the House conferees ultimately receded to the Senate’s narrow provision, supplemented by language in the Joint Conference Statement. The resolution of the natural resource debate for this Congress<sup>162</sup> was thus to accept the Senate’s statutory *de jure/de facto* test for determining sector specificity (and hence, countervailability), with accompanying language directing that the Office of the U.S. Trade Representative request a section 332 ITC investigation<sup>163</sup> into, and self-initiate section 301 actions<sup>164</sup> against, foreign investment barriers.<sup>165</sup> The natural resource issue was thus addressed by the conferees in a manner fully consistent with U.S. international obligations. Its resolution also reflects an awareness on the part of the conferees that the long-term solution to U.S. competitiveness in natural resource-based products is not to countervail, in piecemeal fashion, imports of those products—especially at the potential expense of U.S. export performance—but instead to reduce barriers to U.S. investment in resource-rich countries.

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note that the above forms of subsidies are normally granted either regionally or by sector.” Subsidies Code, *supra* note 7, art. 11:3.

<sup>160</sup> See *supra* note 2.

<sup>161</sup> See Senate offers of March 15, 30, and 31 (1987); see House offers of March 23 and 29 (1987).

<sup>162</sup> Omnibus Act, *supra* note 5, § 1312, at H1887; see also *Joint Conference Statement, supra* note 20, at H2031.

<sup>163</sup> Under section 332 of the Tariff Act of 1930, 19 U.S.C. § 1332 (1982), the ITC has broad authority to investigate issues related to the operation and effect of U.S. customs laws and to report to the President, the House Ways and Means Committee, and the Senate Finance Committee at their request or on its own initiative.

<sup>164</sup> See Omnibus Act, *supra* note 5, § 1301, at H1882.

<sup>165</sup> *Joint Conference Statement, supra* note 20, at H2031. The *Joint Conference Statement* provides:

The U.S. Trade Representative [is] to ask the U.S. International Trade Commission to conduct a section 332 investigation identifying countries which maintain investment barriers or other restrictions which effectively prevent foreign capital from claiming the benefit of foreign government programs on the same terms as domestic capital. The report should be submitted to the House Ways and Means Committee, the Senate Finance Committee, and the USTR. Based upon the ITC report, the USTR should self-initiate section 301 investigations to address those practices it considers to be the most egregious unreasonable practices within the meaning of section 301 and to have the most adverse impact on U.S. industries.

*Id.* For a brief discussion of section 301, see *supra* note 2.



C. *Calculation of Subsidies on Agricultural Products*

In 1984, Congress enacted an "upstream subsidy" provision in order to capture "subsidies bestowed on products at prior stages of manufacture or production."<sup>166</sup> An upstream subsidy is defined as any subsidy conferred on an "input product" that is used in the manufacture or production of merchandise which is subject to a CVD proceeding, and that bestows a competitive benefit and has a significant effect on the cost of production of the merchandise.<sup>167</sup> A competitive benefit exists when the price for the input is lower than the price the producer of the merchandise would otherwise have had to pay in an arms-length transaction.<sup>168</sup> If Commerce determines that an upstream subsidy exists, it includes the amount of the competitive benefit conferred in its calculation of the countervailing duty on the merchandise under investigation.<sup>169</sup>

The upstream subsidy provision is particularly difficult to apply to processed agricultural products, which may have benefitted from subsidies conferred on the upstream raw agricultural input. This is because commodities are, by definition, fungible, and are extremely price sensitive. A subsidized price on the raw product, it is argued, tends to set the market price for all of the supply of that product at a given time. Thus, there is no market-determined price for the raw input against which to measure the competitive benefit bestowed on the processed product.<sup>170</sup> "The upstream subsidies test, if applied to agricultural commodities, would understate the magnitude of the subsidy and permit wholesale circumvention of the countervailing duty statute."<sup>171</sup> Senators Grassley, Baucus, and Pryor thus introduced an amendment to enhance the effectiveness of the upstream subsidy provision in cases involving processed agricultural products.<sup>172</sup> The amendment was intended to codify Commerce practice,<sup>173</sup> which had been overturned by the CIT.

The case that provoked the amendment involved a CVD petition filed by U.S. hog producers and packers of unprocessed pork products against Canadian producers or exporters of live swine and fresh, chilled, and frozen pork.<sup>174</sup> The respondents asserted that live swine were an "input" to unprocessed pork, and that, therefore, the up-

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<sup>166</sup> H.R. CONF. REP. NO. 1156, 98th Cong., 2d Sess. 170, *reprinted in* 1984 U.S. CODE & ADMIN. NEWS 5220, 5287 [hereinafter 1984 Conference Report.]

<sup>167</sup> 1984 Act, *supra* note 4, § 613 (codified at 19 U.S.C. § 1677-1 (Supp. IV 1986)).

<sup>168</sup> 19 U.S.C. § 1677-1(b)(1) (Supp. IV 1986).

<sup>169</sup> *Id.* § 1677-1(c).

<sup>170</sup> See 133 CONG. REC. S8815 (daily ed. June 26, 1987) (statement of Sen. Grassley).

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

<sup>172</sup> Senate Bill, *supra* note 11, § 338.

<sup>173</sup> 133 CONG. REC. S8815 (daily ed. June 26, 1987) (statement of Sen. Baucus).

<sup>174</sup> Live Swine & Fresh, Chilled, & Frozen Pork Products from Canada, 50 Fed. Reg. 25,097 (Int'l Trade Admin. 1985) (final determination), *rev'd & remanded sub nom.* Canadian Meat Council v. United States, 661 F. Supp. 622 (Ct. Int'l Trade 1987) (emphasis added).

stream subsidy provision should be applied to measure any competitive benefit bestowed on unprocessed pork by virtue of subsidies provided to hog producers. Under this analysis, they contended, Commerce would find no competitive benefit to the production of pork.<sup>175</sup>

Commerce applied a two-part test in order to determine whether live swine was a product different from pork such that an upstream subsidies analysis should be employed: first, whether the value added to the input through processing operations was small; and second, whether demand for the input product was dependent upon demand for the processed product.<sup>176</sup> It concluded that live swine were not an "input product" to pork because the two products were essentially the same, and that therefore the upstream subsidies provision did not apply at all.<sup>177</sup> Commerce thus proceeded to evaluate subsidies to Canadian producers or exporters of both live swine and fresh, chilled and frozen pork products, without the necessity for separately analyzing whether any subsidy to hog producers conferred a benefit on pork producers.

In an action contesting Commerce's final affirmative subsidy determination, the CIT reversed and remanded, stating that: "By limiting the applicability of the upstream subsidies provision, Commerce apparently would, as in this case, *automatically impute* early stage subsidies to later stage products on the ground that the products are essentially the same at all stages."<sup>178</sup> The court held that: "Absent statutory recognition of special rules applicable to investigations concerning early stage agricultural subsidies, there is no reason why Commerce should depart from the course set by Congress under section 1677-1 for determining whether upstream subsidies pass through to later stage products in agricultural cases."<sup>179</sup>

The court recognized Commerce's concern that, under the upstream subsidy provision, if the benefit to producers of live swine did not benefit pork producers, only swine could be countervailed, and producers might circumvent duties by slaughtering swine prior to export.<sup>180</sup> It stated, however, that "fear of circumvention is a consideration which is accorded no role under the statute."<sup>181</sup>

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<sup>175</sup> *Id.* at 25,098.

<sup>176</sup> *Id.*

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

<sup>178</sup> *Canadian Meat Council*, 661 F. Supp. at 626 (emphasis added).

<sup>179</sup> *Id.* at 628.

<sup>180</sup> Opponents of the amendment claimed that the provision unnecessarily protected U.S. hog farmers, who had misstated key statistics. See 132 CONG. REC. H3133 (daily ed. May 21, 1986) (statement of Rep. Frenzel noting that a decline in Canadian hog imports had not been offset by an increase in imports of pork meat). Proponents of the measure claimed that Canadian hog producers did act as feared, slaughtering more hogs prior to export and shipping pork products into the United States at lower rates of duty. See 133 CONG. REC. S8816 (daily ed. June 26, 1987) (statement of Sen. Pryor).

<sup>181</sup> *Canadian Meat Council*, 661 F. Supp. at 629.

The amendment agreed to in conference, and supported by the Administration,<sup>182</sup> codifies and clarifies prior Commerce practice by requiring that a subsidy to a producer or processor of a raw agricultural product shall be deemed to be provided to the processed product if the processing operation adds only limited value to the raw product, and if demand for the raw product is substantially dependent upon demand for the processed product. The complications inherent in an upstream subsidy analysis in processed agricultural products cases are thus avoided.

#### D. *Treatment of International Consortia*

As discussed earlier, the countervailing duty statute provides for the imposition of duties if Commerce determines that a country is providing a subsidy to a class or kind of merchandise.<sup>183</sup> In the case of an international consortium, such as Airbus Industrie,<sup>184</sup> however, several countries may provide subsidies to different entities that each produce a part of a final product which is, in turn, exported as a product of only one country. Difficulties may arise when the U.S. industry that produces the final product files a CVD petition alleging injury from subsidized imports of that class or kind of merchandise. Current law does not expressly address whether Commerce may, in such a case, investigate subsidies from all of the countries participating in a consortium to each of the entities which produce only a part of the final product.<sup>185</sup>

A proposal introduced by Senators Danforth and Adams, and supported by the Administration,<sup>186</sup> amended section 701 of the Trade Agreements Act, by adding that, in determining any final countervailing duty on merchandise subject to a CVD investigation that is produced by a consortium, Commerce shall cumulate, in addition to subsidies provided directly to an international consortium, all subsidies received by the members of a consortium producing merchandise subject to a CVD investigation. Covered are all subsidies that assist, permit, or otherwise enable the members to participate in the consortium through production operations in their home coun-

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<sup>182</sup> Omnibus Act, *supra* note 5, § 1313, at H1887-88; see also *Joint Conference Statement*, *supra* note 20, at H2031. Both the USTR and Commerce supported the amendment. See 133 CONG. REC. S8814 (daily ed. June 26, 1987).

<sup>183</sup> 19 U.S.C. § 1671(a) (1982). See *supra* notes 16-20 and accompanying text.

<sup>184</sup> The governments of France, the United Kingdom, the Federal Republic of Germany, and Spain each allegedly subsidize various member entities of the consortium in addition to the consortium itself.

<sup>185</sup> 133 CONG. REC. S8714 (daily ed. June 25, 1987) (statement of Senators Adams (Wash.) and Danforth (Mo.) introducing section 337 of the Senate Bill, *supra* note 11).

<sup>186</sup> Speaking on the floor of the Senate, Senator Bentsen stated that the amendment was consistent with GATT obligations and was supported by the Administration. *Id.* at S8715.

tries.<sup>187</sup> The provision is intended to clarify existing law in order to counter "a new and sophisticated tactic" to avoid inclusion of all subsidies that enable the consortium to produce the final product.<sup>188</sup>

The House, which had no such provision, receded to the Senate.<sup>189</sup> The Joint Conference Statement provides that the amendment would explicitly authorize Commerce "to investigate subsidies provided at each stage of the production process by all participating countries," and to "cumulate the amounts of subsidies from all such countries" in determining the duty to be applied to the final product.<sup>190</sup> Commerce is thus to collapse its subsidy analysis and treat consortium members as one company for purposes of determining the total level of subsidization.<sup>191</sup>

#### *E. Leases Equivalent to Sales*

In 1984, the AD and CVD laws were amended to provide that, in addition to actual sales of the merchandise under investigation, the laws were to apply to any leasing arrangements which were "equivalent to the sale of the merchandise."<sup>192</sup> Since that time, it has been alleged that foreign manufacturers tend to structure leasing arrangements so as to avoid the appearance of a sale in order to circumvent these provisions.<sup>193</sup>

In this session of Congress the Senate originally proposed<sup>194</sup> to delete the phrase "equivalent to the sale" in CVD investigations so that the law would apply to all leasing arrangements.<sup>195</sup> In conference, the House receded with a substitute amendment, which identifies specific factors that must be considered in determining whether a lease is equivalent to a sale for purposes of the antidumping and countervailing duty laws.<sup>196</sup> The objective is to ensure that various

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<sup>187</sup> *Joint Conference Statement*, *supra* note 20, at H2031-32.

<sup>188</sup> 133 CONG. REC. S8715 (daily ed. June 25, 1987) (statement of Sen. Bentsen).

<sup>189</sup> Omnibus Act, *supra* note 5, § 1315, at H1888.

<sup>190</sup> *Joint Conference Statement*, *supra* note 20, at H2031-32.

<sup>191</sup> *Id.* While the *Joint Conference Statement* cites the Airbus venture, the provision may well have potential utility in connection with other types of transnational manufacturing arrangements involving products which require multinational cooperation and government support. *Id.* at H2031.

<sup>192</sup> 1984 Act, *supra* note 4, § 602(a)(1)(C) states in pertinent part: "For purposes of this subsection and section [1671d(b)(1)] of this title, a reference to the sale of merchandise includes the entering into of any leasing arrangement regarding the merchandise that is *equivalent to the sale* of the merchandise." 19 U.S.C. § 1671 (Supp. IV 1986) (emphasis added).

<sup>193</sup> S. REP., *supra* note 28, at 125; see also *Joint Conference Statement*, *supra* note 20, at H2035.

<sup>194</sup> Senate Bill, *supra* note 11, § 335; there was no equivalent House provision.

<sup>195</sup> The amendment did not alter the antidumping law requirement that the lease be equivalent to a sale of the merchandise under investigation. S. REP., *supra* note 28, at 125.

<sup>196</sup> Omnibus Act, *supra* note 5, § 1327, at H1893. The factors Commerce must consider are as follows: (a) the terms of the lease; (b) commercial practice within the industry; (c) the circumstances of the transaction; (d) whether the lease product is integrated into the operations of the company; (e) the likelihood that the lease would be continued or

forms of leases—including so-called “walk-away leases”<sup>197</sup> and certain renewable short-term leases—do not escape operation of the law merely because of their structure.<sup>198</sup>

## V. Injury Provisions

By and large, neither the House nor the Senate bills significantly altered the substance or scope of ITC material injury investigations, other than to devote some attention to higher-technology and other capital intensive products that tend to require substantial investment in continuous product development, and the principle of cumulation described below. As the Joint Conference Statement demonstrates, conferee activity tended to produce clarifications of, rather than significant alterations in, current law.

### A. Material Injury

Under the antidumping law and, in certain cases, under the countervailing duty statute, before duties may be imposed the ITC must determine that dumped or subsidized imports cause or threaten material injury<sup>199</sup> to a U.S. industry, or materially retard its establishment.<sup>200</sup> The House and Senate proposed certain statutory changes to clarify congressional intent regarding the factors the ITC must consider in its material injury and threat of material injury analysis.<sup>201</sup>

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renewed for a significant period of time; (f) other relevant factors, such as whether the lease would permit the avoidance of antidumping or countervailing duties. See *Joint Conference Statement*, *supra* note 20, at H2039.

<sup>197</sup> The *Joint Conference Statement* directs Commerce to focus on the substance rather than the form of a lease.

A renewable short-term lease or an indefinite walk-away lease for an item, such as a large truck, commercial airplane, or heavy electrical equipment would be equivalent to a sale where, for example, the product has been integrated into the operations of the company or where there is a likelihood that the lease will be continued or renewed for a significant period of time.

*Joint Conference Statement*, *supra* note 20, at H2039.

<sup>198</sup> Omnibus Act, *supra* note 5, § 1327, at H1892-93.

<sup>199</sup> See *supra* notes 19-20.

<sup>200</sup> 19 U.S.C. §§ 1671d(b), 1673d(b) (1982). The House bill would have amended section 771(7) of the Trade Agreement Act to authorize the ITC to consider whether imports have historically supplied a substantial proportion of demand in a geographically isolated market, and, in appropriate circumstances, to disregard imports into such a geographically isolated market in making its injury determination. See *Joint Conference Statement*, *supra* note 20, at H2039. In dropping the provision, the conferees expressed the view that “current law already authorizes the ITC to consider, in appropriate circumstances, whether imports enter certain geographical markets where the domestic industry does not compete, in determining whether dumped or subsidized imports are causing material injury or threat of injury.” *Id.* See, e.g., 19 U.S.C. § 1677(4)(C) (1982) (regarding regional industries).

<sup>201</sup> Section 329 of the Senate Bill, *supra* note 11, contained the following amendments: (1) ITC consideration in all cases of volume, price, and impact factors; (2) replacement of the term “price undercutting” with “price underselling”; (3) consideration of an industry’s condition in relation to that particular industry and not in relation to other industries or

First, under current law, among the factors the ITC must consider in its analysis are the volume of imports; the effect of imports on prices in the United States for the like product; and the impact of such imports on domestic producers of the like product.<sup>202</sup> In analyzing specific cases, however, there has been concern that not all of the ITC Commissioners apply all of the factors, and that they do not necessarily make clear which factors have been applied.<sup>203</sup> To remedy this shortcoming, the conferees agreed to "clarify" that the ITC is required to consider and explain its analysis of all three enumerated statutory factors in every case, and any other factors that may have been considered.<sup>204</sup>

Second, the statute currently directs the ITC to evaluate the effects of imports on prices by considering whether there has been significant "price undercutting" of the U.S. product.<sup>205</sup> It has been alleged that certain Commissioners narrowly interpret price undercutting to mean only predatory pricing to gain market power.<sup>206</sup> Because it is believed that below-market prices may cause injury regardless of an intent to obtain market power, however, the conferees replaced the term "price undercutting" with "price underselling." In evaluating the effects of imports on prices, the ITC must thus consider not only predatory pricing to gain market power, but also below-market prices that have an injurious effect.<sup>207</sup>

Third, existing law also requires the ITC in its material injury analysis to examine the impact of dumped or subsidized imports on the affected industry by considering "all relevant economic factors which have a bearing on the state of the industry."<sup>208</sup> In this connection, at least three statutory factors must be evaluated: first, an actual and potential decline in output, sales, market share, profits, productivity, return on investment, and utilization of capacity; second, factors affecting domestic prices; and third, actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment. The conferees added

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manufacturers as a whole; (4) examination of existing efforts by the U.S. industry to develop technology necessary to produce later-generation products; and (5) consideration of only domestic production facilities and operations of U.S. producers in assessing the impact of imports on the industry. S. REP., *supra* note 28, at 115-18. Section 154 of the House Bill, *supra* note 11, referenced all of the factors noted, except the fourth. H.R. REP., *supra* note 85, at 127-29.

<sup>202</sup> 19 U.S.C. § 1677(7) (1982 & Supp. IV 1986).

<sup>203</sup> H.R. REP., *supra* note 85, at 128.

<sup>204</sup> *Id.*; S. REP., *supra* note 28, at 116. Both reports note that "certain Commissioners" do not follow the analysis prescribed by the statute.

<sup>205</sup> 19 U.S.C. § 1677(C)(ii)(I) (1982).

<sup>206</sup> H.R. REP., *supra* note 85, at 128; S. REP., *supra* note 28, at 116. See Certain Red Raspberries from Canada, USITC Pub. 1707, Inv. No. 731-TA-196 (1985) (final determination) (views of Comm'r Liebel).

<sup>207</sup> H.R. REP., *supra* note 85, at 128.

<sup>208</sup> 19 U.S.C. § 1677(C)(iii) (1982).

a fourth statutory factor for the ITC to consider in determining the impact of imports on the affected industry: the "actual and potential negative effects on existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the like product."<sup>209</sup>

### B. Threat of Injury

The ITC may also render an affirmative injury determination in a given case if it finds that dumped or subsidized imports threaten to materially injure a domestic industry.<sup>210</sup> The 1984 Act codified some of the factors the ITC had previously applied at its discretion in assessing the threat of material injury, and added other factors for the ITC to consider.<sup>211</sup> In the current legislative round, the House proposed to add three new factors to the statutory list: (1) the likelihood of diversion of the merchandise to the United States because of restraints on exports to or imports into third countries; (2) whether dumping in foreign markets, as evidenced by outstanding AD orders or findings against the same party on the same merchandise in GATT member markets, suggests a threat;<sup>212</sup> and (3) the likelihood of product-shifting between a raw and processed agricultural prod-

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<sup>209</sup> Omnibus Act, *supra* note 5, § 1328, at H1893; *see also Joint Conference Statement, supra* note 20, at H2039. The statute states further that the ITC shall evaluate all such relevant economic factors within the context of the business cycle and conditions of competition that are distinctive to the affected industry. Omnibus Act, *supra* note 5, § 1328(2)(c), at H1893. *See Senate Offer on Phase II Issues* at 23 (Mar. 15, 1987). As to later-developed products, the Senate Report reflects congressional concern with the erosion of profitability in the aircraft and heavy electrical equipment sectors where the loss of one sale can affect the ability to maintain R&D efforts. *See S. REP., supra* note 28, at 117.

<sup>210</sup> 19 U.S.C. §§ 1671(a)(2)(A)(ii), 1673(a)(2)(A)(ii) (1982 & Supp. IV 1986).

<sup>211</sup> 1984 Act, *supra* note 4, § 612(a)(2)(B) (codified at 19 U.S.C. § 1677(F)(i) (Supp. IV 1986)). The provision enumerates eight factors that the ITC must consider in its threat analysis. The House Report summarizes them as follows:

- (1) if a subsidy is involved, the nature of the subsidy (particularly as to whether the subsidy is an export subsidy inconsistent with the Agreement);
- (2) any increase in production capacity or existing unused capacity in the exporting country likely to result in a significant increase in imports of the merchandise to the United States;
- (3) any rapid increase in United States market penetration and the likelihood that the penetration will increase to an injurious level;
- (4) the probability that imports of the merchandise will enter the United States at prices that will have a depressing or suppressing effect on domestic prices of the merchandise;
- (5) any substantial increase in inventories of the merchandise in the United States;
- (6) the presence of under-utilized capacity for producing the merchandise in the exporting country;
- (7) any other demonstrable adverse trends that indicate the probability that the importation of the merchandise (whether or not it is actually being imported at the time) will be the cause of actual injury; and
- (8) the potential for product-shifting.

H.R. REP., *supra* note 85, at 132-33.

<sup>212</sup> Outstanding AD orders in another country indicate a "pattern of injurious export practices," and thus a threat of injury. *See H.R. REP., supra* note 85, at 133.

uct when there is an AD or CVD order on one but not on the other.<sup>213</sup> The House provision also would have placed a burden of proof on the foreign manufacturer, exporter, or U.S. importer to provide specific and convincing evidence that previous findings of dumping in other markets did not indicate a threat of injury to the domestic industry. Failing such proof, the ITC could draw adverse inferences.<sup>214</sup>

In conference, the House receded to the Senate,<sup>215</sup> thereby eliminating the drawing of adverse inferences and the first of the three factors proposed by the House, which were not part of the Senate provision. The Senate proposal, to which the conferees agreed, requires the ITC in its threat analysis to consider whether dumping of the same product by the same party in a GATT-member market suggests a threat of injury to the U.S. industry,<sup>216</sup> and, in any investigation of raw and processed agricultural products, the likelihood of product-shifting.<sup>217</sup>

Finally, the conferees agreed to add to the ITC's threat analysis the same factor as that agreed to in connection with the evaluation of material injury: The ITC is to consider "the actual and potential negative effects on the existing development and production efforts of the industry, including efforts to develop a derivative or more advanced version of the like product."<sup>218</sup> This factor was proposed in the original Senate bill,<sup>219</sup> and addresses the need to protect domestic research and development efforts on second-generation

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<sup>213</sup> H.R. REP., *supra* note 85, at 121; see *Live Swine & Pork from Canada*, USITC Pub. 1733, Inv. No. 701-TA-224, at 18 (1985) (final determination), *aff'd sub nom.* National Pork Producers Council v. United States, 661 F. Supp. 633 (Ct. Int'l Trade 1987) (upholding the ITC's determination that the likelihood of product-shifting did not rise to the required level to make the threat of material injury real or imminent).

<sup>214</sup> H.R. REP., *supra* note 85, at 133.

<sup>215</sup> Omnibus Act, *supra* note 5, § 1329, at H1893-94; see also *Joint Conference Statement*, *supra* note 20, at H2039.

<sup>216</sup> This provision addressed, for example, the threat posed by the Japanese outboard motor industry which had been found to have massive dumping margins in Europe and Australia. These multiple dumping findings, coupled with the Japanese industry's structural capability to endure suppressed prices, "creates a particularly strong inference that injury is threatened." See S. REP., *supra* note 28, at 119. Dumping enforcement is increasingly coordinated in a de facto way. For example, when a new exporter seeks to gain market share through price underselling, the response of the domestic industry in Europe, Canada, Australia, and the United States is to seek antidumping relief. Thus, there are often multiple dumping cases. The effect of this amendment, particularly if adopted elsewhere, is to put exporters on notice that they cannot continue to dump in other countries, because those cases may well have an impact in the United States. It also may increase the incentive for U.S. companies with manufacturing facilities in other countries to seek relief from dumping there, because it may assist them in subsequent attempts to obtain relief in the United States.

<sup>217</sup> See *supra* note 214.

<sup>218</sup> Omnibus Act, *supra* note 5, § 1329, at H1893-94; see also *Joint Conference Statement*, *supra* note 20, at H2040.

<sup>219</sup> Senate Bill, *supra* note 11, § 330; S. REP., *supra* note 28, at 118.



products.<sup>220</sup>

### C. Cumulation

Prior to 1984, the AD and CVD laws neither mandated nor prohibited the Commission from cumulatively assessing the impact of imports on the domestic industry in cases involving more than one country. Individual Commissioners decided whether to cumulate on a case-by-case basis. The 1984 Act stripped the Commission of its discretion in this regard<sup>221</sup> and provided that the ITC must cumulate the volume and price effects of imports from two or more countries under investigation which compete with each other and with the domestic industry.<sup>222</sup> Since 1984, the practice of a majority of ITC Commissioners has been to cumulate as well volume and price effects of imports subject to any antidumping or countervailing duty order issued within eight months prior to an ITC injury vote in the pending action.<sup>223</sup> The House proposed to require cumulation of the volume and price effects of imports from two or more countries that were currently subject to any antidumping or countervailing duty investigation, or subject to a previous investigation within the past twelve months which resulted in a final order.<sup>224</sup> Placing the timeframe at twelve months preceding the initiation of the current investigation would have altered ITC practice and was characterized as an attempt to set a "reasonable time frame" for the cumulation analysis.<sup>225</sup> The House provision also would have required cumulation of imports subject to an investigation within the prior twelve month period that resulted in a suspension agreement or termination based on a quantitative restraint.<sup>226</sup> The ITC does not currently cumulate the effects of such imports. In conference, these provisions were dropped.<sup>227</sup>

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<sup>220</sup> See S. REP., *supra* note 28, at 118.

<sup>221</sup> See 1984 Conference Report, *supra* note 166, at 173.

<sup>222</sup> 1984 Act, *supra* note 4, § 612(a)(2)(A) (codified at 19 U.S.C. § 1677(7)(C)(iv) (Supp. IV 1986)). Despite the mandatory cumulation provision of the 1984 Act, the ITC had refused to "cross-cumulate" dumped and subsidized imports. See, e.g., Certain Carbon Steel Products from Austria and Sweden, USITC Pub. 179, Inv. Nos. 701-TA-225, 701-TA-227 to -228, 701-TA-230 to -231, 731-TA-219, at 11 (1985) (final determination). In 1987, however, the Court of Appeals for the Federal Circuit ruled that the ITC must "cross-cumulate" less-than-fair-value and subsidized imports. *Bingham & Taylor v. United States*, 815 F.2d 1482 (Fed. Cir. 1987). The Commission now does so. The House would have codified *Bingham* by mandating cross-cumulation to combat the hammering effect from dumped or subsidized imports which have a simultaneous impact on the domestic industry. House Bill, *supra* note 11, § 134; see H.R. REP., *supra* note 85, at 130. However, this provision was dropped in conference. See *Joint Conference Statement*, *supra* note 20, at H2040.

<sup>223</sup> See, e.g., *Stainless Steel Sheet and Strip from Spain*, USITC Pub. 1593, Inv. No. 731-TA-164, at 13 (1984) (final determination).

<sup>224</sup> House Bill, *supra* note 11, § 154; H.R. REP., *supra* note 85, at 129.

<sup>225</sup> H.R. REP., *supra* note 85, at 130.

<sup>226</sup> *Id.* at 129.

<sup>227</sup> See March 23 HOUSE OFFER, *supra* note 47, at 7.

No statutory provision requires cumulation in analyzing the threat of injury and, as a rule, the Commission has not done so. The House proposed a measure requiring such cumulation "to the extent practicable for imports currently subject to a pending AD or CVD investigation and which compete with each other and the domestic like product."<sup>228</sup> The conferees agreed to provide discretionary authority to cumulate in threat cases.<sup>229</sup>

The 1984 Conference Report also specified that cumulation was required for imports with only a "small percentage of total market penetration."<sup>230</sup> The ITC has thus routinely cumulated imports from various countries even where certain of those imports were negligible.<sup>231</sup> To address those cases in which strict adherence to the cumulation requirement led to results that were "anomalous to an objective analysis of market dynamics,"<sup>232</sup> the House proposed a limited exception to mandatory cumulation for negligible imports.<sup>233</sup> The Committee Report stated that in determining whether imports would be considered negligible, the ITC was to examine, among other relevant factors: (1) whether import volume and market share were negligible; (2) whether import sales were sporadic and isolated; and (3) whether the U.S. market for the like product was price sensitive.<sup>234</sup> Where the domestic market was sufficiently price sensitive so that even a negligible quantity of imports could result in price suppression or depression, such as may occur with fungible products, the exception was to be narrowly construed.<sup>235</sup> The conferees agreed to this limited exception to cumulation, stating that it was intended that the ITC apply the exception narrowly in all cases so that it not be used to subvert the purpose of mandatory cumulation.<sup>236</sup>

Finally, the conferees agreed to a provision added in conference by Senator Packwood, "that provides a special rule for investigations involving imports from Israel."<sup>237</sup> The ITC may treat imports as negligible and having no discernible adverse impact on the domestic industry if those imports are from a country with a Free Trade Area Agreement with the United States, in force and effect prior to Janu-

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<sup>228</sup> H.R. REP., *supra* note 85, at 129.

<sup>229</sup> Omnibus Act, *supra* note 5, § 1330, at H1894; *see also Joint Conference Statement, supra* note 20, at H2040.

<sup>230</sup> 1984 Conference Report, *supra* note 166, at 173.

<sup>231</sup> *See, e.g.,* Low Fuming Brazing Rod from France, USITC Pub. 1673, Inv. No. 731-TA-245 (1985) (preliminary determination).

<sup>232</sup> H.R. REP., *supra* note 85, at 131.

<sup>233</sup> House Bill, *supra* note 11, § 154.

<sup>234</sup> H.R. REP., *supra* note 85, at 130-31.

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

<sup>236</sup> Omnibus Act, *supra* note 5, § 1330, at H1894; *see also Joint Conference Statement, supra* note 20, at H2040.

<sup>237</sup> *Joint Conference Statement, supra* note 20, at H2040; Omnibus Act, *supra* note 5, § 1330, at H1894.

ary 1, 1987<sup>238</sup> (Israel is the only qualifying country), if the ITC determines they are not the cause of material injury to domestic producers of like products.<sup>239</sup>

## VI. Additional Provisions

Various miscellaneous provisions agreed to by the conferees reflected a strong desire to ensure that AD and CVD findings cannot be circumvented. Commerce is thus authorized to prevent circumvention of AD and CVD orders by foreign exporters that undertake assembly or finishing operations in the United States or third countries, or that perform minor alterations to covered products or export later-developed merchandise. Concern over circumvention extended to provisions designed to ensure the monitoring of downstream products in order to identify the diversionary impact of AD and CVD orders on inputs, and specific anti-circumvention provisions were put in place on steel imports. Action also focused on increasing the deterrent effect of AD and CVD proceedings through, for example, prohibitions against duty drawback for AD and CVD duties, repeal of the AD/CVD duty exemption for U.S. government purchases, and a clarification of the circumstances under which retroactive duties may be imposed.

### A. Actions to Prevent Circumvention

Commerce must issue an AD or CVD order following an affirmative final determination of dumping or subsidization and, where required, an affirmative final injury determination.<sup>240</sup> The order directs Customs officers to assess an antidumping<sup>241</sup> or countervailing duty<sup>242</sup> on imports of the class or kind of merchandise specified in the scope portion of the order.

Both the House and Senate Committee Reports expressed strong concern over the potential evasion of the AD and CVD laws by exporters that attempt to circumvent final orders through altering their method of production or shipment of merchandise.<sup>243</sup> Circum-

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<sup>238</sup> United States-Israel Free Trade Agreement, signed Apr. 22, 1985, 24 I.L.M. 653-87 (1985) (entered into force Aug. 19, 1985).

<sup>239</sup> The *Joint Conference Statement* provides that before applying this provision, the ITC would first determine whether a domestic industry is materially injured by reason of imports from Israel. If the ITC made an affirmative determination, the provision would not apply. If the ITC made a negative determination, it would be authorized to consider such imports as negligible and having no discernible impact on the domestic industry. The ITC is to consider all relevant economic factors regarding the imports, including the level of the imports from Israel, relative to both domestic production and other imports under investigation, their effect on U.S. prices for the like product, and their impact on domestic producers. *Joint Conference Statement*, *supra* note 20, at H2040.

<sup>240</sup> 19 U.S.C. §§ 1671e(a), 1673e(a) (1982).

<sup>241</sup> 19 U.S.C. § 1673e(a) (1982).

<sup>242</sup> 19 U.S.C. § 1671e(a) (1982 & Supp. IV 1986).

<sup>243</sup> H.R. REP., *supra* note 85, at 135; S. REP., *supra* note 28, at 99-100.

vention of orders on final products had been accomplished by means of the assembly or processing of components in the United States or in third countries; circumvention of orders on components had been accomplished by transshipment to third countries for minor processing operations.<sup>244</sup> The law does not currently address these attempts to evade the scope of an order. Nor does current law address circumvention accomplished by incorporating a component subject to an order into a "downstream" product.

Several provisions were agreed to in conference<sup>245</sup> to remedy these loopholes.<sup>246</sup> The first concerns merchandise assembled or completed in the United States. If merchandise sold in the United States: (i) is of the same class or kind as merchandise subject to an AD or CVD order or finding, (ii) is assembled or completed in the United States from parts or components produced in the country subject to the order, and (iii) differs little in value from the imported parts or components, then Commerce may<sup>247</sup> include the imported parts or components within the scope of the order.<sup>248</sup> Commerce must consider such factors as the pattern of trade, whether the producer or exporter of the components and the U.S. party that com-

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<sup>244</sup> Kamarck & Harr, *Current Issues Relating to the Scope of Antidumping and Countervailing Duty Orders*, in THE COMMERCE DEPARTMENT SPEAKS 13-78 (1987).

<sup>245</sup> Omnibus Act, *supra* note 5, § 1321, at H1889; see also *Joint Conference Statement, supra* note 20, at H2034; House Bill, *supra* note 11, § 155; Senate Bill, *supra* note 11, § 323(a); H.R. REP., *supra* note 85, at 134; S. REP., *supra* note 28, at 96, 99-101.

<sup>246</sup> Authority was also provided to tighten existing enforcement authority over quantitative restraints on steel imports. Under the Steel Import Stabilization Act (title VIII of the Trade and Tariff Act of 1984, *supra* note 3), the President is authorized to enforce quantitative restrictions on steel imports, as provided in bilateral arrangements with steel-exporting countries. Section 195 of the House Bill provided explicit authority to enforce these quantitative restrictions when the steel product is exported from an arrangement country and transshipped or transformed in a nonarrangement country before entering the United States. Any steel product that is manufactured in a country that is not party to a bilateral arrangement (a "nonarrangement country") from steel which is melted and poured in a country that is party to a bilateral arrangement (an "arrangement country") may be treated for purposes of the quantitative restrictions under that arrangement as if it were a product of the arrangement country. Section 323(b) of the Senate Bill contained a similar provision and also authorized USTR to undertake additional actions to preserve the integrity of existing steel import restraints. The House receded to the Senate. The conferees stated that the "melted and poured" provision, (section 1322) of the Omnibus Act, *supra* note 5, applies to products from foreign countries as well as to products from U.S. insular possessions or any territory outside the customs territory of the United States. The conferees also stated that imports from the insular possessions shall be treated in no worse manner than imports from foreign countries under this provision. House Bill, *supra* note 11, § 195; Senate Bill, *supra* note 11, § 323(b); Omnibus Act, *supra* note 5, § 1322, at H1890-91; see also *Joint Conference Statement, supra* note 20, at H2036.

<sup>247</sup> Omnibus Act, *supra* note 5, § 1321, at 1889-90; see also *Joint Conference Statement, supra* note 20, at H2034. In conference, the House receded to the Senate provision, which is discretionary (*e.g.*, Commerce may apply the order to the imported parts or components but is not required to do so); the House provision was mandatory.

<sup>248</sup> The House Report cites as an example of circumvention the importation of picture tubes and printed circuit boards assembled by a U.S. subsidiary of the manufacturer and then sold in the United States as television receivers. H.R. REP., *supra* note 85, at 134.

pletes or assembles them are related, and whether imports of the components increased after the order or finding was issued.

Another provision agreed to in conference addresses circumvention of an order by shipment of merchandise to the U.S. through a third country.<sup>249</sup> Commerce would be permitted to prevent evasion by expanding the scope of an order on parts or components to include a final product assembled or completed in a third country where little value is added to those parts or components. Commerce is to consider the same factors as described above. The Senate Report explained that this provision was intended to address two situations: when the order applies to parts or components sent to a third country for completion or assembly (diversion), and when the order applies to a final product from a particular country that attempts to circumvent the order by shipping the parts or components to a third country for assembly or completion (circumvention) and subsequent export to the United States.<sup>250</sup>

The conferees agreed to this provision, and to a measure to create a rebuttable presumption that an investigation, an AD finding, or an AD or CVD order on a finished product covers that product even if altered in minor respects.<sup>251</sup> Raw agricultural products that have undergone minor processing would also be included. To determine whether alteration is minor, Commerce would be required to compare the new and altered products, applying the following criteria: their general physical characteristics, the expectations of ultimate users, the channels of trade, and the cost of modification relative to the total value.<sup>252</sup>

Commerce may also include later-developed merchandise within the scope of a preexisting order.<sup>253</sup> This provision was intended to clarify and codify current Commerce authority, which has been recognized by the courts.<sup>254</sup> Commerce is to compare the merchandise already subject to the order with the later-developed merchandise, applying the following five criteria:<sup>255</sup> (i) whether they share the same general physical characteristics, (ii) whether the expectations of

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<sup>249</sup> House Bill, *supra* note 11, § 155; Senate Bill, *supra* note 11, § 323(a); Omnibus Act, *supra* note 5, § 1321, at H1889-90.

<sup>250</sup> S. REP., *supra* note 28, at 100.

<sup>251</sup> Omnibus Act, *supra* note 5, § 1321, at H1889-90; *see also Joint Conference Statement, supra* note 20, at H2034. The Administration also supported this reform. *See Administration Position, supra* note 71. *See also* S. 539, 100th Cong., 1st Sess. § 5008 (1987), 133 CONG. REC. 2105 (daily ed. Feb. 19, 1987) (a bill introduced by Senate Republicans on behalf of the Administration).

<sup>252</sup> S. REP., *supra* note 28, at 100. The House Report cites, as an example of minor alteration, the application of a fire resistant coating to cookware prior to importation. *See H.R. REP., supra* note 85, at 135.

<sup>253</sup> Omnibus Act, *supra* note 5, § 1321, at H1889-90.

<sup>254</sup> *Joint Conference Statement, supra* note 20, at H2035.

<sup>255</sup> *See, e.g., Diversified Prods. Corp. v. United States*, 572 F. Supp. 883, 889 (Ct. Int'l Trade 1983).

ultimate purchasers are the same, (iii) whether the ultimate use is the same, (iv) whether they are sold through the same channels of trade, and (v) whether they are advertised and displayed in the same manner. Commerce may not exclude a later-developed product from an AD or CVD order merely because it is classified under a different tariff heading than in the petition or order.<sup>256</sup> Nor may it exclude the later-developed product because it performs additional functions, unless those functions constitute its primary use and represent more than a significant proportion of the total cost of production of the merchandise.<sup>257</sup>

In conference, the House was successful in gaining Senate agreement to a provision requiring Commerce to notify the ITC prior to issuing a determination with respect to any change in the scope of an AD order or finding, or CVD order where the ITC has made an injury determination.<sup>258</sup> The ITC may request consultations and advise Commerce if it believes inclusion of such merchandise in the AD or CVD order would be inconsistent with the injury determination on the basis of which the order was issued.<sup>259</sup> The genesis of this provision was prior disagreement between Commerce and the ITC when Commerce has attempted to broaden the scope of an order to include merchandise not included in the ITC's injury determination.<sup>260</sup>

### *B. Input Dumping and Monitoring*

Congress considered two additional measures to counter circumvention in the context of the physical incorporation into a downstream product of components subject to an order. The first, which failed, would have permitted Commerce to factor into its AD margin

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<sup>256</sup> Omnibus Act, *supra* note 5, § 1321, at H1890. Commerce has maintained, and the courts have held, that it is not bound by tariff classifications. See *Royal Business Machs., Inc. v. United States*, 507 F. Supp. 1007 (Ct. Int'l Trade 1980), *aff'd*, 669 F.2d 692 (Fed. Cir. 1982).

<sup>257</sup> The House conferees unsuccessfully attempted to have this paragraph stricken from the statutory language and included as a sixth criterion for Commerce to consider. See March 23 HOUSE OFFER, *supra* note 47, at 8.

<sup>258</sup> Omnibus Act, *supra* note 5, § 1321, at H1890; see also *Joint Conference Statement*, *supra* note 20, at H2035.

<sup>259</sup> The purpose of authorizing ITC advice is to ensure that any anti-circumvention action taken is consistent with U.S. international obligations. The conferees, however, expressed the view that it would be "relatively unusual" for the ITC to find that inclusion of the merchandise is inconsistent with the prior injury determination; the conferees also suggested that the set of issues addressed by the ITC in making its assessment would be "relatively narrow." *Joint Conference Statement*, *supra* note 20, at H2035. While the ITC can provide its advice in writing, the conferees cautioned that written advice is to be the exception and not the rule; formal written advice (rather than informal communications) should only be provided when the ITC determines "that a significant injury issue is presented." *Id.*

<sup>260</sup> See *Kamarck & Harr*, *supra* note 244, at 28 (discussing Certain In-Shell Pistachios from Iran in which this situation arose).

calculation the benefit to the foreign manufacturer of the downstream product of purchasing inputs at less than fair value—so-called “input dumping.” The second, which was agreed to, involves the monitoring of imports of products believed to contain major components subject to AD or CVD orders.

Congress first focused on the problem of “diversionary input dumping” in 1984, when it considered a provision to remedy what was then called “downstream dumping.”<sup>261</sup> Downstream dumping occurred when a product subject to an AD or CVD investigation included materials or components purchased for less than fair value, which had a significant effect on the cost of producing the merchandise under investigation.<sup>262</sup> If Commerce found downstream dumping, it was to include the amount of the cost advantage derived from that dumping (calculated as the difference between the purchase price and the generally available price of the input) in its calculation of the dumping margin on the final product subject to investigation.

The provision was dropped in conference in 1984; it was reintroduced in 1985 and was incorporated into H.R. 4800, a series of trade proposals that were never enacted by the 99th Congress.<sup>263</sup> These earlier proposals were considered difficult to administer because producers of the allegedly dumped input were unlikely to cooperate in an investigation involving the finished product. Thus, the amount of the cost advantage to the producer of the downstream product would be difficult to calculate.

To remedy this problem, in 1987 the House proposed a diversionary input dumping provision,<sup>264</sup> which would have based FMV of the input on constructed value; FMV would have then been increased by the difference between the dumped input's purchase price and its fair value. In determining the extent to which the input was purchased at less than fair value, the input would have had to have been previously subject to an AD investigation that resulted in an AD order, a suspension or a termination based on a quantitative restraint (following an affirmative preliminary dumping finding). In the case of an input subject to an AD order, foreign market value would have had to have been calculated within the past six years and was to be used to determine the existence and amount of the current input dumping benefit. If the investigation was either suspended or terminated, then the affirmative preliminary determination must have occurred within the past six years. The value of the input

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<sup>261</sup> See 1984 Conference Report, *supra* note 166, at 172.

<sup>262</sup> *Id.*

<sup>263</sup> Senator Heinz introduced a similar diversionary dumping provision in 1985, S. 1493, 99th Cong., 1st Sess. (1985), a bill supported by the Trade Reform Action Coalition (TRAC). See 131 CONG. REC. S10082 (daily ed. July 25, 1985). TRAC continued to support the provision in 1987. See 1987 Hearings, *supra* note 1, at 1129 (statement by TRAC).

<sup>264</sup> See House Bill, *supra* note 11, § 156.

dumping benefit would then be calculated on the basis of the best available information, including the prior affirmative preliminary determination.<sup>265</sup> If, following these computations, Commerce determined that the method for calculating the fair value of the input did not accurately reflect the benefit bestowed on the manufacturer of the subject merchandise, it would have had the authority to make adjustments to more accurately reflect the actual competitive benefit bestowed.<sup>266</sup>

Two additional preconditions to application of the provision were proposed: (1) that the input be so routinely used as a major component in the final product that the cost of the input had a significant effect on the cost of producing the final product; and (2) that there be evidence of diversion, *i.e.*, declining imports of the input and increasing imports of the final product.<sup>267</sup>

The Administration opposed the House measure, arguing strongly that its implementation would violate the GATT and the Antidumping Code and might provoke mirror legislation directed at U.S. exports.<sup>268</sup> The GATT and the Antidumping Code require a comparison of prices for "like products."<sup>269</sup> To the extent an input is transformed into a final product, it is not "like" the finished product subject to investigation. Moreover, the Administration noted that, with the exception of the United States, there is consensus among GATT signatories that such input dumping provisions are inconsistent with GATT obligations.<sup>270</sup>

The input dumping provision was again dropped in conference this year. In its counteroffer, the Senate receded with a three-part substitute amendment accepted by the conferees which: (1) stated that diversionary dumping, comprising both input and third country dumping, should be included as a GATT negotiating objective; (2) authorized USTR to submit an application to a foreign government to initiate an AD action pursuant to article 12 of the GATT Antidumping Code when third country dumping injures a U.S. industry;<sup>271</sup> and (3) clarified existing law to permit Commerce in a con-

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<sup>265</sup> H.R. REP., *supra* note 85, at 136.

<sup>266</sup> As stated in the House Report, the "competitive benefit" test is not intended to yield an arbitrary result. If, for example, a manufacturer purchased the input at prevailing market prices, it would be unfair to hold him to some price "higher" than was realistically available, and thus no competitive benefit would have been bestowed. *Id.* at 137.

<sup>267</sup> *Id.*

<sup>268</sup> See 1987 Hearings, *supra* note 1, at 660 (statement of USTR General Counsel A. Holmer).

<sup>269</sup> GATT, *supra* note 6, art. 6(1)(a); Antidumping Code, *supra* note 7, art. 2:1.

<sup>270</sup> Administration Position, *supra* note 71.

<sup>271</sup> The Antidumping Code, *supra* note 8, art. 12(1) provides: "An application for antidumping action on behalf of a third country shall be made by the authorities of the third country requesting action." Section 1317 of the Omnibus Act, *supra* note 5, sets forth procedures for domestic industries to petition USTR to pursue U.S. rights under article 12. A domestic industry that produces a product like or directly competitive with mer-



structed value case to disregard actual prices between related parties for purchases of an input, and to use instead a reasonable estimate of the cost of production of that input.<sup>272</sup>

Apart from the input dumping provision itself, both the Senate and House proposed similar procedures to assist in identifying instances of input dumping. Those procedures involved the monitoring of imports of downstream products in order to determine whether major component parts subject to an AD or CVD order were being diverted into those imports.<sup>273</sup> The purpose of the monitoring program was to provide an early warning signal of diversionary practices.<sup>274</sup> There is no such provision in current law.

The House receded to the Senate downstream product monitoring provision.<sup>275</sup> It permits a domestic producer of a component part or a downstream product to petition Commerce to designate a downstream product for monitoring in order to identify the potential diversion of components.<sup>276</sup> The petition requesting monitoring must specify the downstream product, the component part incorporated therein, and the reasons for suspecting that AD or CVD duties have resulted in diversion of the component into increased production and exportation of the downstream product. If Commerce determines that there is a "reasonable likelihood" that imports of the downstream product will increase as a result of diversion of the components,<sup>277</sup> the ITC must monitor downstream product import

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chandise produced by a foreign country may submit a petition to USTR if it has reason to believe that such merchandise is being dumped in a third country market and such dumping is injuring the U.S. industry. If the USTR determines there is a reasonable basis for the allegations, an application shall be submitted to the foreign government requesting that AD action be taken on behalf of the United States. USTR is to then seek consultations with the foreign government. If the foreign government refuses to take AD action, the USTR is to consult with the U.S. industry as to whether any other U.S. trade action is appropriate. See Omnibus Act, *supra* note 5, § 1317, at H1888-89; see also *Joint Conference Statement, supra* note 20, at H2033.

<sup>272</sup> Omnibus Act, *supra* note 5, § 1318, at H1889; see also *Joint Conference Statement, supra* note 20, at H2033.

<sup>273</sup> House Bill, *supra* note 11, § 164; Senate Bill, *supra* note 11, § 323(a); H.R. REP., *supra* note 85, at 144-46; S. REP., *supra* note 28, at 97.

<sup>274</sup> S. REP., *supra* note 28, at 99.

<sup>275</sup> Omnibus Act, *supra* note 5, § 1320, at H1889; see also *Joint Conference Statement, supra* note 20, at H2034.

<sup>276</sup> A component part is an import that, within the preceding five years, has been subject to a CVD or AD order or a suspension agreement with respect to which the estimated net subsidy or dumping margin was at least 15%, and is routinely used as a major part, component, assembly, subassembly or material, in a downstream product. *Joint Conference Statement, supra* note 20, at H2034.

<sup>277</sup> Within 14 days, Commerce must determine whether there is "reasonable likelihood," and whether (i) the component is already subject to monitoring pursuant to a bilateral agreement to limit steel imports, or (ii) merchandise related to the component and manufactured in the same country has been subject to AD or CVD orders or several suspended investigations, or (iii) merchandise produced or exported by the component producer or exporter and similar in description and use has been the subject of 2 suspended investigations or AD or CVD orders. Commerce is also to consider, if appropriate, such factors as the value of the component in relation to that of the downstream product; the

volumes.<sup>278</sup> Commerce is to then review the ITC information in determining whether to initiate an AD or CVD investigation of imports of the downstream product, or to request that the ITC cease monitoring.<sup>279</sup>

### C. Processed Agricultural Products

In the area of agricultural trade, an issue that has sparked considerable controversy is the ability of U.S. producers or growers of raw agricultural products to be included as part of the industry<sup>280</sup> against which the impact of allegedly dumped or subsidized imports of processed agricultural products will be evaluated, and as an interested party<sup>281</sup> with standing to file AD and CVD petitions.

Currently, the statute defines the term "industry" as the "domestic producers as a whole of a like product. . . ."<sup>282</sup> "Like product" is, in turn, defined as a "product which is like or, in the absence of like, most similar in characteristics and uses with, the article subject to investigation."<sup>283</sup> Applying these statutory definitions in agricultural products cases has proven especially difficult. While producers or growers on the one hand, and processors on the other, do not produce a like product, there is often a high degree of substitution between the unprocessed and processed form of the product, and a substantial degree of economic interdependence between the producing and processing sectors.

Farm groups have been critical of what they view as inconsistent decisions by the ITC on this issue.<sup>284</sup> Commission practice has been to consider the following two factors in determining whether to de-

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extent of substantial transformation of the component due to its incorporation into the downstream product; and the relationship between the entities producing the component and the downstream product. S. REP., *supra* note 28, at 97-98. In considering the value of the component part in relation to the value of the downstream product, Commerce is to consider whether such part or component represents a significant portion of the costs of producing the downstream product. *Joint Conference Statement, supra* note 20, at H2034.

<sup>278</sup> The ITC will publish reports on a quarterly basis and, if the relevant import volume increases by more than five percent per quarter over the preceding quarter, it will analyze the increase in the context of overall economic conditions in that product sector. *Joint Conference Statement, supra* note 20, at H2034.

<sup>279</sup> The request that the ITC cease monitoring is to be made if the ITC reports indicate that imports are not increasing and Commerce determines there is no longer a reasonable likelihood of diversion. *Id.*

<sup>280</sup> 19 U.S.C. § 1677(4) (1982 & Supp. IV 1986).

<sup>281</sup> *Id.* § 1677(9).

<sup>282</sup> *Id.* § 1677(4)(A) (Supp. IV 1986).

<sup>283</sup> *Id.* § 1677(10) (1982).

<sup>284</sup> See *Live Swine and Pork from Canada*, USITC Pub. 1733, Inv. No. 701-TA-224 (1985) (final determination), *aff'd sub nom. National Pork Producers Council v. United States*, 661 F. Supp. 633 (Ct. Int'l Trade 1987); *Frozen Concentrated Orange Juice from Brazil*, USITC Pub. 1406, Inv. No. 701-TA-84 (1983) (final determination); *Lamb Meat from New Zealand*, USITC Pub. 1191, Inv. No. 701-TA-80 (1981) (preliminary determination).

fine the domestic industry to include producers or growers of a raw agricultural product:

First, the Commission has considered the extent to which the raw product enters into a single line of production resulting in the processed product. Second, the Commission has examined the degree of economic integration between growers and packers, often looking at the legal relationship between the two groups.<sup>285</sup>

As evidence of the legal relationship, a majority of Commissioners has considered the extent of vertical integration in the industry<sup>286</sup> and the existence of a contractual linkage between the prices of the raw and the processed products.<sup>287</sup> Commissioner Liebeler, while agreeing with the first part of the test, has dissented from the majority view on the second part, asserting that it "makes little economic sense" to focus on the legal relationship in determining whether there is the requisite degree of economic integration.<sup>288</sup>

The provision agreed to by the House and Senate conferees<sup>289</sup> reflects the Liebeler view and amends the definition of "industry" to permit growers or producers of a raw agricultural product to be included as part of the U.S. "industry" when the following two conditions are met: (1) the processed agricultural product is produced from the raw product through a single continuous line of production;<sup>290</sup> and (2) there is a substantial coincidence of economic interest between the producers or growers of the raw agricultural product and processors of the agricultural product, based upon relevant economic factors, which may, in the discretion of the Commission, include price, added market value, or other economic interrelationships (regardless of whether coincidence of economic

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<sup>285</sup> *Live Swine*, USITC Pub. 1733 (holding that growers should not be included in a single industry with pork packers because of insufficient economic integration).

<sup>286</sup> *Id.* at 6. In *Live Swine* the majority found that 5% ownership of packing facilities by growers was insufficient to constitute economic integration, whereas in *Lamb Meat* two major packers were owned by growers.

<sup>287</sup> *Id.* at 7. In *Live Swine*, prices for hogs were not linked by contract to prices received by packers for the processed product, whereas in *Orange Juice* the price paid to the grower was determined by the final selling price of the concentrate.

<sup>288</sup> *Id.* at 21.

<sup>289</sup> House Bill, *supra* note 11, § 152; Senate Bill, *supra* note 11, § 326; Omnibus Act, *supra* note 5, § 1326, at H1893; see also *Joint Conference Statement*, *supra* note 20, at H2038. The Liebeler view was also considered and found to have merit by the Canadian Import Tribunal in a CVD investigation of imports of boneless beef from the EEC into Canada. Boneless Manufacturing Beef Originating in or Exported from the European Economic Community, Canadian Import Tribunal, Inquiry No. CIT-2-86 (July 25, 1986). This decision was the subject of a GATT panel finding which is currently "blocked" (*i.e.*, the panel's findings have not been adopted or released). Canada: Imposition of Countervailing Duties on Imports of Manufacturing Beef from the EEC. SCM/85.

<sup>290</sup> Omnibus Act, *supra* note 5, § 1326(a), at H1893. The processed agricultural product is considered to be processed from a raw agricultural product through a single continuous line of production if "(i) the raw product is substantially or completely devoted to the production of the processed product; and (ii) the processed product is produced substantially or completely from the raw product." *Id.*

interest is based upon any legal relationship).<sup>291</sup> The conferees also expanded the statutory definition of "interested party," the entity which has standing to file a petition,<sup>292</sup> to permit a coalition or trade association which is representative of either processors, or processors and producers, to bring an AD or CVD investigation on the processed product.<sup>293</sup> The new industry and standing provisions are subject to a "sunset clause" in the event the amendments are found by GATT to be inconsistent with the international obligations of the U.S.<sup>294</sup>

The conferees also agreed to add an additional factor related specifically to agricultural products to those the ITC must consider

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<sup>291</sup> The provision states that, in addition to such other factors it considers relevant to the question of coincidence of economic interest, the Commission shall

- (i) if price is taken into account, consider the degree of correlation between the price of the raw agricultural product and the price of the processed agricultural product; and
- (ii) if added market value is taken into account, consider whether the value of the raw agricultural product constitutes a significant percentage of the value of the processed agricultural product.

*Id.*

<sup>292</sup> Under current law, the following interested parties have standing to file an antidumping or countervailing duty petition on behalf of an industry: (1) a manufacturer, producer, or wholesaler in the United States of a like product; (2) a certified union or recognized union or group of workers which is representative of an industry engaged in the manufacture, production, or wholesale in the United States of a like product; (3) a trade or business association a majority of whose members manufacture, produce, or wholesale a like product in the United States; and (4) an association, a majority of whose members is composed of interested parties described above. 19 U.S.C. §§ 1671a(b)(1), 1673a(b)(1) (Supp. IV 1986).

<sup>293</sup> Omnibus Act, *supra* note 5, § 1326(a), at H1893. The definition of "industry" for purposes of assessing injury and for standing has been the subject of dispute between the United States and European Community as well. Standing is accorded in both U.S. law and the Antidumping Code to the domestic "industry" which produces a "like product." "Like product" is defined more narrowly in the Antidumping Code than under U.S. law as "alike in all respects" or with "characteristics closely resembling those of the product under consideration." See Antidumping code, *supra* note 8, art. 2:2. A provision enacted in 1984 stated that the term "industry" was to include producers of the "principal raw agricultural product" if they alleged injury as a result of imports of wine and grape products. 1984 Act, *supra* note 4, § 612(a)(1) (codified at 19 U.S.C. § 1677(4)(A) (Supp. IV 1986)). When the American Grape Growers Alliance for Fair Trade filed AD and CVD petitions against French and Italian wine producers, the Commission of the European Communities, as well as foreign producers and domestic importers, objected to providing grape growers with standing or to be considered part of the domestic industry for purposes of determining injury. See *Certain Table Wines from France and Italy*, USITC Pub. 1502, Inv. Nos. 701-TA-210, 701-TA-211, 731-TA-167, 701-TA-168 (1984) (preliminary determination). A GATT panel found the 1984 provision inconsistent with the GATT Antidumping and Subsidies Codes. The panel's findings have not been adopted or released. Nevertheless to avoid retaliation and similar treatment of U.S. exports, the conferees, in agreeing to the new definition of "industry" for agricultural products, provided in the *Joint Conference Statement* that the provision would cease to apply if USTR notified the ITC that its application would be inconsistent with U.S. international obligations. *Joint Conference Statement*, *supra* note 20, at H2038.

<sup>294</sup> Omnibus Act, *supra* note 5, § 1326(a), at H1893; *Joint Conference Statement*, *supra* note 20, at H2038. There have been several GATT challenges to the application of "like product" provisions. See *Joint Conference Statement*, *supra* note 20, at H2038.

in determining threat of material injury.<sup>295</sup> In an investigation involving both raw and processed agricultural products, the ITC is to consider the likelihood of product-shifting; *i.e.*, whether there will be increased imports of one product if an antidumping or countervailing duty order is placed on the other.

#### D. Critical Circumstances

Critical circumstances exist when a domestic industry is being injured by massive imports of dumped or subsidized imports over a short period of time.<sup>296</sup> Import surges typically result when a foreign producer, responding to the filing of an AD or CVD petition, rapidly increases its exports to the United States prior to a preliminary Commerce determination of dumping or subsidization, so as to avoid the duty liability that, in the ordinary case, attaches to merchandise entered on or after the date of the preliminary determination.

Critical circumstances provisions are thus intended to provide relief to the U.S. industry injured by imports prior to the statutory completion of a case; the provisions are also intended to deter circumvention of AD and CVD duties by permitting their imposition retroactively.<sup>297</sup> It has been alleged, however, that the statutory provisions have not proven effective, primarily because of Commerce Department reluctance to expedite its critical circumstances determinations, and because the ITC has had great difficulty in applying critical circumstances criteria during the final injury phase of an AD or CVD proceeding.<sup>298</sup> The conferees have attempted to redress these

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<sup>295</sup> Omnibus Act, *supra* note 5, § 1326(b), at H1893; *see also Joint Conference Statement, supra* note 20, at H2038.

<sup>296</sup> In the ordinary case, Commerce has 85 days from the filing of a CVD petition, 19 U.S.C. § 1671b(b)(1) (Supp. IV 1986), or 160 days from the filing of an AD petition, *id.* § 1673b(b)(1) (1982), to make its preliminary determination of dumping or subsidization. Upon an affirmative preliminary determination, Commerce is to order the suspension of liquidation for all entries of the merchandise subject to the determination. *Id.* § 1671b(d)(1). A petitioner may allege critical circumstances in its original petition or at any time more than 20 days prior to Commerce's final determination. Commerce will determine, on the basis of the best information available, whether there have been massive imports over a short period of time, and whether there is a reasonable basis to believe, in a CVD case, that there is a subsidy inconsistent with the Subsidies Code, or, in an AD case, that there is a history or knowledge of dumping. If Commerce finds critical circumstances, then any suspension of liquidation ordered pursuant to the preliminary affirmative finding will apply to unliquidated entries of the merchandise entered or withdrawn from warehouse for consumption on or after the date 90 days prior to the date on which liquidation was first suspended. *Id.* § 1671b(c)(2). If both the ITC and Commerce make final affirmative determinations of critical circumstances, duties may be imposed retroactively on unliquidated entries, subject to the 90 day limitation.

<sup>297</sup> The GATT Codes require a preliminary finding of subsidy or sales at less than fair value before the imposition of provisional measures. *See* Antidumping Code, *supra* note 8, art. 10:1; Subsidies Code, *supra* note 7, art. 5:1.

<sup>298</sup> S. REP., *supra* note 28, at 92-93. In order to obtain retroactive relief, Commerce must find critical circumstances in its final determination and the ITC must find, in its final

deficiencies.

The Senate proposal,<sup>299</sup> supported by major trade groups and agreed to in conference,<sup>300</sup> makes three changes to current law to facilitate the making of critical circumstances determinations. First, if Commerce has a reasonable basis to suspect critical circumstances, it may request Customs to compile statistics on an expedited basis on the volume and value of imports to be used as a basis for monitoring surges. The second provision clarifies that Commerce may make a preliminary determination of critical circumstances at any time after initiation of an investigation, including *prior* to its preliminary determination of dumping or subsidization.<sup>301</sup> Third, the Senate proposal, as clarified by the conferees, requires that, if Commerce finds critical circumstances, the ITC must examine whether the retroactive imposition of AD or CVD duties appears necessary to prevent a recurrence of material injury that was caused by massive imports over a relatively short period of time and, in CVD cases, that will be difficult to repair.<sup>302</sup> In analyzing the "recurrence" issue, the Commission is to evaluate whether the effectiveness of the AD or CVD order would be materially impaired if the retroactive imposition of duties did not occur.<sup>303</sup> In this latter regard, the ITC is to examine, among other factors: (1) the condition of the domestic industry; (2) whether the import surge can be accounted for by efforts to avoid the imposition of AD or CVD duties; (3) whether foreign economic conditions led to the massive imports; and (4) whether the impact of the import surge is likely to continue for some period after issuance of the AD or CVD order.<sup>304</sup> The conferees expressed the view that these changes

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affirmative injury determination, that: (1) in a countervailing duty investigation there is material injury that will be difficult to repair, and the material injury was by reason of massive imports of the subsidized merchandise over a relatively short period; or (2) in an antidumping investigation, the material injury is by reason of such massive imports to an extent that, in order to prevent such injury from recurring, it is necessary to impose antidumping duties retroactively. 19 U.S.C. §§ 1671d(b)(4)(A), 1673d(b)(4)(A) (1982).

<sup>299</sup> Senate Bill, *supra* note 11, § 321; there was no comparable House provision.

<sup>300</sup> The provision was supported by such groups as the Trade Reform Action Coalition, whose previous critical circumstances proposal was introduced by Senator Heinz in 1985. See 131 CONG. REC. S10079 (daily ed. July 25, 1985) (statement of Sen. Heinz introducing S. 1493, the "TRAC bill").

<sup>301</sup> "While the Committee believes that the Commerce Department has this authority under current law, the Commerce Department practice is to delay any preliminary finding of critical circumstances until its preliminary determination of subsidies or sales at less than fair value, at the earliest." S. REP., *supra* note 28, at 92.

<sup>302</sup> According to the Joint Conference Statement, "the key addition [made by the House clarifying amendment to the Senate proposal] is a clarification of the standards to be used by the ITC in assessing whether the imposition of retroactive duties is necessary to prevent recurrence of injury. *Joint Conference Statement, supra* note 20, at H2037.

<sup>303</sup> Omnibus Act, *supra* note 5, §§ 1324(a)(3), 1324(b)(3), at H1892 (amending 19 U.S.C. §§ 1671d(b)(4)(A), 1673d(b)(4)(A)).

<sup>304</sup> *Id.* The *Joint Conference Statement* notes, in connection with these factors, that the weaker the condition of the U.S. industry, the greater the need to impose duties retroactively. The *Statement* also notes that efforts by exporters to "unload" excess supply on the

should result in more appropriate and effective use of the critical circumstances provisions.<sup>305</sup>

#### *E. Duty Drawback Treatment*

"Drawback" treatment provides for the refund of duties paid on imported merchandise that is subsequently used in the manufacture of goods for export.<sup>306</sup> Until 1984, only AD duties were considered normal duties for drawback purposes. The Trade and Tariff Act of 1984 extended this treatment to countervailing duties as well.<sup>307</sup> Thus both dumping and countervailing duties are treated as regular customs duties eligible for drawback treatment.

The House proposed legislation to amend section 779 of the Tariff Act of 1930 to prohibit countervailing and antidumping duties paid on imported merchandise from being eligible for drawback.<sup>308</sup> The House Report stated the Committee's intention to overrule the action taken in 1984, which was "counterproductive to efforts to discourage dumping and subsidization."<sup>309</sup> The provision was agreed to in conference, and AD and CVD duties are no longer eligible for duty drawback.

#### *F. Governmental Importations*

Although there is no general statutory provision permitting entry of government importations free of AD or CVD duties, articles imported by, or for the use of any United States government agency, including merchandise classified under Schedule 8 of the Tariff Schedules of the United States which enter free of regular Customs duties,<sup>310</sup> have also entered free of AD and CVD duties.<sup>311</sup> The exemption of government purchases from these duties was recently highlighted when a significant U.S. contract for titanium sponge, a strategic metal, was awarded to the Japanese, despite the fact that the bid was based upon dumped prices. In an antidumping suit brought by the domestic industry, Commerce upheld a 1961 Treasury decision to exempt stockpile purchases from the AD and CVD laws.<sup>312</sup>

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U.S. market, thereby "transferring economic hardship," may well call for retroactive duties. *Joint Conference Statement, supra* note 20, at H2038.

<sup>305</sup> *Joint Conference Statement, supra* note 20, at H2038.

<sup>306</sup> The drawback refund equals 99% of the duties attributable to the foreign, duty-paid content of the exported article. The completed article must be exported within five years of the date of importation of the relevant duty-paid merchandise. 19 U.S.C. § 1313 (1982 & Supp. IV 1986); H.R. REP., *supra* note 85, at 141.

<sup>307</sup> 1984 Act, *supra* note 4, § 622 (codified at 19 U.S.C. § 1677h (Supp. IV 1986)).

<sup>308</sup> House Bill, *supra* note 11, § 159.

<sup>309</sup> H.R. REP., *supra* note 85, at 141.

<sup>310</sup> Tariff Schedules of the United States Annotated, USITC Pub. 1910, sch. 8, at 8-1 to 8-6 (1987).

<sup>311</sup> H.R. REP., *supra* note 85, 142.

<sup>312</sup> 1987 House Hearings, *supra* note 1, at 716.

In response, both the House and Senate proposed adding a new section to the Tariff Act of 1930 to clarify that, even if classified under TSUS Schedule 8, such imports are not exempt from antidumping and countervailing duties. The House provision prohibited any exception for government imports.<sup>313</sup> The Senate provision would have exempted from coverage those articles imported by or for the Department of Defense and subject to an MOU (Memorandum of Understanding) in existence before May 16, 1987,<sup>314</sup> or those imports for which the market is normally limited to governments. The conferees ultimately agreed to end the duty exemption accorded U.S. Government purchases of imported merchandise, with a limited exemption for certain merchandise imported by, or for the use of, the Defense Department.<sup>315</sup> Both Committee Reports expressed the view that special duty treatment for U.S. government purchases would be "inconsistent with the U.S. policy of acting against unfair trade practices."<sup>316</sup>

## VII. Conclusion

The AD and CVD provisions contained in the Omnibus Act reflect a conviction on the part of Congress that the two trade statutes are generally effective in addressing problems of dumping and subsidization. While a strengthening of each law was nonetheless viewed as desirable, radical alterations in substance or procedure were rejected. By improving the effectiveness of the laws in the manner accomplished, Congress avoided enacting proposals that could have violated U.S. international obligations, thereby jeopardizing U.S. export performance, while ensuring somewhat greater protection for U.S. industries faced with intensified foreign competition.

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<sup>313</sup> See H.R. REP., *supra* note 85, at 142. Application of this amendment without exemptions would, in the Committee's view, be inconsistent with international obligations and, therefore, the Committee on Ways and Means stated its expectation that those commitments would be renegotiated.

<sup>314</sup> To avoid any conflict with international obligations, the exemption only covers MOU's existing before the date on which the Senate Committee on Finance adopted the provision. See S. REP., *supra* note 28, at 121.

<sup>315</sup> Omnibus Act, *supra* note 5, § 1335, at H1895. The House receded to the Senate with an amendment to limit the exemption to merchandise imported by, or for the use of, the Department of Defense (DOD) if

(1) the merchandise is acquired by, or for the use of, DOD (a) from a country with which DOD had a Memorandum of Understanding which was in effect on January 1, 1988, and has continued to have a comparable agreement (including renewals) or superseding agreements, and (b) in accordance with the terms of the Memorandum of Understanding in effect at the time of importation, or

(2) the merchandise has no substantial non-military use.

*Id.* This would include, for example, the DOD Memoranda of Understanding with Israel, Egypt, and Australia. *Joint Conference Statement*, *supra* note 20, at H2041.

<sup>316</sup> S. REP., *supra* note 28, at 121; H.R. REP., *supra* note 85, at 142.



