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ANTIDUMPING: CURRENCY FLUCTUATIONS AS A CAUSE OF DUMPING MARGINS

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Our international trade community should anticipate and guard against a resurgence of widespread antidumping activity and exposure during 1982. Economic forecasters are predicting that federal trade deficits in the merchandise account for 1982 will run in the vicinity of $40 to $75 billion.[1] Interest rates are also forecast by many to come down.[2] If such forecasts prove true, the result could be a sharp decline in the relative exchange value of the dollar.[3]

A declining dollar generates dumping margins, especially if the decline is too swift to permit reasonable price adjustments. Conversely, when the dollar rises, it tends to erase dumping margins. Oversimplifying for purposes of discussion, dumping occurs when goods are sold by a foreign producer in the United States at prices below the home market price of similar merchandise. Home market price is the usual measure of "fair value." A dumping "margin" is the difference between the fair value and the United States price of the imported goods, after adjustments have been made to accommodate differing circumstances of sale and any product differences. If a dumping finding is in place against specifically described goods from a named

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1. *Economy Slips Into Recession,* Washington Post. Oct. 18, 1981, Sec. F. at 2, col. 2.

2. U.S. Chamber Forecast Center, U.S. Chamber of Commerce Economic Outlook, Dec. 1981 at 5; Nation's Business, Jan. 1982 at 26. Additional forecasts have been made by Merrill, Lynch, etc. *Contra,* the forecasts of Henry Kaufman, Chief Economist for Salomon Brothers, Inc., *Record-High Rates Predicted,* Washington Post. Jan. 6, 1982, Sec. D at 8, col. 1.

3. That there is some inter-relationship between high interest rates in the United States and the relatively high exchange rate value of the U.S. dollar appears to be a valid assumption. *See, e.g., U.S. Interest Rates: Currency Mover,* New York Times, Feb. 10, 1982, Sec. D at 1. The Federal Reserve Board has studied econometric models on the dollar. In an unpublished manuscript, Peter Hooper and John Morton cite the following variables as bearing upon the relative exchange rate: current account, money supply, consumer price index, real exchange rate, interest rates, spot exchange rates, time trends, trade balance, along with exogenous variables. Hooper & Morton, *Fluctuations in the Dollar: A Model of Nominal and Real Exchange Rate Determination,* Dec. 1981 (forthcoming in J. INT'L MONEY & FIN.).

country: (1) cash deposits of estimated duties are required upon entry of such goods into the Customs territory of the United States, and (2) each entry of those goods must be appraised to determine whether "margins" exist. If margins appear after appraisal, the importer of record must ultimately pay special antidumping duties equal to such margins.[4]

For an exporter/importer, to the extent that the dollar falls it will: (1) decrease the return the company receives in its home market currency for U.S. dollars, and (2) raise the antidumping fair value standard and increase production costs because of the required exchange rate adjustment of the home market currency. In such a scenario, an affected exporter/importer to the United States could possibly wind up with dumping margins, sales below cost, and losses on its sales to the United States — purely attributable to rapid exchange rate decline of the dollar. For example, between January and August of 1978, the dollar fell against the yen from 241 to 183 in a period of only eight months.[5] Fair value, thus, on an index, would rise during that period from 100 to 132; a thirty-two percent increase in fair value over eight months. A company would have been forced, correspondingly, to raise its prices by thirty-two percent to maintain the original relationship between export and home market prices. The exporters' yield on that U.S. sale would also have dropped dramatically. To some extent, the company could guard against exchange rate losses by taking a forward position in the relevant currency against the dollar,[6] but that opportunity has its limitations and is not recognized as an antidumping adjustment. Factors such as published price lists, maintenance of market share, and commitments to suppliers, all operate to limit the ability of the exporter/importer to raise prices abruptly in order to accommodate the exchange rate fluctuations. In some cases, to raise prices so quickly would mean being suddenly frozen out of the market. The

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4. ALI-ABA, A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS, at 85–106 (2d ed. Surrey & Wallace 1977); Antidumping Act of 1921, *as amended* by the Trade Act of 1974; 19 U.S.C. §§ 160–65. *See also,* Dickey, *A Guide for Pricing Commodities to Enter the Commerce of the United States,* 11 LAW AND POL. IN THE INT'L BUS. 491 (1979).

5. *See* chart in FED. RESERVE BULL. vol. 67, no. 4, Apr. 1981, at A66; BOARD OF GOVERNORS OF THE FED. RESERVE SYSTEM, ANNUAL STATISTICAL DIGEST 1970–79 (March 1981); FED. RESERVE BULL., vol. 64, no. 8, Aug. 1978, at 700.

6.

> A foreign exchange contract to buy (sell) one currency with (for) another at an exchange rate fixed today for delivery more than two business days from the date of the contract is agreed on. There is no exchange of funds until the future day. Usually forward contracts are made for periods of 1, 2, 3, 6, and 12 months, starting from the spot date. The only difference between the spot contract and forward contract is the time of delivery and consequently the rate of exchange.

experience in a similar drop in the value of the dollar in 1972 and 1973 taught many foreign companies that they could not adequately cope with these problems. This realization provided some motivation for them to move dumping-sensitive production into the United States to avoid such problems at the border.[7]

Although antidumping statutes have been on the books since 1916, only since about 1969 has the law been enforced as it is now. Prior to 1969, when a company was found to have been dumping, the Treasury Department would, in the ordinary course, accept a letter from the offending parties assuring the government that their pricing policies would be altered to eliminate the dumping problem. In 1969, however, the Treasury Department stopped accepting such assurances except where dumping consequences had proved after investigation to be only *de minimus*. Therefore, for the purpose of present day antidumping discussion, the only meaningful experience with the law is the period following 1969.

Since 1969 we have witnessed two economic cycles that have generated considerable new antidumping activity. The first period was in 1971–72

The following diagram may help to illustrate the difference between the spot and the forward contract; assume a 90-day forward.

	Spot	Forward
Day on which exchange rate is fixed	Today	Today
Day on which monies are paid and received by the company	2 days from today	92 days from today

Example. On Wednesday, July 25, Norris Tools Ltd. calls its bank and agrees to buy 1 million pounds with $2,300,000 for delivery in one month. The exchange rate is 1 pound = $2.30. Norris will get 1 million pounds on Monday, August 27. (Spot date is July 27; therefore, the one-month date is August 27.) Norris will give the bank dollars the same day. The contracted amounts will be exchanged on August 27 regardless of the exchange rate between pounds and dollars prevailing on that date.

The forward contract itself has the two elements common to most exposure situations-time and currency. A forward contract itself is sufficient to eliminate an exposure in the future. A company knows it must pay pesos in two months; the company executes a forward contract with a bank, and in two months the bank delivers the pesos. The company turns around and pays off its debt. Nothing more is needed, the company has covered its exposure.

T. Walker, A Guide for Using the Foreign Exchange Market 14–15 (1981).

7. Such companies as Hitachi, Sharp, Sanyo, Mitsubshi, and NEC, manufacturing a host of electronics-related commodities, in recent years, have moved production facilities into this country. The foreign automobile industry has shifted some production facilities into the United States as well.

when more than thirty cases were initiated in each year; the second period was during 1977–78 when close to forty cases were initiated in each year. The period in between, specifically 1973–76, resulted in a relatively lower incidence of new dumping investigations, and there has been a marked decline in new investigations from 1979 to date. Only eleven new investigations were initiated during 1981 — most of them involving a relatively low trade value.[8]

The two cycles have shown that a distinct correlation exists between:

(1) merchandise trade balances;[9]
(2) the relative exchange value of the dollar;[10] and
(3) new dumping investigations.

The United States entered negative trade balance cycles in its merchandise account for both the 1971–72 and 1977–78 cycles. A merchandise trade balance upswing occurred during the 1973–76 period. Trade balances began a slide into an approximate $32 billion deficit during 1977. Correspondingly, the weighted-average index of the exchange value of the United States dollar dropped remarkably fast simultaneously with the trade balance figures. The weighted average index started down from 120.23 in April of 1971 to a low of 92.7 in July of 1973. The dollar then increased in relative value. The dollar began a steady, slow decline from 104.4 in June of 1977 to 94.74 in June of 1978 to 89.5 in June of 1979. During 1980, the dollar remained at a relatively constant low level, but started up again at the end of 1981 and has increased dramatically in value during 1981 until now the dollar rates over 112 on a weighted average index.

Today, there is relatively little new antidumping activity now compared with the 71–72 and 77–78 cycles. A steadily increasing value of the dollar is probably the primary reason for the immediate lull. Other factors, however, are also involved. The cost of presenting a case increased from a few thousand dollars in the early 1970s to quotations now ranging from $100,000

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8. The eleven new investigations begun in 1981 were reported by telephone from the Office of Investigations, ITA, U.S. Dep't of Commerce. None of the investigations involved a major commodity such as televisions, major steel trade etc. One antidumping case involving steel was self-initiated.

9. *See* BUREAU OF ECONOMIC ANALYSIS, U.S. DEP'T OF COMMERCE, SURVEY OF CURRENT BUS., SPECIAL SUPP., NATIONAL INCOME AND PRODUCT ACCOUNTS, 1976–79, at 40 (July 1981); BUREAU OF ECONOMIC ANALYSIS, U.S. DEP'T OF COMMERCE, SURVEY OF CURRENT BUS., vol. 61, at 13 (Aug. 1981); and Wall Street Journal, Dec. 30, 1981, at 24, col. 2.

10. *See* BUREAU OF ECONOMIC ANALYSIS, U.S. DEP'T OF COMMERCE, SURVEY OF CURRENT BUS., vol. 61, at 32–33 (June 1981).

to $150,000.[11] Threshold standards for commencement of both fair value investigations and injury investigations by government agencies seem to have increased.[12] There is greater understanding as to how the law operates and probably more enlightened planning of pricing strategy by exporters and importers.[13] Production of some dumping sensitive commodities has moved into the United States. There have been growing instances of joint ventures whereby domestic producers own a share of the foreign resource,[14] thus creating a disincentive to register complaints. Many companies felt that where they had won an antidumping case, the foreign competition simply moved onshore (into the United States) and the complainant-petitioner had won the short-term battle, but lost the long-term competition war. All of these factors deter use of antidumping procedures against foreign competition; however, where major commodities are affected by dumping, the great expense and complex procedures become relatively less of a deterrent.

This declining-dollar scenario ought to generate concern on the part of GATT signatory members over the dumping consequences of dramatic exchange-rate changes. Dumping often carries with it the pejorative of being "unfair" conduct, but here we see the exporter/importer, situationally, more prey than predator.

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11. Pryor, *Litigation Cost One Cause of Shifting Trade Practice*, Legal Times, Oct. 5, 1981, at 1.

12. To the best of the author's knowledge and belief, no studies have been done to establish the increased threshold standards. However, based upon interviews with staff at both the ITC and the ITA, the prevailing view is that considerably more data is required by each of the agencies before they initiate an investigation. It was once the case (in the late 1960's and before), that all a petitioner need do in order to have an antidumping investigation initiated was to file a simple letter with the United States Treasury Department. Today the procedure is more complex. The Commerce Department demands considerably more data on injury and sales for below fair value before taking steps to begin an investigation.

13. Before 1968, little information on dumping was available because of the low incidence of dumping activity and because instances of dumping could be settled by a simple letter of assurance. Dumping was not a significant practical problem in the international trade community. Little was written on the subject and few people had practical experience with the concept. Little was being taught in schools and universities and, therefore, it was not a problem contemplated by international traders. After a number of investigations occurred and significant consequences attached to those investigations, corporations found it necessary to integrate antidumping compliance into their planning agendas. It took considerable time for the implications of the law to become sufficiently well-defined to permit effective compliance and understanding of the consequences of specific actions.

14. While it is impossible, out of considerations of attorney-client privilege, etc., to discuss specific actions where domestic companies have refrained from initiating action against foreign competitors because of joint venture ties; domestic companies would, in effect, "gore their own ox" by initiating an action against a joint venture partner.

Further, where companies do, in fact, protect themselves by taking forward positions to avoid being currency speculators, no recognition is given to such forward positions in the context of antidumping administration. Some allowance is given for currency exchange fluctuations during the investigatory phases of antidumping proceedings, but the exchange factor deserves increased recognition. Actual operating losses and diminished return in compensation for U.S. exports associated with a weak dollar, will automatically remedy most of the problem until the next cycle begins.

Without specifying solutions, I would simply urge that this exchange problem in an antidumping context should receive considerably more study by, and better solutions from, the GATT, U.S. trade partners and the relevant Congressional Committees.