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Rethinking Antidumping Law

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RETHINKING ANTIDUMPING LAW

RAJ BHALA*

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As of the time of this writing, the Department of Commerce (DOC) had not published final antidumping regulations implementing the Uruguay Round Agreements Act. This Article does not deal with the Commerce Department's proposed regulations, which are published at 61 Fed. Reg. 7308 (Feb. 27, 1996).

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I. THE WEAPON OF CHOICE

If the other fellow sells cheaper than you, it is called "dumping"!

Course, if you sell cheaper than him, that's "mass production."¹

Tariffs no longer matter in international trade law. Between 1947, when the General Agreement on Tariffs and Trade (GATT) entered into force,² and 1994, the eve of the entry into force of the Uruguay Round agreements,³ average tariffs in industrial countries plunged from 40% to 6.3%.⁴ As a result of the Uruguay Round, that average will fall to just 3.9% and the percentage of industrial products (by value) that receive duty-free treatment will rise from 20% to 43%.⁵ Nontariff barriers are what matter in late twentieth and early twenty-first century international trade law, leaving protectionists with few remaining weapons to achieve their goals.

In the 1980s the United States began to utilize antidumping law as its weapon of choice.⁶ Only eighty-four U.S. antidumping orders, applicable to exporters from twenty-three countries, were

1. Will Rogers, *quoted in* JAMES BOVARD, *THE FAIR TRADE FRAUD* 107 (1991) [hereinafter BOVARD].

2. General Agreement on Tariffs and Trade, *opened for signature*, Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 [hereinafter GATT].

3. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Dec. 15, 1993, Hein's No. KAV 3778.

4. POWELL, GOLDSTEIN, FRAZER & MURPHY, *BACKGROUND MATERIALS ON GATT ANTIDUMPING ISSUES*, tab A, at 17 (June 1994) (on file with *The George Washington Journal of International Law and Economics*).

5. *Id.* For analyses of the economic effects of the Uruguay Round agreements, see U.S. GEN. ACCOUNTING OFFICE, *THE GENERAL AGREEMENT ON TARIFFS AND TRADE: URUGUAY ROUND FINAL ACT SHOULD PRODUCE OVERALL U.S. ECONOMIC GAINS* 2-5 (1994); OFFICE OF THE U.S. TRADE REPRESENTATIVE, *URUGUAY ROUND: JOBS FOR THE UNITED STATES, GROWTH FOR THE WORLD* 6-15 (n.d.); JEFFREY J. SCHOTT, *INSTITUTE FOR INT'L ECONOMICS, THE URUGUAY ROUND: AN ASSESSMENT* (1994).

6. See Bryan T. Johnson, *A Guide to Antidumping Laws: America's Unfair Trade Practice*, BACKGROUNDER (Heritage Foundation), July 21, 1992, at 1, 4-5 (stating that "successive GATT rounds have eliminated many forms of direct trade protectionism [and] U.S. antidumping laws thus have proved to be a more convenient tool to limit competition by denying foreigners access to the U.S. market") (on file with *The George Washington Journal of International Law and Economics*); Nancy Dunne, *US Companies Use Protectionist Tactics, Says Budget Office*, FIN. TIMES, June 16, 1994, at 5 (noting biases in U.S. antidumping law against foreign exporters and U.S. consumers of foreign goods); Frances Williams, *Dumping Complaints Rising Rapidly*, FIN. TIMES, Apr. 28, 1993, at 5 (discussing the "growing use of antidumping rules to keep out unwanted imports").

in effect in 1980.⁷ These orders affected just 131 categories of merchandise in the Harmonized Tariff Schedule (HTS), or 3.43% of U.S. imports.⁸ By 1990 there were 197 orders applicable to exporters from forty-two countries.⁹ These orders affected 219 categories of merchandise in the HTS, or 9.59% of U.S. imports.¹⁰ In addition, the U.S. Department of Commerce (DOC) found dumping in over 90% of all antidumping petitions filed during this period.¹¹ Between 1985 and 1992 the DOC terminated only 2% of all U.S. antidumping cases because of a lack of dumping.¹² Similarly, the U.S. International Trade Commission (ITC) found that injury existed in just under 60% of all cases.¹³

Antidumping law also became a potent weapon for protectionists in other countries in the 1980s. Between 1980 and 1990 the United States, Australia, Canada, and the European Union were responsible for bringing 95% of all antidumping cases worldwide.¹⁴ That figure dropped to 80% between 1985 and 1992,¹⁵ suggesting an increase in other countries' use of antidumping law as a weapon.¹⁶ Unsurprisingly, the Economist printed in 1988 that "[a]nti-dumping suits are emerging as the chemical weapons of the world's trade wars."¹⁷

7. Keith B. Anderson, *Antidumping Laws in the United States: Use and Welfare Consequences*, J. WORLD TRADE, Apr. 1993, at 99, 102. Unless otherwise noted, the term "exporter" as used herein includes both the foreign company producing merchandise and the foreign company exporting that merchandise.

8. *Id.* at 105.

9. *Id.* at 102.

10. *Id.* at 105.

11. POWELL ET AL., *supra* note 4, tab A, at 13. See PATRICK LOW, *TRADING FREE: THE GATT AND U.S. TRADE POLICY* 81 (1993). The 90% figure may reflect the high cost (both in terms of time and money) of bringing a petition. As a result of the high cost, marginal petitions (those with little chance of success) are not filed.

It should be clear that not all affirmative dumping determinations yield equal results. As a rule of thumb, unless a petitioner successfully proves the existence of a dumping margin of at least 10% or more and obtains a double-digit antidumping duty order, it is unlikely to view the competitive playing field as leveled. See Greg Rushford, *America's "MITI Without Brains"*, WALL ST. J., Feb. 3, 1995, at A12 (for an acerbic critique of the DOC's Import Administration Department, the agency responsible for dumping margin determinations).

12. SCHOTT, *supra* note 5, at 78 n.1.

13. LOW, *supra* note 11, at 81. As a result of settlements and other dispositions, "[w]ell under half of all [antidumping] cases [brought in the United States actually] result[ed] in the imposition of duties." Gary N. Horlick, *The United States Antidumping System*, in *ANTIDUMPING LAW AND PRACTICE: A COMPARATIVE STUDY* 99, 165 n.254 (John H. Jackson & Edwin A. Vermulst eds., 1989).

14. Johnson, *supra* note 6, at 5.

15. SCHOTT, *supra* note 5, at 78.

16. See *id.* at 79.

17. *The Anti-Dumping Dodge*, ECONOMIST, Sept. 10, 1988, at 77.

Surely, the Uruguay Round was supposed to destroy the antidumping law weapon. Due to its wide-ranging agreements on nontariff matters, the Uruguay Round is hailed as the most ambitious and trade-liberalizing multilateral trade negotiation in GATT history.¹⁸ Fortunately for protectionists seeking undeserved protection from competitive imports, the antidumping law weapon survived. The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Agreement),¹⁹ ensures that antidumping law will remain a weapon of choice, at least until the conclusion of the next round of multilateral trade negotiations.²⁰ The Agreement deserves the "C+" grade assigned to it by one economist²¹ because it

will add new layers to the arbitrary rules governing the use of antidumping measures, *but will do little to assuage the concerns of exporters and import-competing industries alike about the abuse of trading rules.* Indeed, as these changes promote the adoption of antidumping laws in more and more countries, the number of antidumping actions is likely to expand rapidly. This will undoubtedly lead to more trade disputes among [World Trade

18. As the legislative history to the U.S. legislation implementing the Uruguay Round agreements indicates:

In addition to updating and further developing the codes on non-tariff measures negotiated in the previous two rounds of multilateral trade negotiations—making most of them multilateral agreements instead of limited membership agreements as negotiated in the Kennedy and Tokyo Rounds—the Uruguay Round tackled new areas, such as services, intellectual property rights, and investment, reflecting the growing complexity of the world trading system. . . . Furthermore, the Uruguay Round overhauled the mechanism for settling disputes among signatory countries and established the World Trade Organization (WTO), which will provide a permanent arena for member governments to address issues affecting their multilateral trade relations as well as to oversee the implementation of the trade agreements negotiated in the Uruguay Round.

SENATE COMM. ON FIN., SENATE COMM. ON AGRIC., NUTRITION, AND FORESTRY, AND SENATE COMM. ON GOVERNMENTAL AFFAIRS, URUGUAY ROUND AGREEMENTS ACT, S. REP. NO. 412, 103d Cong., 2d Sess. 3 (1994) [hereinafter SENATE REPORT]; *see also* HOUSE COMM. ON WAYS AND MEANS, URUGUAY ROUND AGREEMENTS ACT, H.R. REP. NO. 826, 103d Cong., 2d Sess. 16 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3773 [hereinafter HOUSE REPORT] ("The Uruguay Round Agreements are the broadest, most comprehensive trade agreements in history They are vital to our national interest and to economic growth, job creation, and an improved standard of living for all Americans."); *Results of the Uruguay Round Negotiations: Hearings before the Senate Committee on Finance*, 103d Cong., 2d Sess. 6-7 (1994) (statement of Ambassador Mickey Kantor, U.S. Trade Representative, discussing the merits of the "largest, broadest trade agreement in history" that is "shaped to the strengths of our economy").

19. Agreement on Implementation of Article VI, Dec. 15, 1993, Hein's No. KAV 3778, annex 1A, no. 8, at 1-26 [hereinafter Agreement].

20. *See* Gary N. Horlick & Eleanor C. Shea, *The World Trade Organization Antidumping Agreement*, J. WORLD TRADE, Feb. 1995, at 5, 6-23 (for a discussion of the negotiating history of the Agreement).

21. SCHOTT, *supra* note 5, at 8, 12.

Organization] trading partners. In short, the agreement provides a bandage to a festering sore of trade policy²²

Title II, subtitle A of the Uruguay Round Agreements Act (Act),²³ which implements the Agreement by amending the Tariff Act of 1930 (1930 Act),²⁴ also merits a C+. The Agreement and the Act fail to resolve the central crisis facing antidumping law: abuse of the law by protectionists who use it as a nontariff barrier to trade.

The new law invites protectionist abuse because it is replete with ambiguous language and neglects to consider the relationship between pricing strategy and costs of production. It should be replaced with a straightforward "traffic-light" system. In this system only "red-light" dumping, which entails predatory behavior, would be unlawful. No liability would be ascribed to "yellow-light" or "green-light" dumping.

Part II of this Article presents an economic analysis of antidumping law and explains why the clear consensus of scholarly opinion finds no economic justification for antidumping law. More importantly, it emphasizes that this consensus is of little practical value. Antidumping law is here to stay, thus making the more appropriate inquiry whether its use for protectionist purposes may be circum-

22. *Id.* at 85 (emphasis added).

23. Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809, 4842-4901 (1994) [hereinafter Act] (codified in scattered sections of 19 U.S.C.).

For discussions of U.S. implementation of the Agreement, see generally Alan F. Holmer et al., *Enacted and Rejected Amendments to the Antidumping Law: In Implementation or Contravention of the Antidumping Agreement?*, 29 INT'L LAW. 483 (1995) (discussing the debate between those in favor and those opposed to antidumping law); David Palmeter, *United States Implementation of the Uruguay Round Antidumping Code*, J. WORLD TRADE, June 1995, at 39 (discussing changes in U.S. antidumping law because of the Uruguay Round).

In January 1995, the DOC published an Advance Notice of Proposed Rulemaking soliciting suggestions for regulatory changes to implement the Act and improvements in antidumping law generally. 60 Fed. Reg. 80 (1995) (proposed Jan. 3, 1995). This Article does not address the notice or the many comments made by practitioners. For an example of propetitioner comments, see Letter from Michael H. Stein & John A. Ragosta of Dewey Ballantine to Susan G. Esserman, assistant secretary, U.S. Department of Commerce (Feb. 3, 1995) (with attached materials) (on file with *The George Washington University Journal of International Law and Economics*). For an example of prorespondent comments, see Letter from Eugene J. Milosh, president, Association of Exporters and Importers to Susan G. Esserman, assistant secretary, U.S. Department of Commerce (Feb. 3, 1995) (with attached materials) (on file with *The George Washington University Journal of International Law and Economics*).

24. Tariff Act of 1930, ch. 497, 46 Stat. 590 (codified as amended in scattered sections of 19 U.S.C.). Major amendments to the antidumping provisions of the 1930 Act were made by the following acts: Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144; Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2984; Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107.

scribed. In answering this question, Part II defines protectionist abuse.

Part III reviews pre-Uruguay Round U.S. antidumping law. This review is worthwhile for four reasons. First, the reader must understand the status quo ante to recognize the significance of the Agreement and the Act because the protectionist abuse problem, left unresolved by the Agreement and the Act, is rooted in prior law. Second, the pre-Uruguay Round regime is applicable to cases arising before January 1, 1995, when the Act took effect.²⁵ The new regime only applies to cases where an antidumping petition or a request for an annual review of an existing antidumping order is filed on or after January 1, 1995.²⁶ As a result, the United States will have two parallel antidumping regimes for several years to come. Third, much of prior law remains good law for cases arising after January 1, 1995. Although the Agreement and the Act significantly modify certain aspects of prior law, they leave other major areas—such as procedural aspects of preliminary and final determinations—relatively untouched. Finally, most economic analyses of antidumping law proceed immediately to the level of impractical grand theory and neglect to consider how antidumping law actually works. An understanding of pre-Uruguay Round antidumping law assists in bridging the gap between theory and operation.

Part IV argues that post-Uruguay Round antidumping law is textually ambiguous and ignores the cost structure of petitioners and respondents.²⁷ Part IV advances five key points. First, the Agreement and the Act expand the universe of potential petitioners and cases. Second, they provide a petitioner with numerous opportunities to manipulate a dumping margin calculation to achieve the maximum margin. Third, their injury provisions enhance the ability of a petitioner to claim successfully that it is injured by reason of dumped imports. Fourth, they permit the scope of an antidumping order to be expanded easily to include component parts and new

25. Act, *supra* note 23, § 291, 108 Stat. at 4931.

26. *Id.*

27. The petitioner, in most antidumping actions, is a U.S. producer of a domestic like product—merchandise identical or akin to the merchandise subject to investigation—or a union. 19 U.S.C. § 1677(10) (1994).

The respondent in an antidumping action is usually the exporter of subject merchandise—the allegedly dumped product under investigation. The U.S. importer of the merchandise is also likely to be a respondent, particularly where the importer is legally related to the exporter. *See* 19 U.S.C. § 1677(4)(B) (1994). When an importer is unrelated to a respondent-exporter, its role typically is limited to monitoring a case, even though the importer is liable for any antidumping duties imposed.

shippers. Fifth, they make revocation of an antidumping order difficult.

Part IV also emphasizes the distinctions between the Agreement and the Act. It asks whether the United States faithfully implemented the Agreement and suggests that in at least three areas—price averaging, captive production, and anticircumvention—the Act is inconsistent with the Agreement. These areas may give rise to challenges by other countries against the United States in a future World Trade Organization (WTO) dispute resolution proceeding.

Part V considers how the Uruguay Round negotiators should have addressed the problem of protectionist abuse. It proposes a traffic-light system, based on the microeconomic theory of the cost structure of a firm, that eliminates some of the ambiguities in the Agreement and the Act. The traffic-light system focuses on predatory behavior. Dumping is considered predatory and occurs when an exporter sells merchandise in the United States at a price below its average total and variable costs of production. Under this system such behavior is categorized as unlawful red-light dumping. Yellow-light dumping occurs when an exporter sells at a price below its average total cost but above its average variable costs of production, and it leads to the issuance of a caution. Green-light dumping is defined as pricing above average total cost of production and is lawful.

Part VI provides concluding remarks.

II. THE ECONOMIC CRITIQUE

In a substantial number of [antidumping] cases the root of the problem is a loss of comparative advantage.²⁸

A. *Antidumping Law as Protectionism*

Broadly defined, dumping is international price discrimination.²⁹ It occurs when an exporter sells merchandise in the import-

28. Bernard M. Hoekman & Michael P. Leidy, *Antidumping and Market Disruption: The Incentive Effects of Antidumping Laws*, in *THE MULTILATERAL TRADING SYSTEM: ANALYSIS AND OPTIONS FOR CHANGE* 155, 164 (Robert M. Stern ed., 1993) (citation omitted).

29. JACOB VINER, *DUMPING: A PROBLEM IN INTERNATIONAL TRADE* 3 (Augustus M. Kelley 1991) (1923). Ever since Viner published his classic economic study in 1923, economists have characterized dumping as cross-border price discrimination. See, e.g., MELVYN B. KRAUSS, *THE NEW PROTECTIONISM: THE WELFARE STATE AND INTERNATIONAL TRADE* 68-70 (1978) ("According to Article VII of GATT, dumping is defined as the sale of a product abroad at a lower price than charged domestically."); KENNETH W. DAM, *THE GATT* 168 (1970) (analyzing Viner's work and discussing dumping as international price discrimination); Alan V. Deardorff, *Economic Perspectives on Antidumping Law*, in *THE MULTILATERAL*

ing country at a price significantly below that at which it sells like merchandise in its home country.³⁰ If the home market is not viable for this comparison, the exporter's prices in a third country or a constructed value (CV) is used to determine whether it is dumping.³¹ A stricter definition of dumping is that it occurs when the exporter sells merchandise in the importing country at a price below its cost of production.³² In either case, dumping is actionable if: (1) it causes or threatens to cause material injury to an established industry in the importing country; or (2) it materially

TRADING SYSTEM, *supra* note 28, at 135, 136-42; John J. Barceló III, *Antidumping Laws as Barriers to Trade—The United States and the International Antidumping Code*, 57 CORNELL L. REV. 491, 500-16 (1972) (for an analysis of Viner's Work).

The economic literature on dumping is voluminous. See RANIER M. BIERWAGEN, GATT ARTICLE VI AND THE PROTECTIONIST BIAS IN ANTI-DUMPING LAWS 171 (1990) (for an excellent bibliography as of 1990); Richard D. Boltuck, *An Economic Analysis of Dumping*, J. WORLD TRADE L., 1987, at 45 [hereinafter *An Economic Analysis of Dumping*]; Richard D. Boltuck, *Reply to Professor Lazar's Comment on "An Economic Analysis of Dumping"*, J. WORLD TRADE L., 1988, at 129 [hereinafter *Reply to Lazar*]; Fred Lazar, *Structural/Strategic Dumping: A Comment on Richard Boltuck's "An Economic Analysis of Dumping"*, J. WORLD TRADE L., 1988, at 91; Michael Leidy, *Antidumping: Unfair Trade or Unfair Remedy*, FIN. & DEV., Mar. 1995, at 27.

Much of the recent scholarship emphasizes econometric models of dumping. See generally Dan Bernhardt, *Dumping, Adjustment Costs and Uncertainty*, 8 J. ECON. DYNAMICS & CONTROL 349 (1984); James Brander & Paul Krugman, A "Reciprocal Dumping" Model of International Trade, 15 J. INT'L ECON. 313 (1983); Satya P. Das & Adwait K. Mohanty, *Dumping in International Markets and Welfare: A General Equilibrium Analysis*, 17 J. INT'L ECON. 149 (1984); Stephen W. Davies & Anthony J. McGuiness, *Dumping at Less than Marginal Cost*, 12 J. INT'L ECON. 169 (1982); Wilfred J. Ethier, *Dumping*, 90 J. POL. ECON. 487 (1982); Brian Pinto, *Repeated Games and the "Reciprocal Dumping" Model of Trade*, 20 J. INT'L ECON. 357 (1986); Daniel Treffer, *Trade Liberalization and the Theory of Endogenous Protection: An Econometric Study of U.S. Import Policy*, 101 J. POL. ECON. 138 (1993). At least one observer finds these studies "not very helpful" because "[t]hey depend on a number of assumptions which render them useless for day to day use as well as for a more general hypothesis." BIERWAGEN, *supra*, at 10. My own review of the econometric analyses leads to the same conclusion.

30. HOUSE COMM. ON WAYS AND MEANS, 103D CONG., 1ST SESS., OVERVIEW AND COMPI- LATION OF U.S. TRADE STATUTES 62 (Comm. Print 1993) [hereinafter OVERVIEW].

Article VI of the 1947 General Agreement on Tariffs and Trade (GATT) defines dump- ing as the sale of merchandise in an export market at a price below normal value (NV). GATT, *supra* note 2, 61 Stat. at A23-25, 55 U.N.T.S. at 212; see KENNETH R. SIMMONDS & BRIAN H.W. HILL, LAW AND PRACTICE UNDER THE GATT 12 (1988). The NV is the price charged by the exporter for like merchandise in its home market. 19 U.S.C. § 1677b(3)(d) (1994). If there are no sales in the exporter's home market (or the volume of such sales is small), the NV is estimated by calculating either the price the exporter charges in a third market or a constructed value (CV). 19 U.S.C. § 1677b(3)(e) (1994). The CV is the sum of the cost of: (1) materials and fabrication; (2) selling, general, and administrative (SG&A) expenses; (3) profits; and (4) containers, coverings, and items incidental to placing the merchandise in a condition ready for shipment to the importing country. 19 U.S.C. § 1677b(3)(e)(1) (1994).

31. See discussion *infra* part III.C.3.

32. BIERWAGEN, *supra* note 29, at 8.

retards the establishment of an industry in that country.³³ The importing country may react to dumping by imposing an antidumping duty on the dumped merchandise in the amount of the dumping margin. The dumping margin is the difference between the prices for the merchandise in the exporter's home market and the importing country.³⁴

An exporter may successfully engage in a bifurcated cross-border price strategy upon the existence of three necessary and sufficient conditions.³⁵ First, the exporter's home market and the importing country's market must be segregated so that merchandise does not flow between them. Tariff and nontariff barriers in the exporter's home market must support a higher home market price and consumers must face significant costs in traveling to the importer's market. Once this condition is met, the cross-border price differential may persist because of the impracticality of arbitrage (buying the product in the cheaper market and selling it in the more expensive market).³⁶

Second, the exporter must not face perfect competition in both markets. It must have sufficient market power to influence the price of merchandise in at least one of the markets.³⁷ Without such power, any price differential for merchandise in the different markets would not be within its control.³⁸ In an extreme case, the exporter is a monopolist in its home market and a perfect competitor in the importing country's market.

Third, the exporter must face a relatively more elastic demand curve for merchandise in the importing country's market, and a relatively less elastic demand curve for like merchandise in its home market. This differential may result from trade barriers that shield the exporter from competition in its home market.³⁹ Absent this elasticity differential, the price charged by the exporter in the importing country would equal or exceed the price charged in its home market and there would be no dumping.⁴⁰

33. 19 U.S.C. § 1673(2) (1994).

34. GATT, *supra* note 2, art. VI, 61 Stat. at A23, 55 U.N.T.S. at 212; SIMMONDS & HILL, *supra* note 30, at 13.

35. Hoekman & Leidy, *supra* note 28, at 158-59.

36. *Id.*

37. *Id.* at 159.

38. *Id.*

39. *Id.*

40. For example, in a world of uncertainty, unintentional dumping may occur because of changes in exchange rates. In this world only the first condition is required—market power and elasticities are irrelevant. *Id.*

Economists generally agree that, except for predation, dumping is "basically harmless for the importing country."⁴¹ Consumers in the importing country benefit from the lower price of imported goods:

If one takes the importing country's viewpoint only, all consumers are being favored. That is, the importing country as a whole benefits unambiguously from dumping to the extent that it acquires access to imported goods at a lower price than it would if dumping were not taking place. This lower price must be a benefit to the importing country as a whole, despite distributional effects that will hurt some residents who compete with imports, precisely because the importing country is a net demander of the dumped good.⁴²

Empirical evidence strongly suggests that this gain outweighs the cost to producers in the importing country, measured by reduced profits, and to their employees, in terms of reduced employment. One economist's 1989 to 1990 welfare analysis of eight U.S. antidumping proceedings found that

such duties are an extremely costly way to improve the profitability of U.S. producers or employment in U.S. industries. In these eight cases, the consumer cost per dollar of increased profits ranged from 2.40 to 25.10 dollars, with an average cost of 8.00 dollars. The cost to the U.S. economy per dollar of profit range[d] from 0.20 to 10.80 dollars, with an average value of 3.60 dollars. The minimum consumer cost per job created was 113,800 dollars, while the minimum cost to the economy to create an additional job was 14,300 dollars.⁴³

The ITC recently considered what the economywide welfare effects would have been if all outstanding U.S. antidumping and countervailing duty orders in 1991 had been removed.⁴⁴ These orders affected \$9 billion out of \$491 billion, or approximately 1.8% of all U.S. merchandise imports in 1991.⁴⁵ The ITC estimated that these orders imposed a net welfare cost on the U.S. economy of \$1.59 billion, or 0.03% of the U.S. gross domestic product in 1991 (\$5.725 trillion).⁴⁶ The loss to consumers in the form of

41. Deardorff, *supra* note 29, at 135.

42. *Id.* at 139.

43. Anderson, *supra* note 7, at 115 (footnote omitted). In theory, the gain to consumers from lower prices could be taxed and redistributed to companies and workers injured by competition from lower-price imports. In the context of current trade remedy laws, petitioners could bring safeguard actions and receive adjustment assistance. 19 U.S.C. § 2251 (1994).

44. The Economic Effects of Antidumping and Countervailing Duty Orders and Suspension Agreements, USITC Pub. 2900, Inv. No. 332-344, at ix (June 1995).

45. *Id.* at ix.

46. *Id.*

higher prices far outweighed the benefit to petitioning industries in the form of increased output and employment.⁴⁷

Taking both the exporting and the importing countries into consideration, it is impossible to prove a priori that the welfare effects of cross-border price discrimination are negative. Although consumers in the exporter's home market are harmed by a higher price, the source of the higher price is the exporter's monopoly power, not dumping. Such power enables the exporter to garner monopoly rents by charging a price above its marginal cost of production. These extra profits do not offset the welfare loss to consumers in the exporting country.

The same logic applies to the less extreme situation where the exporter charges a high (but not monopoly) price in the home market and a low (but not perfectly competitive) price in the importing country. Whether the aforementioned benefits from cheaper prices in the importing country offset the net loss from monopoly prices in the exporter's country is uncertain. As Kenneth Dam concludes:

The fact that governments act against dumping only when the low price is charged in their own territory reveals that governments are concerned with the welfare of their own enterprises rather than with the protection of their citizens from extremely high prices charged by monopoly sellers. If the problem were really the discrimination itself, then presumably governments would be more concerned to attack high prices than low prices. Where an exporter sold at home at higher prices than he sold abroad, it would be the exporter's government, not the importer's government, that would take coercive action. The General Agreement [on Tariffs and Trade], like the governments themselves, views the impact in the low-price country as the harmful aspect of dumping

. . . .

The concern with dumping is therefore a concern with the protection of domestic industry from international competition.⁴⁸

Two hypothetical inquiries illustrate the fallacy of assuming dumping is evil. First, suppose that antidumping laws are repealed and the conditions that make dumping possible are eliminated. Theoretically, prices in the home and importing countries would converge because of cross-border arbitrage.⁴⁹ Consumers in the

47. This static result, however, does not consider the cumulative effect of outstanding antidumping orders over time.

48. DAM, *supra* note 29, at 168.

49. See *supra* note 36 and accompanying text.

home country would benefit from lower prices, consumers in the importing country would be harmed by higher prices, and the exporter's profits would decline. Whether the benefits to the consumers in the home country outweigh the losses to the consumers in the importing country is uncertain. The net welfare effect of the repeal can only be forecast as positive if the exporter's monopoly position in the home country is completely undermined, and it behaves like a perfect competitor in the importing country.

Second, suppose an antidumping duty is imposed on the exporter's merchandise in an effort to level the competitive playing field between that merchandise and like merchandise produced by companies in the importing country. In this situation, consumers in the importing country are the clear losers. They must pay a higher price for the imported product because of the duty. In addition, they may have to pay a higher price for like merchandise because other companies may competitively raise prices to match the price of the imported merchandise.⁵⁰

One observer points out that between 1980 and 1989, "almost all foreign companies investigated for alleged dumping [in the United States] were found guilty."⁵¹ That observer concludes:

While many people consider dumping an arcane subject, dumping penalties have forced Americans to pay more for photo albums, pears, mirrors, ethanol, cement, shock absorbers, roof shingles, codfish, televisions, paint brushes, cookware, motorcycle batteries, bicycles, martial art uniforms, computers and computer disks, telephone systems, forklifts, radios, flowers, aspirin, staplers and staples, paving equipment, and fireplace mesh panels. Dumping laws increasingly prevent American businesses from getting vital foreign supplies and machinery. Commerce Department officials now effectively have direct veto power over the pricing policies of over 3,000 foreign companies. Dumping law constitutes potential political price controls over almost \$500 billion in imports a year.⁵²

50. William J. Davey, *Antidumping Laws in the GATT and the EC*, in *ANTIDUMPING LAW AND PRACTICE*, *supra* note 13, at 298; see also Laura Fraedrich, *The Japanese Minivan Antidumping Case: How American Manufacturers Lost the Legal Battles But Won the War*, 2 *GEO. MASON U. L. REV.* 107, 120-24 (1994) (for a discussion of harm to consumer interests resulting from an antidumping case brought and lost by General Motors, Chrysler, and Ford against Japanese minivan manufacturers).

51. BOVARD, *supra* note 1, at 108.

52. *Id.*; see also N. David Palmeter, *The Capture of the Antidumping Law*, 14 *YALE J. INT'L L.* 182, 190 n.44 (1989) (citing Department of the Treasury, *Antidumping Duties*, in *UNITED STATES INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD* 395, 406 (1971) (pointing out that a DOC determination of dumping has a chilling effect on a U.S. importer)).

In effect, when the interests of consumers of dumped merchandise are considered, application of antidumping law makes the playing field less competitive.

What about the predation case where an exporter attempts to drive its competitors in the importing country out of business and then raise its prices? In this situation the exporter's conduct is unfair and antidumping law affords protection to its competitors in the importing country. The law, however, is clumsy. It confuses predatory and nonpredatory behavior because it fails to consider the exporter's cost structure. As long as the exporter's marginal revenue from sales in the importing country exceeds its marginal cost of production, the exporter is behaving in an economically rational fashion.⁵³ Moreover, an exporter that sells merchandise in the importing country at a price above its average variable cost of production is not engaging in predatory behavior.⁵⁴ The law protects the exporter's competitors from rational, nonpredatory behavior. Competitors are not challenged to reduce their cost structures to remain competitive with the exporter. The development of a perfectly competitive market in the importing country is throttled and consumers are denied the benefit of lower prices:

In using the predation rationale for AD [antidumping], purportedly the interests of consumers are being advanced, not those of import-competing firms. Yet in the absence of successful predation, the imposition of AD duties can only harm domestic consumers. As AD actions cause exporters to recoil from the foreign market, competitive pressures are diminished and domestic prices move upward. It is rather paradoxical that vigilant and enthusiastic application of AD by policy officials tends to promote the result that it is supposed to combat under the predation justification: monopoly pricing.⁵⁵

Skepticism about the economic effects of antidumping law motivates some scholars to argue for repeal of the law.⁵⁶ These scholars

53. Davey, *supra* note 50, at 296 (defining and describing the role of marginal cost and marginal utility in a microeconomic sense). See generally PAUL A. SAMUELSON, *ECONOMICS* 431-32, 439-43 (11th ed. 1980) (discussing marginal cost and utility, cost curves, and shutdown and breakeven points).

54. See *infra* notes 342-350 and accompanying text.

55. Hoekman & Leidy, *supra* note 28, at 162.

56. See generally BIERWAGEN, *supra* note 29, at 168-69 (concluding that the final step in reforming antidumping legislation is to phase it out in favor of domestic antitrust and competition law); BOVARD, *supra* note 1, at 160 ("The U.S. should take the lead in the dismantling of antidumping laws."); Davey, *supra* note 50, at 296-97 (antidumping laws are not "justified economically"); GABRIELLE MARCEAU, *ANTI-DUMPING AND ANTI-TRUST ISSUES IN FREE-TRADE AREAS* 310-18 (1994) (discussing measures to phase out antidumping provisions on a regional basis in order to integrate economies); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 309-11 (4th ed. 1992) (describing antidumping policies as protectionist

present four lines of attack. First, they argue antidumping law is redundant to domestic antitrust laws.⁵⁷ The Robinson-Patman Act⁵⁸ proscribes price discrimination,⁵⁹ while section two of the Sherman Act⁶⁰ outlaws predatory pricing.⁶¹ This redundancy vio-

and thus not justified); Wesley K. Caine, *A Case for Repealing the Antidumping Provisions of the Tariff Act of 1930*, 13 LAW & POL'Y INT'L BUS. 681, 681-83, 724-26 (1981) (arguing antidumping provisions of the Tariff Act of 1930 are unpredictable, unfair, and should be repealed); Michael S. Knoll, *United States Antidumping Law: The Case for Reconciliation*, 22 TEX. INT'L L.J. 265, 288 (1987) (concluding both the United States and the second GATT antidumping duty code provisions should be reconsidered). *But see* Richard Boltuck & Robert E. Litan, *America's "Unfair" Trade Laws*, in DOWN IN THE DUMPS: ADMINISTRATION OF THE UNFAIR TRADE LAWS 1, 10-11 (Richard Boltuck & Robert E. Litan eds., 1991) (summarizing new economic rationales in favor of antidumping laws and rebuttals).

57. See generally BIERWAGEN, *supra* note 29, at 162-64 (discussing the substitution of antidumping law with competition law); POSNER, *supra* note 56, at 309-11 (explaining dumping and the free-trade question); Jacques H.J. Bourgeois, *Antitrust and Trade Policy: A Peaceful Coexistence? European Community Perspective—I*, INT'L BUS. LAW., Feb. 1989, at 58-67 (discussing antidumping actions in context of competition law in the European Community); Jacques H.J. Bourgeois, *Antitrust and Trade Policy: A Peaceful Coexistence? European Community Perspective—II*, INT'L BUS. LAW., Mar. 1989, at 115-22 (reviewing European Community trade policy); Terry Calvani & Randolph W. Tritell, *Invocation of United States Import Relief Laws as an Antitrust Violation*, 31 ANTITRUST BULL. 527 (1986) (explaining why the U.S. import relief laws are antitrust violations); Jeffrey L. Kessler, *The Antidumping Act of 1916: Antitrust Analogue or Anathema?*, 56 ANTITRUST L.J. 485 (1987) (discussing provisions and the legislative history of the rarely used Antidumping Act of 1916 which aimed at "prevention of predatory international price discrimination") (emphasis omitted); Thomas J. Schoenbaum, *The International Trade Laws and the New Protectionism: The Need for a Synthesis with Antitrust*, 19 N.C. J. INT'L L. & COM. REG. 393, 398-402 (1993) (arguing that "the antidumping laws have numerous shortcomings"); A. Paul Victor, *Antidumping and Antitrust: Can the Inconsistencies be Resolved?*, 15 N.Y.U. J. INT'L L. & POL. 339 (1983) (reviewing the relationship between U.S. antidumping and antitrust laws); George Yarrow, *Economic Aspects of Anti-dumping Policies*, 3 OXFORD REV. ECON. POL'Y 66 (1987) (assessing the current policies of antidumping); Note, *The Antidumping Act—Tariff or Antitrust Law?*, 74 YALE L.J. 707 (1965) (explaining how the Antidumping Act is a hybrid of tariff ideas and theories of antitrust law). *But see* Ronald A. Cass, *Price Discrimination and Predation Analysis in Antitrust and International Trade: A Comment*, 61 U. CIN. L. REV. 877 (1993) (arguing that antidumping law assesses price discrimination and predation in a markedly different manner from international law). One scholar suggests a new way of viewing the injury requirement in antidumping law that is based on antitrust law principles, but stops short of calling for the repeal of antidumping law. Diane P. Wood, *"Unfair" Trade Injury: A Competition-Based Approach*, 41 STAN. L. REV. 1153, 1174-93 (1989); see also Richard D. Boltuck & Seth Kaplan, *Conflicting Entitlements: Can Antidumping and Antitrust Regulation Be Reconciled?*, 61 U. CIN. L. REV. 903, 912-13 (1993) (critically appraising Wood's position).

58. Robinson-Patman Antidiscrimination Act, ch. 592, 49 Stat. 1526 (1936) (codified as amended at 15 U.S.C. §§ 13, 13a, 13b, 21a (1994)).

59. 15 U.S.C. §§ 13(a)-(b), 21(a) (1994); see also Christopher M. Barbuto, Note, *Toward a Convergence of Antitrust and Trade Law: An International Trade Analogue to Robinson-Patman*, 62 FORDHAM L. REV. 2047, 2085-94 (1994) (discussing the convergence of antitrust and antidumping law).

60. Sherman Act, ch. 647, § 2, 26 Stat. 209, 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1994)).

61. 15 U.S.C. § 2 (1994). Some economists suggest that antitrust laws are the appropriate means for combating predatory pricing. See, e.g., Hoekman & Leidy, *supra* note 28, at

lates the national treatment clause of Article III of the 1947 GATT, which suggests that conduct permitted domestically should be treated similarly if engaged in internationally.⁶² Antidumping law does not apply to the domestic context. A domestic company engaged in price discrimination or predatory pricing only in its home country may run afoul of antitrust law but not of antidumping law. One could argue, however, that antidumping law is not redundant to domestic laws because

161 ("In the unlikely event that an anticompetitive outcome develops from a strategy of predatory dumping, this could be challenged under existing antitrust or competition laws, assuming that problems related to extraterritorial enforcement can be overcome." (footnote omitted)); Barbuto, *supra* note 59, at 2089-94 (suggesting a convergence of antitrust and trade law).

The antitrust literature on predatory pricing is extensive and a review of it is beyond the scope of this Article. See generally Harvey M. Applebaum, *Foreign Predation & Price Discrimination against U.S. Firms—Antidumping Under Title VII*, in ANTITRUST AND TRADE POLICIES IN INTERNATIONAL TRADE 1-11 (Barry Hawk ed., 1985) (examining the issue of predatory intent in antidumping law); ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978) (reviewing antitrust policies); George A. Hay, *A Confused Lawyer's Guide to the Predatory Pricing Literature*, in ECONOMIC ANALYSIS AND ANTITRUST LAW 209 (Terry Calvani & John Siegfried eds., 2d ed. 1988) (discussing the wave of economic litigation on predatory pricing); HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 298-328 (1994) (reviewing predatory pricing); Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 700-32 (1975) (discussing tests for distinguishing between predatory and competitive pricing); Joseph F. Brodley & George A. Hay, *Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards*, 66 CORNELL L. REV. 738, 765-92 (1981) (outlining the rules on predatory pricing and their relationship to current economic theories); Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 318-33 (1981) (discussing potential remedies for predation); James D. Hurwitz & William E. Kovacic, *Judicial Analysis of Predation: The Emerging Trends*, 35 VAND. L. REV. 63, 94-99 (1982) (discussing the effect of debate on judicial decisions); Paul L. Joskow & Alvin K. Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L. J. 213, 242-58 (1979) (examining alternative policies for predatory pricing); Charles W. McCall, *Predatory Pricing: An Economic and Legal Analysis*, 32 ANTITRUST BULL. 1, 9-19 (1987) (critically reviewing the legislative guidelines used in predatory pricing litigation); F.M. Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 HARV. L. REV. 869, 869-83 (1976) (examining the shortcomings of the Areeda-Turner analysis of predatory pricing); Oliver E. Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 YALE L.J. 284 (1977) (discussing the consensus in favor of cost-based rules dealing with predatory pricing).

For a discussion of nonprice predatory behavior such as exclusive dealing arrangements, see Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209, 230-49 (1986) (demonstrating how antitrust enforcers can develop a set of objective guidelines to carry out a new two-step analysis).

62. MARCEAU, *supra* note 56, at 101-29; Davey, *supra* note 50, at 297; Horlick, *supra* note 13, at 101 n.1. Of course, one could argue that there is no violation because Article VI of the GATT authorizes antidumping law and, therefore, is an exception to the national treatment clause. This rebuttal may explain why no argument about inconsistency has been made in a GATT proceeding.

[o]ver time, antidumping policy and antitrust policy have diverged strikingly. Antidumping law and policy have evolved along a path of ever-increasing protection for U.S. firms from imports and decreasing concern for consumers and the economy as a whole. Antitrust law relating to predatory pricing, at least in recent decades, has taken a path of increasing concern for consumers and the economy as a whole and decreasing concern for firms suffering intense competition.

Antidumping law no longer acts primarily against predatory pricing. It acts against international price discrimination (sales at a lower price in the United States than in the home country of the exporter) and sales below cost, regardless of whether the sales are predatory. Yet, the relevant provisions of the antitrust laws prohibit only predatory pricing; they do not prohibit selling below cost or price discrimination analogous to that prohibited by the antidumping laws except in cases where it is predatory.

This difference is important. Predatory pricing is detrimental to economic welfare because it leads to monopolies, which cause economic inefficiency and raise concerns about social equity. It seldom occurs, however, because it is rarely a profitable strategy and is usually not possible. By contrast, nonpredatory price discrimination and sales below cost generally provide net benefits to the country receiving the lower price, and both are relatively common. Moreover, seldom do cases of price discrimination or selling below cost have anything to do with predatory pricing.⁶³

Antidumping law is not redundant to antitrust law because it is a practical and political necessity in a world in which cross-border price discrimination is possible because of protection in home markets.

Second, scholars argue antidumping law is unnecessary because injury to an industry caused by imports can be addressed by safeguard or escape clause actions under section 201 of the Trade Act of 1974.⁶⁴ Section 201 provides assistance to companies and workers who suffer from fair foreign competition. Applying it in the context of dumping is legitimate because dumping is not necessar-

63. CONGRESSIONAL BUDGET OFFICE, A REVIEW OF U.S. ANTIDUMPING AND COUNTERVAILING-DUTY LAW AND POLICY 2-3 (May 1994) (memorandum) [hereinafter CBO MEMORANDUM].

64. Trade Act of 1974, Pub. L. No. 93-618, § 201, 88 Stat. 1978, 2011-14 (codified as amended at 19 U.S.C. § 2251 (1994)); *see also* Hoekman & Leidy, *supra* note 28, at 171-72, 174-75, 178-79 (stating that antidumping injury requirement is less stringent than safeguard injury requirement); CBO MEMORANDUM, *supra* note 63, at 3-7 (describing section 201 escape clause).

ily unfair.⁶⁵ Adjustment assistance, however, is difficult to obtain and meager in amount.⁶⁶

Third, they argue antidumping law cannot address the source of the problem of the alleged unfair pricing—the closed foreign market.⁶⁷ Although antidumping law may serve as a bargaining chip in dealing with a closed foreign market, the law does not aim to dismantle the tariff and nontariff barriers to trade in an exporter's home market that ensure market segmentation. If these barriers were removed, one of the three conditions necessary for dumping would not exist and dumping would be impossible. Scholars argue that section 301 of the Trade Act of 1974, and not antidumping law, is the unilateral tool for prying open a foreign market.⁶⁸ The use of section 301, however, is constrained by the Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes.⁶⁹ This is illustrated by the recent U.S.-Japan dispute about Japanese barriers to U.S. automobiles and auto parts.⁷⁰

Fourth, they argue antidumping law creates one of two perverse incentives for an exporter.⁷¹ First, antidumping law may distort an exporter's marketing decisions. An exporter might reduce its exports and increase its home-market sales to minimize the risk of being named as a respondent in an antidumping action. In turn,

65. A section 201 claim in the United States requires: (1) an increase in the volume of imported merchandise that is a (2) substantial cause of (3) serious injury to (4) a domestic industry that makes like merchandise. 19 U.S.C. § 2251(a) (1994). The price at which imported merchandise is sold is irrelevant. Antidumping law does not require a change in import volume, "substantial" cause, or "serious" injury. However, it is beyond the scope of this Article to consider whether the escape clause affords adequate relief or whether it would be desirable to harmonize the elements of an escape clause and antidumping claim.

66. See Comment, *Worker Adjustment Assistance: The Failure & the Future*, 5 NW. J. INT'L L. & BUS. 394, 415-17 (1983).

67. Hoekman & Leidy, *supra* note 28, at 163.

68. See Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978, 2041 (codified as amended at 19 U.S.C. § 2411 (1994)); Alan F. Holmer & Judith Hippler Bello, *U.S. Trade Law & Policy Series No. 14: The 1988 Trade Bill: Savior or Scourge of the International Trading System?*, 23 INT'L LAW. 523, 527 (1989).

69. See MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE URUGUAY ROUND TRADE AGREEMENTS, TEXTS OF AGREEMENTS IMPLEMENTING BILL, STATEMENT OF ADMINISTRATIVE ACTION AND REQUIRED SUPPORTING STATEMENTS, H.R. DOC. NO. 316, 103d Cong., 2d Sess. 1008 (1994) [hereinafter MESSAGE].

70. See, e.g., Bob Davis, *U.S. and Japan Agree to One Meeting on Auto Trade as Squabble Continues*, WALL ST. J., June 5, 1995, at A5 (United States threatened sanctions if auto and auto-parts issues are not resolved); Nancy Dunne, *US Steps Up Pressure on Japan*, FIN. TIMES, May 19, 1995, at 18 (citing one model on the sanctions list, the Infiniti Q45, selling at \$59,350 in the United States and at \$75,069 in Japan).

71. See, e.g., Hoekman & Leidy, *supra* note 28, at 170 (listing inducements of rent-seeking behavior for import-competing firms and the incentive to locate productive facilities for exporting firms).

the price of its merchandise in the importing country rises, reducing competitive pressure on producers in that country, while the price of its merchandise in its home country falls. Alternatively, antidumping law may distort an exporter's decisions about foreign direct investment. If the importing country represents a significant market, the exporter may relocate its production facilities there.

These skeptics teach that antidumping law is inherently protectionist.⁷² As Bovard states, "[e]conomic xenophobia is the foundation of U.S. antidumping law."⁷³ Unfortunately, this insight is on a par with advice that "rain is wet" when what is sorely needed is direction to the nearest umbrella vendor. The call for repeal of antidumping law is quixotic. For approximately the last century, long before the GATT entered into force, the international trading community has condemned dumping.⁷⁴ The GATT contracting parties have had four opportunities to ban antidumping law: (1) in 1947 when the GATT was drafted; (2) between 1964 and 1967 when the Kennedy Round Antidumping Code was produced; (3) between 1974 and 1979 when the Tokyo Round Antidumping Code was produced; and (4) between 1986 and 1994 when the Uruguay Round Antidumping Code was produced.⁷⁵ Each time, however, the negotiators affirmed the law.

72. The first U.S. legislation designed to afford relief from dumping, enacted in 1916, was designed principally to protect the U.S. chemical industry from German competition, particularly in the dyestuff sector. JOSEPH E. PATTISON, *ANTIDUMPING AND COUNTERVAILING DUTY LAWS* § 15.02 (May 1995). For a review of this Act, see RAJ BHALA, *INTERNATIONAL TRADE LAW: CASES AND MATERIALS* ch. 7 (Michie 1996). For an entertaining account of the history of U.S. antidumping law, see BOVARD, *supra* note 1, at 109-14.

73. BOVARD, *supra* note 1, at 107.

74. See JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 221 (1989).

75. See JOHN H. JACKSON, *WORLD TRADE AND THE LAW OF GATT 1969* (discussing the drafting of the 1947 GATT).

For discussions of the 1967 Kennedy Round Antidumping Code, see BHALA, *supra* note 72, ch. 6; THOMAS B. CURTIS & JOHN ROBERT VASTINE, JR., *THE KENNEDY ROUND AND THE FUTURE OF AMERICAN TRADE* 202-215 (1971); JOHN W. EVANS, *THE KENNEDY ROUND IN AMERICAN TRADE POLICY: THE TWILIGHT OF THE GATT?* 260-62, 270 (1971). This Code took effect on July 1, 1968. SENATE REPORT, *supra* note 18, at 32. The United States was one of the original signers of the Code. However, for political reasons relating to congressional-executive relations, Congress limited the effect of the Code by statute. See Renegotiation Amendments Act of 1968, Pub. L. No. 90-634, § 201, 82 Stat. 1345, 1347. Some scholars incorrectly suggest that the United States never joined the Code. See, e.g., JACKSON, *supra* note 74, at 226 ("The Code, as an international treaty, had been signed by authority of the President, but there was no participation of the U.S. Congress. . . . The Congress enacted legislation that prohibited the executive and the . . . [ITC] from following the rules of the GATT [Antidumping] Code in certain circumstances.").

For a review of the 1979 Tokyo Round Antidumping Code and U.S. implementing legislation—the Trade Agreements Act of 1979—see William H. Barringer & Christopher A.

One observer commented that the Tokyo Round actually resulted in greater opportunities for bringing antidumping claims:

Since antidumping laws are a protectionist device, the GATT should attempt to eliminate them or restrict their use. Unfortunately, the fact that article VI of the General Agreement explicitly allows their use, has meant that GATT control of dumping has been largely limited to regulation of procedures only. *What is needed is a change in emphasis in the GATT [Tokyo Round] Antidumping Code, so that it restricts more tightly than now the permissible scope of antidumping laws.* A similar change in attitude is needed in GATT member states. The antidumping laws have been treated by many legislators as inherent rights of their constituents, rights that should be regularly "improved" by making relief more readily available.⁷⁶

The harsh reality is that antidumping law remains a strategic weapon in the protectionist arsenal.⁷⁷ A cynical view of this reality is that the law benefits a powerful lobby in Washington, D.C.—the international trade bar. Eliminating antidumping law would dramatically reduce the business of international trade lawyers.

Whether antidumping law is economically justified is irrelevant. The practical and more ambitious inquiry is whether the law can be circumscribed to minimize the risk of protectionist abuse. Like

Dunn, *Antidumping and Countervailing Duties Investigations Under the Trade Agreements Act of 1979*, 14 J. INT'L L. & ECON. 1, 2-3 (1979); Peter D. Ehrenhaft, *What the Antidumping and Countervailing Duty Provisions of the Trade Agreements Act [Can][Will][Should] Mean for U.S. Trade Policy*, 11 LAW & POL'Y INT'L BUS. 1361, 1361-65 (1979); John J. Barceló III, *Subsidies, Countervailing Duties and Antidumping After the Tokyo Round*, 13 CORNELL INT'L L.J. 257, 259 (1980); Terrence Roche Murphy, *Antidumping and Countervailing Duties under the Trade Agreements Act of 1979: A Preliminary Analysis*, 14 INT'L LAW. 203, 221 (1980); Alan H. Silverman, *An Examination of the Antidumping Provisions of the Trade Agreements Act of 1979: United States Implementation of the Antidumping Code Formulated in the Tokyo Round*, 7 SYRACUSE J. INT'L L. & COM., 239, 240 (1979); Diana Jean Carloni, Note, *An Analysis of "Material Injury" Under the 1979 Trade Agreement Act*, 4 LOY. L.A. INT'L & COMP. L.J. 87, 88-89 (1981); Thomas Early, Note, *Judicial Review of Antidumping Cases and the Trade Agreements Act of 1979: Towards a Unified System of Review*, 14 J. INT'L L. & ECON. 101, 101 n.5 (1979); Shelley A. Lorenzen, *Technical Analysis of the Antidumping Agreement and the Trade Agreements Act*, 11 LAW & POL'Y INT'L BUS. 1405, 1416-19 (1979); Nancy L. Nowak, Note, *The Trade Agreements Act of 1979: Countervailing and Antidumping Procedures*, 14 J. INT'L L. & ECON. 63, 84-85 (1979); Timothy J. Patenode, Comment, *The New Anti-Dumping Procedures of the Trade Agreements Act of 1979: Does it Create a New Non-Tariff Trade Barrier?*, 2 NW. J. INT'L L. & BUS. 200, 221 (1980); Robert L. Reifenberg, Comment, *Antidumping Investigations: Procedural Reform and Substantive Change Through the Trade Agreements Act*, 1 N. ILL. U. L. REV. 261, 263, 281-82 (1981). The United States and 25 other GATT contracting parties signed this Code, which replaced the Kennedy Round Antidumping Code. The Tokyo Round Code and Trade Agreements Act entered into force on Jan. 1, 1980. SENATE REPORT, *supra* note 18, at 32. Both the Agreement and the Act supersede them.

76. Davey, *supra* note 50, at 296 (emphasis added).

77. See, e.g., Hoekman & Leidy, *supra* note 28, at 156 (suggesting that antidumping law is the most common method of "contingent protection").

their predecessors, the Uruguay Round negotiators dodged this question and wound up expanding opportunities for a petitioner to deploy antidumping law as a nontariff barrier to trade.

B. *Focusing on Protectionist Abuse*

The profile of a protectionist abuser is a petitioner that has lost its comparative advantage in manufacturing merchandise to a respondent that makes the same or similar merchandise. The petitioner is unwilling or unable to reduce its cost structure to meet global competitive pressures, fails to incorporate technological innovations in its manufacturing process and product design, or is insensitive to changes in consumer tastes. Its strategy for restoring its advantage is to raise the cost of imported merchandise by imposing an antidumping duty on the imports.

To some extent, the very filing of the petition serves this goal. It harasses the competitive respondent, generates uncertainty about the respondent's future prices and liabilities, and raises the respondent's legal fees.⁷⁸ Litigation in federal courts may drag on for over a decade, thus enabling a petitioner to delay final liquidation of entries of merchandise.⁷⁹ As Judge Posner writes:

Of course, the concerns that actually animate anti-dumping, countervailing-duty, and other measures directed against allegedly "unfair" trade practices of foreign producers go far beyond a concern with predatory pricing. *The dominant concern is to protect U.S. industry from foreign producers that have genuinely lower costs, whether because they pay lower wages, incur fewer pollution-control and other regulatory costs, are better managed, have better workers, or have more modern plants and equipment.* Policies so motivated are called "protectionist"⁸⁰

78. See, e.g., Low, *supra* note 11, at 86 (stating that antidumping law "can in effect be easily used to create uncertainty and inhibit trade" and that "[m]ere initiation of a case can have trade harassment effects."); SCHOTT, *supra* note 5, at 78 ("[T]he very initiation of an antidumping case casts a cloud over trade, both because the liability for penalty duties that accused exporters face is uncertain and potentially large, and because there is concern that national authorities will interpret the rules so as to favor the domestic constituents seeking import relief."); POWELL ET AL., *supra* note 4, tab A, at 13 (discussing the chilling effect of antidumping litigation and stating that the cost of defending against a petition typically exceeds \$1 million per year); Tim W. Ferguson, *Trade Policy's "Chokepoint"*, WALL ST. J., Apr. 11, 1995, at A21 (explaining that "[s]ome manufacturers . . . cannot bear the overhead expense and risk of a dumping case [and] withhold shipments to be safe. . . . By disrupting dependable supply channels, dumping law is the most injurious form of trade barrier").

79. See, e.g., Daniel Michaels, *Legal Charges Keep Electric Golf Cart Going—To Court*, WALL ST. J., May 24, 1995, at A1 (discussing antidumping litigation involving golf carts from Poland that has run for 21 years).

80. POSNER, *supra* note 56, at 310-11 (emphasis added).

After initiating an antidumping case, the protectionist abuser eagerly manipulates the calculation of a dumping margin to maximize the potential duty. It exploits permissive injury and causation standards to support its dubious claim. In effect, the petitioner seeks governmental assistance to negate the economic law of comparative advantage with respect to specific merchandise.⁸¹ Whenever the government obliges, it gives greater priority to the interests of the inefficient petitioner than to those of the importing country (not to mention the global economy) as a whole:

Local firms suffer "injury" (in the sense that they make less, or lose more, money than they otherwise would) whenever the import price is the same or lower than the price they charge. *That injury is no greater when dumping is present than when the import price merely reflects the comparative advantage of the exporter.* But it is only when consumers in another country are charged a higher price that this injury triggers government action under antidumping laws. And this government action normally occurs, unless the "injury" criterion is unusually stringently construed, *whatever the level of efficiency of local firms. Indeed, the less efficient the local firms, or the greater their local monopoly, the more easily the requisite injury can be shown (even though the local consumer's need for the low-priced goods is comparatively greater).*⁸²

In contrast to the protectionist petitioner, one bringing a meritorious antidumping action can show predatory dumping. It can demonstrate that the exporter sells merchandise in the importing market at a price below the exporter's average variable cost of production.⁸³ Further, it can prove that the exporter seeks to drive it out of business and, perhaps, to ultimately gain a monopoly position in the importing country. Such a petition has merit because absent predatory dumping the petitioner would be a financially robust and competitive company. The antidumping order places both the petitioner and consumers of its product at risk.⁸⁴

To differentiate the protectionist abuser from the meritorious petitioner, antidumping law must avoid two pitfalls. First, it must

81. This law, articulated by Adam Smith in 1776 and David Ricardo in 1819, remains the standard economic rationale for why nations trade. DAVID RICARDO, *ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION* 141-42 (Piero Sraffa ed., 1951); ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 474, 474-95 (Edwin Cannan ed., 1976). For modern treatments of the principle, see generally BHALA, *supra* note 72, ch. 1. To the extent international trade law reflects this principle, nations gain from trade. See *id.*; Ronald A. Brand, *GATT and the Evolution of United States Trade Law*, 18 BROOK. J. INT'L L. 101, 105, 116 (1992) (discussing the extent to which the principle is manifest in U.S. trade law).

82. DAM, *supra* note 29, at 168-69 (emphasis added).

83. See *infra* notes 595-601 and accompanying text.

84. See discussion *infra* part IV.E.

be clear and unequivocal. A protectionist abuser is sure to exploit ambiguities. The broad comment of one observer about pre-Uruguay Round law remains true:

[E]ven if there is some underlying validity to the notion of the international and national antidumping rules when properly managed, as actually managed currently it is fair to express considerable doubt about the policy soundness of the implementation of some of these rules. *There seems to be a considerable "tilt" against imports*, and any close observer of the processes of governments, whether of the United States, European Community, Canada, or Australia (the four principal users of antidumping law), can observe the considerable pressures brought by competing domestic producer groups so as to influence the governmental implementation of the antidumping laws in order to limit import competition.

United States law, in particular, is especially vulnerable to these type[s] of criticisms.⁸⁵

Second, antidumping law must be grounded in microeconomic theory. It must examine the cost structure of a firm to isolate and sanction predation cases. The Agreement and the Act also fail to satisfy this criterion. As the U.S. Court of Appeals for the Federal Circuit accurately observed over a decade ago in *Smith-Corona Group v. United States*:

Antidumping duties are imposed on the basis of differences in value, *not* differences in cost. The importation of foreign merchandise can occur at a price greater than cost, yet *still generate liability* for an antidumping duty. The language of the statute would impose a duty on a foreign producer who "eats" either costs or profits in the American market relative to the home market. Thus, cost criteria alone will not redress the full margin of dumping to which Congress sought to attach an antidumping duty. Value *must* be considered under the statute.

....

Congress sought to afford the domestic manufacturer strong protection against dumping, seeming to indicate that the Secretary [of Commerce] *should err in favor of protectionism*.⁸⁶

The traffic-light system proposed in Part V attempts to differentiate the protectionist abuser from the meritorious petitioner by avoiding both pitfalls.

85. JACKSON, *supra* note 74, at 242 (emphasis added).

86. 713 F.2d 1568, 1575-76 (Fed. Cir. 1983) (emphasis added), *cert. denied*, 465 U.S. 1022 (1984). The court's subsequent discussion of cost concerned only circumstances of sale adjustments to foreign market value, not a complete accounting for comparative advantage. *Id.* at 1577-82. This adjustment is discussed later. See *infra* notes 194-196 and accompanying text.

III. PRE-URUGUAY ROUND ANTIDUMPING LAW

This is not a protectionist administration This is an administration that believes in opening markets.⁸⁷

The principal U.S. antidumping statute is the 1930 Act,⁸⁸ which mandates the assessment and collection of antidumping duties if findings are affirmative in two separate and final administrative determinations.⁸⁹ These determinations are complex as well as contentious.⁹⁰ The following flow chart lays out the course of an antidumping case:⁹¹

87. Paul Ingrassia & Asra Q. Nomani, *Some Fear a Backlash As Detroit Prepares Charges Against Japan*, WALL ST. J., Feb. 8, 1993, at A1 (quoting Commerce Secretary Ron Brown).

88. Title VII of the 1930 Act contains the antidumping sections. See Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 144, 150 (adding title VII, entitled Countervailing and Antidumping Duties, to the Tariff Act of 1930) (codified as amended in scattered sections of 19 U.S.C.). After the Uruguay Round a number of terms used in the Uruguay Round Agreements Act were changed to conform with the Agreement. For example:

the term "export price" replaces the term "purchase price," the term constructed export price" replaces the term "exporter's sales price," and the term "normal value" replaces the term "foreign market value." In addition, because the Agreement[] use[s] the term "like product" to refer to both foreign and domestic merchandise, the [Act] distinguishes between "foreign like product," which replaces the term "such or similar merchandise" (referring to merchandise produced in the foreign country whose exports to the United States are subject to investigation), and "domestic like product," which replaces the term "like product" (which, under U.S. law, refers to U.S. production). And, for ease of reference, in . . . the antidumping . . . provisions, what was formerly referred to as the "class or kind" or merchandise subject to investigation or covered by an order is now referred to as "subject merchandise."

SENATE REPORT, *supra* note 18, at 33. These changes may be easily referenced in the table of Pre- and Post-Uruguay Round Terminology and Abbreviations. See *infra* app. A.

This Article uses the pre-Uruguay Round terminology in its discussion of pre-Uruguay Round law, and the post-Uruguay Round terminology in its discussion of post-Uruguay Round law.

For in-depth discussions of the 1930 Act, see BRUCE E. CLUBB, UNITED STATES FOREIGN TRADE LAW §§ 21.1-33 (1991); HORLICK, *supra* note 13; PATTISON, *supra* note 72, § 1.04; DAVID SERKO, IMPORT PRACTICE CUSTOMS AND INTERNATIONAL TRADE LAW 465-95 (2d ed. 1991); THOMAS V. VAKERICS ET AL., ANTIDUMPING, COUNTERVAILING DUTY, AND OTHER TRADE ACTIONS 23-192 (1987); EDWIN A. VERMULST, ANTIDUMPING LAW AND PRACTICE IN THE UNITED STATES AND THE EUROPEAN COMMUNITIES 31-193, 338-415, 504-626 (1987).

89. Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. at 162 (adding § 731 of title VII to the Tariff Act of 1930) (codified as amended at 19 U.S.C. § 1673 (1994)).

90. See, e.g., *Smith-Corona Group*, 713 F.2d at 1571 (accurately pointing out that the dumping margin determination is "complicated by the difficulty in quantification of these factors [Foreign Market Value and United States Price] and the foreign policy repercussions of a dumping determination," thus making it "a difficult and supremely delicate endeavor").

91. See discussion *infra* parts IIIA-E (discussing the flow chart in greater detail).

TABLE 1.
THE PROCESS OF AN ANTIDUMPING CASE

-
1. Petition is filed with the DOC and the ITC.
 2. The ITC preliminary determination: "reasonable indication" of injury
 - a) If the ITC's preliminary dumping injury determination is affirmative, the DOC renders a preliminary determination as to whether there is a "reasonable basis" for concluding there are less than fair value (LTFV) sales.
 - b) If the ITC's preliminary dumping injury is negative, the petition is dismissed.
 3. The DOC preliminary dumping determination: "reasonable basis" that there are LTFV sales
 - a) If the DOC's preliminary LTFV dumping determination is affirmative: (1) it suspends liquidation of entries; and (2) requires that estimated antidumping duties are deposited. The DOC proceeds to a final dumping determination.
 - b) If the DOC's preliminary dumping injury determination is negative, the DOC proceeds to a final dumping determination.
 4. The DOC final dumping injury determination.
 - a) If the DOC's final dumping injury determination is affirmative, the ITC renders a final injury determination.
 - b) If the DOC's final dumping injury determination is negative, the petition is dismissed. Any suspension of entries is lifted and any estimated duty deposits are refunded.
 5. The ITC final injury determination
 - a) If the ITC's final injury determination is affirmative, the DOC issues an antidumping order.
 - b) If the ITC's final injury determination is negative, the petition is dismissed. Any suspension of liquidation of entries is lifted and any estimated duty deposits are refunded.
-

First, the DOC must determine whether the respondent sells the class or kind of merchandise subject to investigation at less than fair value (LTFV) in the United States.⁹² It does so by calculating the dumping margin or the extent of cross-border price discrimination. Second, the ITC must determine that the merchandise

92. For a discussion of this determination, see Alan F. Holmer & Judith Hippler Bello, *U.S. Trade Law and Policy Series #9: The Scope of "Class or Kind of Merchandise" in Antidumping and Countervailing Duty Cases*, 20 INT'L LAW. 1015, 1015-24 (1986).

materially injures or threatens to injure a U.S. industry or materially retards the establishment of a U.S. industry.⁹³

If both determinations are affirmative, the DOC issues an antidumping order calling for the collection of a duty equal to the dumping margin.⁹⁴ The duty is collected by the U.S. Customs Service on a company-specific basis for an indefinite period.⁹⁵ It applies to current and future imports of the class or kind of merchandise subject to investigation.⁹⁶

The amount of the duty depends on the estimated duty deposit, calculated as part of the DOC's initial investigation. The respondent makes the deposit with the U.S. Customs Service at the time merchandise is imported.⁹⁷ If neither the petitioner nor the respondent requests an annual administrative review, the estimated duty amount remains effective and the deposit is converted to an assessed duty. Each year, in the anniversary month of the antidumping order, either party may request the DOC to review whether the estimated amount is accurate or should be adjusted to yield a new amount applicable to the prior twelve months of imports.⁹⁸ If the DOC determines that a higher amount is appropriate, the respondent is liable for the difference between the estimated and final amount plus any interest. If a lower amount is appropriate, the respondent receives a refund for the difference plus interest. In either case, the new final amount remains the deposit rate until completion of the next administrative review.⁹⁹

A. *Filing a Petition*

Although the DOC may initiate an antidumping action, in almost every case an interested party files a petition. An "interested party" is one that acts on behalf of the allegedly affected U.S. industry and may be defined as follows: (1) "a manufacturer, producer, or wholesaler in the United States of a domestic like product"; (2) a "certified . . . or recognized union or group of workers which is representative of an [affected] industry"; (3) "a trade or business association [with] a majority of . . . members" producing a domestic like product; (4) a coalition of firms, unions, or trade associa-

93. OVERVIEW, *supra* note 30, at 64.

94. 19 U.S.C. § 1673e(a)(1) (1994); 19 C.F.R. § 353.21 (1995).

95. See POWELL ET AL., *supra* note 4, tab A, at 5-6.

96. See Monique Ross & Pete Zarocostas, *An Overview of Antidumping*, GLOBAL TRADE TALK, Mar./Apr. 1994, at 8, 8-9 (for a brief discussion of the role of the Customs Service).

97. 19 U.S.C. § 1673b(d)(1)(A)-(B) (1994).

98. 19 U.S.C. § 1675 (1994).

99. POWELL ET AL., *supra* note 4, tab A, at 5-6.

tions in which a majority of the individual members have standing; (5) a coalition or trade association representative of processors, or processors and producers, or processors and growers in cases involving processed agricultural products.¹⁰⁰ A petitioner files with the DOC and the ITC simultaneously.¹⁰¹

The DOC does not ask whether any other producers support the petition. Instead, it assumes that standing to file a petition exists unless a majority of the industry contests the petitioner's standing.¹⁰² Therefore, as Gary N. Horlick states, "when Commerce finds standing, it actually has no idea what proportion of the domestic industry supports the petition."¹⁰³ The DOC does not place an emphasis on standing requirements because an antidumping order cannot be issued until the DOC makes a final affirmative determination of injury to a U.S. industry. The DOC "has gone to great lengths to try to define the industry in such a way as to be able to find support from more than a mathematical majority."¹⁰⁴

100. 19 U.S.C. § 1677(9)(C)-(G) (1994); *see also* OVERVIEW, *supra* note 30, at 66; *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 667 (Fed. Cir. 1992) (upholding the DOC's interpretation that so long as a petition is filed by an "interested party," it is considered filed "on behalf of" the domestic industry).

101. 19 U.S.C. § 1673a(b)(2) (1994). A petitioner, in its filing, must set forth the following information: (1) its identity; (2) the identity of all known domestic producers of the domestic like product; (3) the volume and value of the domestic like product that is produced by the petitioner and each domestic producer; (4) a description of the allegedly dumped product; (5) the name of each country in which the allegedly dumped product originates or from which it is exported; (6) the identity of each known exporter, foreign producer, and importer of the allegedly dumped product; (7) the nature of its injury allegedly caused by the allegedly dumped product; (8) the export price or constructed export price of the allegedly dumped product; and (9) the NV of the allegedly dumped product. 19 C.F.R. § 353.12(b) (1995).

102. Horlick, *supra* note 13, at 154.

103. *Id.*

104. *Id.* at 155. U.S. companies may file claims when they are injured by dumping outside the United States. Such petitions may arise in the case of third-country dumping. For example, if U.S. and Japanese companies each sell merchandise in Thailand, the U.S. exporter may claim injury from dumping by the Japanese company. In this situation, the U.S. Trade Representative (USTR) is authorized to ask the third country—here, Thailand—to take action against dumping in its market that injures U.S. exporters. 19 U.S.C. § 1677k(c)(1) (1994). In contrast, neither the DOC nor the International Trade Commission (ITC) is authorized to take action in response to requests from other countries. HOUSE REPORT, *supra* note 18, at 106.

Downstream or diversionary input dumping is another example of dumping outside the United States that adversely affects U.S. exporters. Downstream dumping occurs when an exporter ships finished merchandise to the United States that is comprised of raw and intermediate goods that have been dumped in the exporter's country by some third country. For example, a Japanese company may sell merchandise in the United States comprised of Thai components dumped in Japan by a Thai exporter. As a result, the price of the imports sold in the United States is below that of comparable U.S.-made goods. In such a case a U.S. company may file a petition with the USTR for relief from alleged injury. 19

Although the DOC's aim is to identify and dismiss those petitions supported by producers accounting for only a small volume of the subject merchandise, the DOC makes little effort to ascertain the relevant facts and rarely dismisses a petition for lack of support.¹⁰⁵

B. *Preliminary and Final Determinations*

After an antidumping petition is filed, the DOC and the ITC render preliminary and final administrative determinations.¹⁰⁶ The process is designed to allow the U.S. Customs Service to begin collecting security for antidumping duties as soon as the ITC and the DOC have preliminarily determined that imports are causing or threatening to cause injury to a U.S. industry and are being sold at less than fair value.¹⁰⁷

The DOC sets the duty rate by calculating the rate of dumping in three stages: (1) a preliminary determination (the basis for collecting the security); (2) a final determination (the basis for collecting cash deposits of the estimated duties); and (3) an annual review of the dumping order (the basis for collecting the actual duties and liquidating the entries of the class or kind of merchandise subject to investigation).¹⁰⁸ Absent a request for an annual review, the liability of the importer of the merchandise is fixed at the cash deposit rate.

The ITC makes an initial preliminary determination as to whether there is a "reasonable indication" of material injury within forty-five days after a petition is filed.¹⁰⁹ If this determination is negative, the investigation is concluded. If the ITC's preliminary injury determination is affirmative, the DOC makes a second preliminary determination as to whether there is a "reasonable basis to believe or suspect" that the class or kind of merchandise subject to

U.S.C. § 1677k(b) (1994); OVERVIEW, *supra* note 30, at 71. If the USTR finds a reasonable basis for the allegation of downstream dumping, it requests the government of the third country—here, Thailand—to investigate and, if necessary, take action against the dumping on behalf of the United States. 19 U.S.C. § 1677k(c)(1) (1994); OVERVIEW, *supra* note 30, at 71. If the foreign government refuses to take such action, the USTR consults with the petitioner to determine whether relief under U.S. law is appropriate. 19 U.S.C. § 1677k(e) (1994); OVERVIEW, *supra* note 30, at 71.

105. Horlick, *supra* note 13, at 155.

106. For discussions of procedural aspects of these determinations, see OVERVIEW, *supra* note 30, at 66-69; VAKERICS, *supra* note 88, at 23-56.

107. See OVERVIEW, *supra* note 30, at 69.

108. *Id.* at 66-69.

109. 19 U.S.C. § 1673b(a) (1994); OVERVIEW, *supra* note 30, at 66-67. This and other time limits for preliminary and final determinations are subject to extension under certain circumstances. See 19 U.S.C. § 1675(c)(5)(B) (1994).

investigation is or is likely to be sold at less than fair value.¹¹⁰ The DOC must make this determination within 160 days after a petition is filed, but the DOC may not do so before the ITC has made a preliminary affirmative determination of injury.¹¹¹

An affirmative preliminary dumping margin determination by the DOC has three effects. First, the DOC directs the U.S. Customs Service to suspend liquidation of all entries of merchandise subject to the affirmative preliminary determination.¹¹² Liquidation is "the final computation of the duties and fees due on an entry."¹¹³ The suspension requires the U.S. Customs Service to "defer[] calculation of the amount and rate of duty applicable to each individual entry until a later time."¹¹⁴ Second, the respondent posts with the U.S. Customs Service a cash deposit, bond, or other appropriate security equal to the estimated dumping margin calculated by the DOC in its preliminary determination for each entry of the class or kind of merchandise subject to investigation.¹¹⁵ This security deposit is required to ensure payment of antidumping duties in the event that final affirmative dumping and injury determinations are rendered and an antidumping order is issued.

Third, the ITC begins a final injury determination. If the DOC's preliminary determination is negative, the ITC will not begin a final injury determination unless the DOC renders a final affirmative dumping determination.¹¹⁶ The ITC renders its final determination of injury by the later of 120 days after the DOC's preliminary affirmative determination, or forty-five days after the DOC's final affirmative determination.¹¹⁷

The DOC renders a final determination regardless of whether its preliminary dumping margin determination is affirmative or negative. It makes its final determination within seventy-five days of its preliminary determination.¹¹⁸ If its final determination is negative, the DOC terminates the investigation,¹¹⁹ revokes the suspension of

110. 19 U.S.C. § 1673b(b)(1)(A) (1994); OVERVIEW, *supra* note 30, at 67.

111. 19 U.S.C. § 1673b(b)(1)(A) (1994) (stating 140 days after initiation of investigation); OVERVIEW, *supra* note 30, at 67 (stating 160 days after filing of petition).

112. 19 U.S.C. § 1673b(d)(2) (1994).

113. RICHARD M. BELANGER, IMPORT AND CUSTOMS COMPLIANCE GUIDE, glossary, at 7 (1995); see also 19 C.F.R. § 159.1 (1995) (defining liquidation as "the final computation or ascertainment of the duties or drawback accruing on an entry").

114. BELANGER, *supra* note 113, ¶ 1512.21.

115. See 19 U.S.C. § 1673b(d)(1)(B) (1994); OVERVIEW, *supra* note 30, at 67.

116. See 19 U.S.C. § 1673b(d) (1994); OVERVIEW, *supra* note 30, at 67.

117. 19 U.S.C. § 1673d(b)(2) (1994).

118. 19 U.S.C. § 1673d(a)(1) (1994); BELANGER, *supra* note 113, ¶ 1512.22.

119. BELANGER, *supra* note 113, ¶ 1512.22.

liquidation, and refunds any estimated antidumping duty deposits.¹²⁰ If the DOC's final determination is affirmative, the ITC makes a final injury determination.¹²¹

If the ITC's final determination is negative, it terminates the case and refunds any estimated duty deposits.¹²² If it is affirmative, the DOC issues an antidumping order within seven days of the ITC's determination.¹²³ The order requires the U.S. Customs Service to collect an antidumping duty equal to the dumping margin.¹²⁴ The company that imports the dumped product ultimately is responsible for payment of this duty as well as estimated duty deposits.¹²⁵

The antidumping order applies on a countrywide basis. It includes all exporters, whether or not investigated, unless the DOC determines that a specific exporter is selling its product at a nondumped price.¹²⁶ The DOC generally attempts to include exporters accounting for 60% of U.S. imports of the class or kind of merchandise subject to investigation in its LTFV investigation. Nonetheless, the 40% of exporters not investigated are subject to the order.¹²⁷

C. *The Dumping Margin Calculation*

1. The Basic Formula

To calculate the dumping margin, the DOC makes a "fair" value comparison between: (1) the United States Price (USP), the price of the class or kind of merchandise subject to investigation in the United States; and (2) the foreign market value (FMV), the price of "such or similar merchandise" in the exporter's home market.¹²⁸ The formula for the dumping margin calculation is:

120. *See id.*

121. 19 U.S.C. § 1673d(b)(2) (1994).

122. *See* BELANGER, *supra* note 113, ¶ 1512.23; 19 U.S.C. § 1673e(a) (1994).

123. 19 U.S.C. § 1673e(a) (1994); OVERVIEW, *supra* note 30, at 69.

124. 19 U.S.C. § 1673e(a) (1994); OVERVIEW, *supra* note 30, at 69.

125. 19 U.S.C. § 1505 (1994) (citing "importer of record" is responsible).

126. 19 C.F.R. §§ 353.14(a), 353.21(c) (1995).

127. *See* David A. Gantz, *A Post-Uruguay Round Introduction to International Trade Law in the United States*, 12 ARIZ. J. INT'L & COMP. L. 1, 70. The order also covers merchandise from a new shipper. 19 U.S.C. § 1673e(d)(2) (1994). A new shipper is an exporter that did not ship merchandise at the time the order was issued but began exportation thereafter. *Id.*

128. *See* 19 U.S.C. § 1673 (1994). Section 233(a)(4) of the Act substituted "foreign like product" for "such or similar merchandise." *See* Act, *supra* note 23, 108 Stat. at 4899. Under pre-Uruguay Round law the term "such or similar merchandise" was defined as merchandise identical or comparable to the merchandise subject to investigation. *See* 19 U.S.C. § 1677(16) (1994).

Several cases have addressed the relationship between the DOC's determination of the class or kind of merchandise subject to investigation (for purposes of the dumping margin

$$\text{Dumping Margin} = \text{FMV} - \text{USP}.$$

The DOC faces three threshold questions in the dumping margin calculation. First, can nondumped sales offset dumped sales? An exporter may make some, but not all of its home-market sales at a price above the USP. The DOC does not offset sales made at LTFV in the United States—those where the FMV exceeds the USP—against those not made at LTFV—those where the FMV is less than the USP.¹²⁹

Second, is there an amount of dumping that is nonactionable? Nonactionable dumping is defined in terms of a de minimis dumping margin or volume of imports.¹³⁰ Although there is no bright-line rule to determine whether the volume of the class or kind of merchandise subject to investigation is de minimis,¹³¹ a weighted average dumping margin of 0.5% or less is typically considered de minimis. If such a margin exists, the DOC terminates its investigation.¹³²

Third, should average or individual transaction prices be used to compare the FMV with the USP? It is critical to compare “apples with apples.” If an average-to-average methodology is used, the DOC compares the average FMV to the average USP. The averages

investigation) and the ITC's identification of a like domestic product (for purposes of the injury investigation). See *Hosiden Corp. v. United States*, 16 Ct. Int'l Trade 1088, 1094-99 (1992) (holding that the ITC must make a separate injury determination for each class or kind of merchandise designated by the DOC, but that the ITC's like product determination could include products with minor differences in physical characteristics or uses from the imported article); *Torrington Co. v. United States*, 938 F.2d 1278, 1280 (Fed. Cir. 1991) (upholding the ITC's determination that there were six separate like products and domestic industries involving antifriction bearings); see also *Luciano Pisoni Fabbrica Accessori Instrument Musicali v. United States*, 10 Ct. Int'l Trade 424, 429 (1986) (holding that the DOC improperly compared Italian woodwind instrument pads without allowing for differences in physical characteristics and pad sizes).

129. See Davey, *supra* note 50, at 298-99; Horlick, *supra* note 13, at 146.

130. 19 U.S.C. § 1673d(a)(4) (1994); JACKSON, *supra* note 74, at 232.

131. The issue of whether a dumping margin is de minimis is distinct from the issue of whether the volume of imports is negligible. While the first issue is determined by the DOC, the second issue is a matter for the ITC. In making a material injury determination, the ITC declines to cumulate imports that are negligible and that have no discernible impact on the domestic injury. 19 U.S.C. § 1677(7) (1994). “Negligible” is defined in terms of qualitative factors, and the ITC examines the U.S. market share held by each country's imports. 19 U.S.C. § 1677(24) (1994).

132. 19 C.F.R. § 353.6 (1995); see also *Carlisle Tire & Rubber Co. v. United States*, 10 Ct. Int'l Trade 301, 306 (1986) (*Carlisle II*) (holding that a 0.45% margin might be de minimis if the DOC can adequately explain the basis for such a finding). The de minimis exception was not set forth in the statute. Rather, it was created by the DOC over the objections of petitioners. See *Carlisle Tire & Rubber Co. v. United States*, 1 Ct. Int'l Trade 352, 353-54 (1981) (*Carlisle I*). The exception was promulgated as a regulation after *Carlisle II*.

are based on data from the same time period and the respondent may be able to use nondumped sales to offset dumped sales. Conversely, if the DOC uses the individual-to-individual methodology, it compares the FMV of a specific sale in the exporter's home market to the USP associated with a specific and contemporaneous sale in the United States. Although the DOC is authorized to use either methodology,¹³³ its practice is to calculate an average of prices in the exporter's home market—generally based on a six-month period—and then to compare that average to an individual U.S. sales price.¹³⁴ This practice protects firms and consumers against “targeted” dumping, where an exporter charges a dumped price to particular customers or regions while selling at higher prices to other customers or regions at the same time.¹³⁵

2. Identifying the USP

The USP is based on either the Purchaser's Price (PP) or the Exporter's Sales Price (ESP) of the class or kind of merchandise subject to investigation.¹³⁶ Both measures attempt to establish an arms-length price; namely, an unbiased, undistorted figure.¹³⁷ The PP is the price at which the class or kind of merchandise subject to investigation is purchased or agreed to be purchased from the manufacturer for export to the United States *prior to* the date of importation into the United States.¹³⁸ The DOC uses the PP if the exporter sells the merchandise *before* importation by an *unrelated* U.S. purchaser.¹³⁹ The ESP is the price at which the exporter sells

133. 19 U.S.C. § 1677f-1(a)-(c) (1994).

134. SENATE REPORT, *supra* note 18, at 33; Boltuck & Litan, *supra* note 56, at 14. In contrast to the calculation period for a Less Than Fair Value (LTFV) investigation, the DOC uses a monthly average when reviewing an antidumping order.

135. Boltuck & Litan, *supra* note 56, at 14 (discussing individual-to-average comparisons and “spot” or “rifleshoot” dumping); HOUSE REPORT, *supra* note 18, at 98; MESSAGE, *supra* note 69, at 842; *see also* Koyo Seiko Co. v. United States, 20 F.3d 1156, 1159 (Fed. Cir. 1994) (observing that “[a]veraging U.S. prices defeats [the purpose of the antidumping statute] by allowing foreign manufacturers to offset sales made at less-than-fair value with higher priced sales. Commerce refers to this practice as ‘masked dumping’”).

136. OVERVIEW, *supra* note 30, at 65. Some scholars do not always differentiate carefully between the Purchaser's Price (PP) and the Export Sales Price (ESP). *See, e.g.*, JACKSON, *supra* note 74, at 232 (stating that either ESP or PP shall be used, “whichever is appropriate”).

137. PATTISON, *supra* note 72, § 5.04[1].

138. 19 C.F.R. § 353.41(b) (1995).

139. *See* PATTISON, *supra* note 72, § 5.04[2]. The PP is also used where an intermediary, whether unrelated or related to the exporter, exists between the exporter and the U.S. buyer. Suppose the buyer has an overseas purchasing agent that purchases merchandise from an unrelated foreign manufacturer. The price paid by the agent to that manufacturer is the PP. Conversely, suppose a foreign manufacturer has a U.S. marketing subsidiary that

or agrees to sell the class or kind of merchandise subject to investigation.¹⁴⁰ It is most frequently used “when the merchandise has not as yet been sold at the time of importation and, therefore, since the exporter or a party related to the exporter still has title over the goods, is imported for the benefit of the exporter.”¹⁴¹

3. Identifying the FMV

The DOC begins the FMV determination with one threshold inquiry: What merchandise sold by the exporter in its home market is the same as the class or kind of merchandise subject to investigation in the United States? Ideally, the DOC will be able to identify identical merchandise the exporter sells in the home market in a quantity sufficient to allow for meaningful comparison. The DOC modifies its FMV determination, however, if the exporter does not sell identical merchandise in the home market or if the exporter sells a significant amount of merchandise at a price below the cost of production.¹⁴² In these situations, the DOC may look to a CV or to intermediate country sales in determining the FMV.¹⁴³

Although the DOC prefers to use identical merchandise,¹⁴⁴ such merchandise may not exist because of differences in style, design, or features that accommodate variations in consumer preferences in the home and U.S. markets. The DOC may be forced to use the exporter’s sales of merchandise similar to or of the same general class as the merchandise subject to investigation.¹⁴⁵ If the exporter does not sell identical or comparable merchandise in its home

sells merchandise to an unrelated U.S. buyer. The price charged by that subsidiary to the buyer is the PP. Note, however, that under certain circumstances, if the merchandise is placed in inventory at the expense of the subsidiary before it is sold to the buyer, the price is the ESP. In both cases the DOC relies on the PP because the exporter knows the merchandise is destined for the United States.

140. 19 U.S.C. § 1677a(b) (1994); 19 C.F.R. § 353.41(c) (1995); see OVERVIEW, *supra* note 30, at 65. Section 223 of the Act generally amended 19 U.S.C. § 1677a, substituting the term “export sales price” with “constructed export price.” Act, *supra* note 23, 108 Stat. at 4876-78.

141. PATTISON, *supra* note 72, § 5.04[3]. In practice, despite the statutory language regarding the ESP, the DOC sometimes focuses more on which party has title to the merchandise and whether the merchandise is held in inventory in the United States, than on the time the sale actually occurs.

142. 19 U.S.C. § 1677b(a)(1)(C) (1994).

143. *Id.* § 1677b(a)(4).

144. See *id.* § 1677b(a)(1)(B) (using the term “foreign like product”).

145. These alternative preferences are set forth in 19 U.S.C. § 1677(16) (1994). The DOC seeks to treat merchandise with distinct features as if it were identical, unless there are significant differences in cost associated with the features. 19 U.S.C. § 1677(16) (1994). The market value of the particular features may also be relevant. PATTISON, *supra* note 72, § 5.06[5].

country, the DOC investigates whether the exporter sells identical or comparable merchandise in a third country.¹⁴⁶ In some cases, the DOC may have to look to sales in a third country as a basis for the FMV even though sales exist in the home market of identical or comparable merchandise. This situation arises when: (1) the exporter sells merchandise only or largely for export, eliminating home-market sales or rendering them so few as to provide an inadequate basis for comparison; and (2) more than 90% of sales are disregarded by the DOC as below the exporter's cost of production.¹⁴⁷

To determine whether an exporter's home market provides an adequate basis for comparison, the DOC applies a 5% "home-market viability test." If the volume of home-market sales is less than 5% of the volume the exporter sells to third countries, it is deemed insufficient.¹⁴⁸ The market viability formula is:

$$MV = (Q_H/Q_F) \times 100$$

where MV is market viability, Q_H is the quantity of sales by an exporter of such or similar merchandise in its home market, and Q_F is the quantity of sales by an exporter of such or similar merchandise to countries other than the United States.¹⁴⁹ If the home market is not viable, the DOC bases the FMV on the price at which the exporter sells such or similar merchandise to a third country.¹⁵⁰

146. PATTISON, *supra* note 72, § 5.05[3].

147. *Id.* § 5.05[2]. Alternatively, unique circumstances may exist in the home market that render sales therein incomparable. *Id.* § 5.05[3].

148. 19 C.F.R. § 353.48 (1995). The test has a long history. See H.R. REP. NO. 1261, 85th Cong., 1st Sess. 8 (1957); S. REP. NO. 249, 96th Cong., 1st Sess. 92-95 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381, 478-81.

The DOC, in some instances, may choose to examine U.S., not third-country, sales. See PATTISON, *supra* note 72, § 5.05[2].

149. 19 C.F.R. § 353.46 (1995).

150. 19 U.S.C. § 1677b(a)(1)(C) (1994); 19 C.F.R. § 353.49(a) (1995); *see also* NMB Singapore Ltd. v. United States, 15 Ct. Int'l Trade 590, 593-95 (1991) (holding that the DOC erred in including ball bearing parts in the calculation of the viability of the Singapore home market for ball bearings).

A variation of the third-country sales scenario occurs when a foreign company with inadequate home-country sales has production facilities in several countries. The DOC may use data from the markets in which a multinational company's facilities are located as a basis for calculating the foreign market value (FMV). See 19 U.S.C. § 1677b(d) (1994); 19 C.F.R. § 353.53 (1995).

If sales in two or more third countries may provide a basis for calculating the FMV, an interesting question arises as to selection of an appropriate third country. Criteria for making this selection are set forth at 19 C.F.R. § 353.49(b) (1995). See *also* Southwest Fla. Winter Vegetable Growers Ass'n v. United States, 7 Ct. Int'l Trade 99, 103 (1984) (rejecting a claim that use of third-country sales was inappropriate because of price volatility and sales

The DOC disregards sales made at prices below the cost of production in the home- or third-country market and calculates the FMV on the basis of the remaining above-cost sales.¹⁵¹ The exclusion of below-cost sales causes the FMV to rise because below-cost sales are the exporter's lowest-price sales. In turn, the probability of an affirmative dumping margin determination increases.

Before disregarding certain sales, the DOC must have "reasonable grounds to believe or suspect" that the exporter sells such or similar merchandise in the home- or third-country market at prices below the cost of production.¹⁵² If reasonable grounds exist, the DOC determines whether such sales exist "in fact." The DOC must then exclude these sales if they are made: (1) "in substantial quantities;" (2) "over an extended period of time;" and (3) not "at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade."¹⁵³

As to the first criterion, the DOC considers sales to be made in substantial quantities when they cross a 10% threshold. If 10% or less of the sales of a particular product are below cost, they are included in the calculation of the FMV.¹⁵⁴ If between 10% and 90% of the sales are below cost, the DOC only uses those sales that are above cost.¹⁵⁵ If more than 90% of the sales are below cost, the DOC disregards all sales.¹⁵⁶

With respect to the second criterion, an extended period of time normally means a period greater than six months.¹⁵⁷ A recent case, however, suggests a three-month period will be typical in the future.¹⁵⁸

below cost of production in the third country). In certain circumstances the DOC may combine sales to several third countries.

151. 19 U.S.C. § 1677b(b) (1994); 19 C.F.R. § 353.51(a) (1995). The cost of production of such or similar merchandise sold in the home market is the sum of the costs of manufacturing the merchandise (and includes factors such as materials and labor costs, factory overhead, financing expenses), plus an amount for general expenses, such as expenses incurred to sell the product. It does not include an amount for profit. 19 C.F.R. § 353.51(c) (1995). For a discussion of the Cost of Production Questionnaire used by the DOC, see PATTISON, *supra* note 72, § 5.05[7].

152. 19 U.S.C. § 1677b(b) (1994); 19 C.F.R. § 353.51(a) (1995).

153. 19 C.F.R. § 353.51(a)(1)-(2) (1995).

154. Horlick, *supra* note 13, at 137.

155. *Id.*

156. *Id.*

157. 19 U.S.C. § 1677b(b)(2)(B) (1994).

158. Certain Hot-Rolled Lead and Bismuth Carbon Steel Products from the United Kingdom, 60 Fed. Reg. 10061, 10063 (Dep't Comm. 1995) (preliminary results of antidumping review).

The third criterion is defined in a case-specific context.¹⁵⁹ As a practical matter, it is usually ignored by the DOC and therefore is not a source of controversy.

If neither home- nor third-country sales are an adequate basis for the FMV, either because of insufficient sales or because more than 90% of the sales are disregarded as below the cost of production, the DOC identifies the FMV by calculating the CV of such or similar merchandise.¹⁶⁰ A statutory formula for the CV emphasizes the average total costs of manufacture plus a minimum amount for profit and overhead.¹⁶¹ The CV functions as a substitute for the sales price and thus incorporates the same items as an actual sales price. It equals the sum of: (1) the costs of materials, fabrication, and other processing; (2) an amount for general expenses based on actual financial performance, but at least 10% of material and fabrication costs; (3) an amount for profits based on actual financial performance but at least 8% of materials, fabrication costs, and general expenses; and (4) the cost of all containers, coverings, and packing.¹⁶²

Sometimes the class or kind of merchandise subject to investigation is exported to the United States from an intermediate country, rather than directly from the country of origin. In such cases, the DOC bases the FMV of such or similar merchandise on sales in the intermediate country if: (1) the producer of the merchandise does

159. See PATTISON, *supra* note 72, § 5.05[6] (stating that the DOC treats many below-cost sale issues "on a case-by-case basis" and has "no available set of guidelines . . . which are of general applicability in below cost sale situations.").

160. 19 U.S.C. § 1677b(a)(2), (b), (e) (1994). The DOC expressly prefers to examine third-country sales as a basis for determining the FMV before resorting to the CV. 19 C.F.R. § 353.48(b) (1995); see also *Floral Trade Council v. United States*, 15 Ct. Int'l Trade 497, 500-01 (1991) (upholding the DOC's rejection of home-market and third-country sales in favor of CV because: (1) U.S. and third-country prices were not positively correlated; (2) third-country sales occurred only in peak months; and (3) the perishability of the product—fresh-cut flowers—led to price differentials unrelated to dumping). However, as a practical matter, when there are no acceptable home-market sales to serve as a basis for determining the FMV, the DOC often uses the CV without bothering to seek data on third-country prices.

161. 19 C.F.R. § 353.50(a) (1995). The concept of the cost of manufacturing—which is associated with the CV and adjustments for differences in merchandise, see *infra* notes 186-187 and accompanying text—is distinct from the concept of the cost of production, which is associated with below-cost sales. The cost of manufacturing includes only variable costs of production.

162. 19 U.S.C. § 1677b(e)(1) (1994); 19 C.F.R. § 353.50(a) (1995). General expenses include interest, and the DOC's approach to interest has created controversy. See generally Mark David Davis & Jeffrey Allen May, *Recent Stitches in the Department of Commerce's Cost of Production Analysis: The MMF Sweaters Antidumping Case and Commerce's Treatment of Interest Expense*, 25 GEO. WASH. J. INT'L L. & ECON. 115, 123-30 (1991) (discussing the DOC's approach to interest).

not know its merchandise is destined for export; and (2) the class or kind of merchandise subject to investigation is transshipped through, not substantially transformed in, the intermediate country.¹⁶³ When either of these conditions is not satisfied, or the intermediate-country market is not viable (i.e., sales are too small in volume to serve as a basis for the FMV), the DOC bases the FMV on sales in the country of origin.

Regardless of whether home-country sales, third-country sales, the CV, or sales in an intermediate country are used to identify the FMV, the sale prices typically will be denominated in a foreign currency. The DOC converts these prices into U.S. dollars at an official quarterly foreign exchange rate published by the Federal Reserve Bank of New York.¹⁶⁴ Because exchange rates are notoriously volatile, changing dramatically in a short period,¹⁶⁵ the DOC disregards temporary fluctuations. Temporary fluctuations are those where the exchange rate on a day during the investigation period varies by 5% or more from the applicable quarterly rate during that period.¹⁶⁶

4. Adjusting the USP

The DOC and lawyers for the petitioner and respondent spend an enormous amount of time and energy adjusting the FMV and

163. 19 U.S.C. § 1677b(a)(3) (1994).

164. See 31 U.S.C. § 5151 (1988) (ordering the secretary of the Treasury to estimate and publish the values of foreign coins quarterly). Under certain circumstances the DOC may use a hedged, or forward, rate.

165. See generally Raj Bhala, *Risk Trade-Offs in the Foreign Exchange Spot, Forward and Derivative Markets*, THE FINANCIER: ANALYSES OF CAPITAL AND MONEY MARKET TRANSACTIONS, Aug. 1994, at 34, 34-50 (discussing the management of currency risks). For a recent discussion of key issues, see *Thyssen Stahl AG v. United States*, 886 F. Supp. 23, 25-29 (Ct. Int'l Trade 1995) (discussing an adjustment to the U.S. price requested by Thyssen under 19 U.S.C. § 1677a(c)(2)(A)).

166. See 19 C.F.R. § 353.60(b) (1995); PATTISON, *supra* note 72, § 5.01[3]. For discussions of pre-Uruguay Round rules on currency conversion, see William Dickey, *Antidumping: Currency Fluctuations as a Cause of Dumping Margins*, 7 INT'L TRADE L.J. 67 (1982) (discussing the potential for widespread antidumping activity during 1982); William Mange, *Recent Development*, 20 TEX. INT'L L.J. 425 (1985) (discussing one court's method of calculating the foreign currency exchange rate); N. David Palmetier, *Exchange Rates and Antidumping Determinations*, J. WORLD TRADE, 1988, at 73, 73-80 (discussing the selection of an appropriate exchange rate under Article VI of the GATT). Of course, the DOC cannot ignore long-term appreciation or depreciation, such as the appreciation of the Japanese yen relative to the U.S. dollar from approximately 1992 to the present. See THE BANK CREDIT ANALYST RESEARCH GROUP, THE OUTLOOK 1995, at 57 (1995) (on file with *The George Washington Journal of International Law and Economics*). Exporters are expected to respond to such trends within a reasonable period known as the "lag time." See 19 C.F.R. § 353.60(b) (1995); PATTISON, *supra* note 72, § 5.01[3].

the USP to ensure that the methodologies used to arrive at those prices are comparable:

Were products produced overseas and in U.S. markets virtually identical in physical and sales characteristics, the complex adjustments established by the Tariff Act would be unnecessary. In reality, however, such identical characteristics are never present. Even if domestic and export products are identical physically, they are inevitably packed and transported differently, and often sold through different commercial procedures. The adjustment framework is designed to effectively reduce domestic and U.S. sales to common denominators so that they may be fairly compared.¹⁶⁷

Adjustments are supposed to ensure that the FMV and the USP are ex-factory prices, or prices prevailing when the merchandise leaves the factory in which it is made.

Determining the appropriate adjustments is very complicated and largely within the discretion of the DOC. The stakes are high because whether the DOC finds a dumping margin invariably depends on adjustments made to the sales prices.¹⁶⁸ Arguments about adjustments are common, time-consuming, and costly. One practitioner writes that "fighting over adjustments to [the FMV and the USP] historically has been the main forum for lawyers' efforts."¹⁶⁹ Another writes that "[m]any attorney hours are spent on numerous potential adjustments to each of the prices to be compared."¹⁷⁰ A petitioner's incentive is to maximize the dumping margin by maximizing the FMV and minimizing the USP. It seeks to minimize deductions from the FMV and maximize deductions from the USP. Conversely, a respondent wants to minimize or eliminate the dumping margin by minimizing the FMV (without lowering prices below cost) and maximizing the USP. It aims to

167. PATTISON, *supra* note 72, § 5.01[1]. Similarly, one observer points out that the dumping margin

determination process can be extremely complex, partly because of the large number of potential "adjustments" that can be made either to the export price figures or to the comparable home-market price in order to arrive at what is deemed a fair comparison.

JACKSON, *supra* note 74, at 231-32; see generally Charlene Barshefsky & Richard O. Cunningham, *The Prosecution of Antidumping Actions Under the Trade Agreements Act of 1979*, 6 N.C. J. INT'L L. & COM. REG. 307, 343-50 (1981) (for discussions of adjustments under pre-Uruguay Round law); U.S. DEP'T OF COMMERCE, STUDY OF ANTIDUMPING ADJUSTMENTS METHODOLOGY AND RECOMMENDATIONS FOR STATUTORY CHANGE (1985) (regarding the need and the means for simplifying and modifying adjustment practices).

168. See PATTISON, *supra* note 72, § 5.06[1] ("[T]he results of most antidumping investigations hinge upon the application of such adjustments.").

169. Horlick, *supra* note 13, at 144.

170. JACKSON, *supra* note 74, at 233.

maximize deductions from the FMV and minimize deductions from the USP.

The DOC makes adjustments for differences in the quantity and quality of merchandise sold in the exporter's home market and the United States, as well as for differences in the circumstances of sale in these two markets.¹⁷¹ It may make several adjustments to the USP, whether the PP or the ESP. These adjustments are divided into two categories: additions to and subtractions from a starting figure for the USP.

The DOC makes three additions to the USP, assuming these additions are not already included in the USP and are directly related to the class or kind of merchandise subject to investigation: (1) the cost of containers and coverings used to pack the merchandise for shipment to the United States;¹⁷² (2) the amount of any import duties imposed by the exporting country that are rebated or uncollected because the merchandise is exported to the United States;¹⁷³ and (3) the amount of any taxes imposed by the exporting country that are rebated or uncollected because the merchandise is exported to the United States.¹⁷⁴ The logic behind making these additions to the USP is that the FMV includes these items.

171. See 19 U.S.C. § 1677b(a)(1)(B) (1994). Some observers fail to differentiate carefully among the adjustments made to the FMV versus the United States Price (USP). See, e.g., JACKSON, *supra* note 74, at 232-33 (explaining that for the ESP a single price is matched to determine whether dumping or LTFV exists, but because the FMV is an *average* of all export sales, about half of the export sales are below the average (the FMV), and thus dumping or LTFV is established).

172. 19 U.S.C. § 1677a(c)(1)(A) (1994); 19 C.F.R. § 353.41(d)(1)(i) (1995). This addition, which concerns preshipment expenses, is distinct from the deduction for costs associated with the shipment of the merchandise to the United States. See *infra* note 175 and accompanying text. In effect, the DOC attempts to arrive at net prices for merchandise packed ready for shipment to the United States. Accordingly, it deducts packing costs from both the USP and the FMV but includes the cost of U.S. packing. See *infra* note 182 and accompanying text.

173. 19 U.S.C. § 1677a(c)(1)(B) (1994); 19 C.F.R. § 353.41(d)(1)(ii) (1995). An example of this addition would be drawback of customs duties.

174. 19 U.S.C. § 1677a(c)(1)(B) (1994); 19 C.F.R. § 353.41(d)(1)(iii) (1995). An example of this addition would be an indirect tax such as a sales or value added tax. See, e.g., *Daewoo Elec. Co. v. International Union of Elec. Workers*, 6 F.3d 1511, 1513-19 (Fed. Cir. 1993) (upholding the DOC's accounting methodology whereby all Korean commodity taxes assessed on home-market sales but forgiven upon export were added to the USP, and finding that the DOC was not required to make an econometric analysis of the tax incidence on Korean consumers); *Zenith Elec. Corp. v. United States*, 988 F.2d 1573, 1580-82 (Fed. Cir. 1993) (holding that the DOC improperly applied a circumstances-of-sale adjustment to the FMV to account for a multiplier effect of home-country taxes associated with an adjustment to the USP). As the *Daewoo* and *Zenith* cases suggest, how to adjust for rebated or uncollected taxes has been litigated extensively.

Technically, the 1930 Act, as codified in the U.S. Code, calls for a fourth addition—the amount of any countervailing duty imposed by the United States on merchandise to offset

The exporter incorporates packing costs, import duties, and taxes into the price of such or similar merchandise and passes these items onto home-country consumers. Without these additions, the FMV and the USP are incomparable because the USP is artificially low and any dumping margin is correspondingly high.

The DOC also makes two deductions from the USP, assuming they are not already excluded: (1) costs associated with shipping the class or kind of merchandise subject to investigation from the original place of shipment in the exporting country to the United States;¹⁷⁵ and (2) the amount of any export taxes imposed by the exporting country on the merchandise.¹⁷⁶ The rationale for making these deductions is that the FMV excludes these items. The exporter does not incorporate these items in the price of such or similar merchandise and does not pass them on to home-country consumers. Without these deductions, the FMV and the USP are incomparable because the USP is artificially high and any dumping margin is correspondingly low.

If the ESP is the basis for the USP, the DOC makes three further deductions, assuming the ESP also includes these deductions: (1) any direct or indirect selling expenses incurred by the exporter—such as a commission paid, guarantee, warranty, or credit expense—to sell subject merchandise in the United States;¹⁷⁷ (2) any direct or indirect expenses incurred by the exporter to sell merchandise in the United States that is the same or similar to subject merchandise;¹⁷⁸ and (3) the amount of any value added to the merchandise as a result of manufacture or assembly after its import into the United States, but before its sale to an unrelated buyer.¹⁷⁹ The second deduction is related to the ESP offset to the FMV.¹⁸⁰ These deductions are necessary because of the costs associated with using the ESP.

an export (but not domestic) subsidy provided by the exporter's government. 19 U.S.C. § 1677a(c)(1)(C) (1994); 19 C.F.R. § 353.41(d)(1)(iv) (1995).

175. 19 U.S.C. § 1677a(c)(2)(A) (1994); 19 C.F.R. § 353.41(d)(2)(i) (1995). These include, for example, international and U.S. freight charges, insurance premiums, handling, port and customs brokerage fees, U.S. import duties, and warehousing expenses. PATTISON, *supra* note 72, § 5.04[4].

176. 19 U.S.C. § 1677a(c)(2)(B) (1994); 19 C.F.R. § 353.41(d)(2)(ii) (1995). This deduction is rarely applied because so few countries tax their exports.

177. 19 U.S.C. § 1677a(d)(1)(A)-(C) (1994); 19 C.F.R. § 353.41(e)(1)-(2) (1995).

178. 19 U.S.C. § 1677a(d)(1)(D) (1994); 19 C.F.R. § 353.41(e)(2) (1995). An example might be advertising expenses.

179. 19 U.S.C. § 1677a(d)(2) (1994); 19 C.F.R. § 353.41(e)(3) (1995).

180. See *infra* notes 199-204 and accompanying text.

When the ESP is used, the exporter sells and ships merchandise to a related party in the United States before a final sale to an unrelated buyer is arranged. Typically, the exporter pays the related party a commission and incurs selling expenses in connection with the final sale. Before this sale, the related party may process the merchandise further by adding material or labor. Neither the commission nor the expenses are included in the FMV of such or similar merchandise the exporter sells directly to consumers in its home market.

The DOC also excludes from the FMV material, labor, and other expenses associated with processing in the United States because merchandise sold in the home market is not further processed. If commissions, sales expenses, and value added are not deducted, the ESP is artificially inflated and the dumping margin is correspondingly small. In practice, a case involving further processing may be extraordinarily complicated, particularly where there are multiple related parties and the value added in the United States is high.

5. Adjusting the FMV

Like adjustments to the USP, adjustments to the FMV are divided into additions to and subtractions from a starting figure for the FMV.¹⁸¹ Some of these adjustments are the same as those made to the USP. If, for example, the cost of containers and coverings used to pack such or similar merchandise sold in the exporter's home market is not already included, it is added to the FMV.¹⁸² Four types of adjustments to the FMV that are particularly noteworthy include those made to account for differences in: (1) the quantity of merchandise sold in the home market and the United States; (2) the physical characteristics of merchandise sold in the home market and United States; (3) the levels of trade of such sales; and (4) the circumstances of such sales.¹⁸³

181. The DOC has a de minimis rule regarding FMV adjustments. Any individual adjustment with an ad valorem effect of less than 0.33%, or any group of adjustments with an ad valorem effect of less than 1%, is de minimis and may be disregarded. 19 C.F.R. § 353.59(a) (1995). In practice, this rule is rarely invoked because the DOC has to make the adjustment in order to determine whether it has a de minimis effect. There is no reason to disregard the adjustment once it is made.

182. 19 C.F.R. §§ 353.46(a)(1), 353.49(a)(1) (1995). *But see* Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States, 13 F.3d 398, 402 (Fed. Cir. 1994) (holding that home-market transportation costs in the country of origin are not to be deducted from the FMV).

183. 19 C.F.R. §§ 353.54-58 (1995); *see* 19 U.S.C. § 1677b(a)(6)-(7) (1994)

With respect to quantity adjustments, the DOC ensures that sales used to establish the FMV are comparable in volume to those used to establish the USP.¹⁸⁴ Where an exporter grants a quantity discount in its home market but not in the United States, there is an issue as to whether the DOC should compare the USP to the discounted price alone. It may do so on two conditions. First, the exporter must give the discount to 20% or more of the home market. Second, the exporter must show that its discount is warranted on the basis of cost savings. This requires a showing that the exporter has achieved an economy of scale in production.¹⁸⁵

With respect to adjustments for physical characteristics, commonly known as difference in merchandise (DIFMER) adjustments, the DOC ensures that the merchandise sold in the home and U.S. markets are comparable. Merchandise that is similar but not identical requires a DIFMER adjustment unless both the home-market and the U.S.-market merchandise incur the same cost of production. To determine whether merchandise is identical or merely similar, the DOC focuses on the physical comparability of merchandise, not their uses.¹⁸⁶ A respondent asserting that its home-market merchandise is of a lower quality than the merchandise it sells in the United States will not receive a DIFMER adjustment unless it demonstrates that the quality differential results in a cost difference between the home-market and U.S.-market merchandise. The DOC has broad discretion in this regard and, as suggested above, it almost always analyzes cost of production data.¹⁸⁷ If there is a direct relationship between the cost of production and the difference in merchandise sold in the home and U.S. markets, a DIFMER adjustment is appropriate. No adjustment is made, however, where identical merchandise is manufactured in different facilities with different production costs.

Differences between the actual functions performed by the sellers in the foreign and U.S. markets, or differences in the level of

184. 19 C.F.R. § 353.55(a) (1995).

185. *Id.* § 353.55(b), (d).

186. *Id.* § 353.57(a) (stating that the DOC must make "reasonable allowance for differences in the *physical* characteristics of merchandise") (emphasis added).

187. *But see* *Smith-Corona Group v. United States*, 713 F.2d 1568 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984). There, the DOC made a difference in merchandise (DIFMER) adjustment based on value, instead of cost of production. The court upheld the DOC's decision to adjust for accessories and printed manuals associated with merchandise sold in the home market but not the U.S. market, even though the merchandise itself was not changed by these features. The dispositive fact was that the DIFMER adjustment was based on a difference in value, and product accessories and manuals can enhance value. *Id.* at 1582.

trade, may necessitate a level of trade (LOT) adjustment that increases or reduces the FMV.¹⁸⁸ The 1930 Act does not expressly allow for this adjustment, though DOC regulations provide for comparisons “at the same commercial level of trade” or “appropriate adjustments for differences affecting price comparability.”¹⁸⁹ The purpose of the adjustment is to ensure that retail sales in the home market are not compared with wholesale sales in the United States (or vice versa). The FMV and the USP must result from functions performed by those sellers in the foreign market and the United States that operate at the same level of trade (usually the ex-factory level).¹⁹⁰ The burden is on the respondent to prove the validity of any LOT adjustment that lowers the dumping margin.

Sometimes an exporter does not sell to end-user customers in its home market but to wholesale distributors in the United States. In such cases, the DOC makes a LOT adjustment to compare wholesale-to-wholesale or retail-to-retail sales.¹⁹¹ The DOC looks past formalisms like the name of a purchaser or the characterization of the purchaser by a petitioner or respondent. Instead, the DOC focuses on substantive issues such as the purchaser’s marketing and distribution functions and the quantity of merchandise that it buys. If the volume of sales in either or both the home- or U.S.-markets at the same level of trade is inadequate, the DOC compares sales at the nearest commercial level of sales. In general, the DOC prefers to avoid making a LOT adjustment because it is unnecessary and susceptible to abuse:

The effect of difference in trade levels can often be adjusted through other types of adjustments, based on the particular facts of a case. Indeed, the level of trade adjustment in many respects could be characterized as a *redundant* provision of Department regulations; in some ways it *invites parties to place labels on transactions (wholesale, retail, etc.) that the Department will not accept on their face in any event*, being inclined to analyze transactions in its own framework. It is not surprising that level of trade adjustments are frequently rejected.¹⁹²

188. See 19 C.F.R. § 353.58 (1995).

189. *Id.*

190. In practice, the meaning of the phrase “ex-factory level” and its relation to the purpose of the statute are unclear.

191. See 19 C.F.R. § 353.58 (1995).

192. PATTISON, *supra* note 72, § 5.06[3] (emphasis added) (footnote omitted).

Practitioners sometimes find it futile to request a LOT adjustment because the DOC rarely grants the request. In lieu of a LOT adjustment, the DOC simply seeks to match prices at the same level.¹⁹³

In contrast to LOT adjustments, circumstances of sale (COS) adjustments are common. Differences in home-market and U.S. prices may arise because of differences in sales commissions, warranties, technical services, interest on accounts receivable, guarantees, credit terms, advertising, warehousing, general discounts and rebates, free samples of merchandise, and sampling and testing expenses.¹⁹⁴ If such differences relate directly to the sales under consideration and arise simultaneously with or after such sales, the DOC makes appropriate adjustments to the FMV. These criteria amount to a "but for" test. An expense is deducted from the FMV as a circumstance of sale if it would not have been incurred but for the particular sales at issue.¹⁹⁵ Research and development expenses and salaries of technical service personnel are usually not deducted from the FMV because these costs are incurred regardless of whether the sales were made.¹⁹⁶

The DOC traditionally takes a strict view of what constitutes a "direct" sales expense because it fears that a respondent can easily manipulate the level of such expenses incurred in its home market in order to minimize any dumping margin. Accordingly, a salesperson's salary is considered an indirect sales expense.¹⁹⁷ It is not deducted from the FMV in a case where a PP is used as the basis for the USP. Indirect sales expenses related to circumstances of sale, however, may be deducted from the FMV in a case where the ESP is used.¹⁹⁸

The DOC limits the amount of indirect sales expenses that a respondent can deduct from the FMV. The most controversial COS adjustment is the ESP cap-offset scheme.¹⁹⁹ As stated above, if the basis for the USP is the ESP, the DOC deducts from the ESP both direct and indirect expenses incurred in connection with U.S.

193. Courts have upheld the DOC's requirement that a respondent bears the burden of supporting its claim for a level of trade adjustment. *See, e.g., Fundicao Tupy S.A. v. United States*, 12 Ct. Int'l Trade 6, 7 (1988) (agreeing that "it is reasonable to place a burden on the party seeking the benefit of those assertedly lower selling costs"), *aff'd*, 859 F.2d 915 (Fed. Cir. 1988) (affirming lower court's discretion in denying an adjustment based on respondent's insufficiency of proof).

194. PATTISON, *supra* note 72, § 5.06[4].

195. *Id.*

196. *See* 19 C.F.R. § 353.56(a) (1995).

197. Horlick, *supra* note 13, at 145.

198. *Id.*

199. PATTISON, *supra* note 72, § 5.06; 19 C.F.R. § 353.56(b)(2) (1995).

sales.²⁰⁰ At the same time that the DOC deducts indirect sales expenses from the ESP, it deducts indirect expenses associated with home-market sales from the FMV. The deduction from the FMV for indirect sales expenses is the "ESP offset." The amount deducted from the ESP establishes the "ESP cap." The ESP offset cannot exceed the ESP cap. The deduction for indirect sales expenses from the FMV may be, at most, equal to the amount of indirect sales expenses deducted from the ESP. The rationale for this policy, as one practitioner puts it, is that "the cap represents an irrebuttable presumption that all indirect selling expenses claimed for home market sales are false to the extent they are in excess of indirect selling expenses deducted from the U.S. price."²⁰¹

In spite of this limitation, the ESP offset is extremely valuable. In 1987 Senator Ernest Hollings sponsored legislation that would have eliminated the offset.²⁰² The bill, which was not enacted, would have inflated dumping margins by continuing the deduction for indirect sales expenses from the ESP but barring an offset to the FMV.²⁰³ Had it been passed, deleterious economic effects might have ensued: U.S. living standards might have fallen by \$38.7 billion—about \$640 per four-person family—in part because foreign companies would have had to raise their prices by 20% or more to avoid accusations of dumping. In addition, higher import prices might have caused the loss of 880,000 jobs among U.S. wholesalers and retailers, as well as reduced the competitiveness of U.S. exporters that rely on imported components.²⁰⁴

D. *The Injury Determination*

The ITC's injury determination previously entailed a two-pronged inquiry: injury and causation.²⁰⁵ First, the ITC decided whether there was material injury to a U.S. industry, threat of material injury to a U.S. industry, or material retardation of the establishment of a U.S. industry.²⁰⁶ Second, if there was actual injury,

200. See *supra* notes 177-180 and accompanying text.

201. Holmer et al., *supra* note 23, at 498 n.57.

202. Donald B. Cameron & Susan M. Crawford, *An Overview of the Antidumping and Countervailing Duty Amendments: A New Protectionism?*, 20 LAW & POL'Y INT'L BUS. 471, 497 (1989).

203. *Id.*

204. Robert Z. Lawrence, *The Dangers of the ESP Amendment*, 1, 6-8 (on file with *The George Washington Journal of International Law and Economics*).

205. OVERVIEW, *supra* note 30, at 66. Interestingly, in countervailing duty cases the ITC undertakes the same inquiries using the same standards.

206. 19 U.S.C. § 1673d(b)(1) (1994). As with DOC dumping margin investigations, the ITC makes its injury determinations, in part, on the basis of a questionnaire sent to rele-

threat of injury, or retardation, the ITC had to determine whether dumped merchandise was the cause.²⁰⁷ Recent ITC practice suggests that it increasingly uses a unitary approach to injury determinations, essentially combining the two inquiries. Nonetheless, for present purposes it is useful to retain the conceptual distinction between injury and causation analysis.

A critical threshold requirement underlies both the injury and causation inquiries. The injury must be to an industry as a whole; not merely to one or a few firms in the industry that do not comprise all or a sizeable portion of that industry.²⁰⁸ As John H. Jackson states, "[i]f the industry is generally thriving, even though several firms are going out of business, arguably, there is not material injury."²⁰⁹ The outcome of an ITC inquiry hinges critically on its identification of the U.S. industry allegedly injured by dumping.

As amended and codified in the U.S. Code, the 1930 Act defines "industry" as the "producers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product."²¹⁰ Identifying the industry, therefore, depends on defining "like product."

vant parties; namely, importers and U.S. producers of the merchandise in question. See PATTISON, *supra* note 72, § 4.03. The ITC relies on the same factors to make preliminary and final injury determinations. See, e.g., *Certain Carbon Steel Products from Belgium, the Federal Republic of Germany, France, Italy, Luxembourg, the Netherlands, and the United Kingdom*, 45 Fed. Reg. 31,814, 31,815 (Dep't Comm. 1980) (stating that "the same factors with respect to material injury are to be considered in making both preliminary and final determinations"). For discussions of pre-Uruguay Round injury rules, see Paul W. Jameson, *Recent International Trade Commission Practice Regarding the Material Injury Standard: A Critique*, 18 LAW & POL'Y INT'L BUS. 517, 517-77 (1986); N. David Palmeter, *Material Retardation in the Establishment of an Industry Standard in Antidumping Cases*, J. WORLD TRADE L., June 1987, at 113, 113-15; N. David Palmeter, *Injury Determinations in Antidumping and Countervailing Duty Cases—A Commentary on U.S. Practice*, J. WORLD TRADE L., Jan. 1987, at 23-26 [hereinafter *Injury Determinations*]; Bruce A. Ortwine, Note, *Injury Determinations Under United States Antidumping Laws Before and After the Trade Agreements Act of 1979*, 33 RUTGERS L. REV. 1076, 1076-1107 (1981); John Slayton, Note, *The Trade Agreements Act of 1979: Material Injury Standard*, 14 J. INT'L L. & ECON. 87, 87-100 (1979); Peter D. Staple, Note, *Implementing "Tokyo Round" Commitments: The New Injury Standard in Antidumping and Countervailing Duty Law*, 32 STAN. L. REV. 1183, 1183-87 (1980).

207. For discussions of causation in the context of injury determinations, see William D. DeGrandis, *Proving Causation in Antidumping Cases*, 20 INT'L LAW. 563, 563-90 (1986); Edward R. Easton & William E. Perry, *The Causation of Material Injury: Changes in the Antidumping and Countervailing Duty Investigations of the International Trade Commission*, 2 U.C.L.A. PAC. BASIN L.J. 35, 35-37 (1983).

208. JACKSON, *supra* note 74, at 236.

209. *Id.*

210. 19 U.S.C. § 1677(4)(A) (1994). The ITC has discretion to exclude from the definition of "industry" a U.S. producer that is related to the exporter or importer of dumped merchandise, or which itself is the importer of dumped merchandise. *Id.* § 1677(4)(B)

The 1930 Act states that a "like product" is a product that is like, or the most similar in characteristics to, the class or kind of merchandise subject to investigation.²¹¹ This definition leaves the ITC with considerable discretion. Usually, it will not conclude that products are different because of minor variations.²¹² Several of the factors used by the ITC to determine if an item is a "like product" include: (1) the characteristics and uses of the product; (2) whether the product is interchangeable with another product; (3) channels of distribution for the product; (4) customer and producer perceptions of the product; (5) whether the product is made at the same manufacturing facility as another product; and sometimes (6) the price of the product.²¹³ If the ITC cannot obtain this product data, it considers economic data that might permit the separate identification of production—profits, production processes, productivity, employment, cash flow and capacity utilization.²¹⁴ The ITC is not required to define a "like product" in the same way the DOC defines a "class or kind of merchandise" and neither grouping must resemble a classification in the Harmonized Tariff System.²¹⁵

1. Injury Standards

"Material injury" is defined by statute as harm that "is not inconsequential, immaterial, or unimportant."²¹⁶ As with the like product determination, the ITC possesses considerable discretion in determining whether an injury is material.²¹⁷ The ITC analyzes three variables: (1) the volume of imports of the class or kind of

(1994). See, e.g., *Torrington Co. v. United States*, 16 Ct. Int'l Trade 220 (1992) (holding that the ITC did not abuse its discretion in failing to exclude parties that import or are related to exporters of ball bearings from a preliminary injury determination because "appropriate circumstances did not exist for exclusion").

211. 19 U.S.C. § 1677(10). Section 233(a)(3)(A)(iii) of the Act substituted "domestic like product" for "like product." Act, *supra* note 23, 108 Stat. at 4898.

212. See SENATE COMM. ON FIN., TRADE AGREEMENTS ACT OF 1979, S. REP. NO. 249, 96th Cong., 1st Sess. 90-91 (1979), reprinted in 1979 U.S.C.C.A.N. 381, 476-77 [hereinafter TRADE AGREEMENTS ACT SENATE REPORT].

213. High Information Content Flat Panel Displays and Display Glass Therefore from Japan, 56 Fed. Reg. 32,376, 32,381 (Dep't Comm. 1991) (final determination).

214. TRADE AGREEMENTS ACT SENATE REPORT, *supra* note 212, at 83-84.

215. Erasable Programmable Read Only Memories from Japan, 57 Fed. Reg. 11,599, 11,601 (Dep't Comm. 1992) (final scope rule); see Robert Mordhorst, Comment, *International Trade Administration vs. International Trade Commission: The Scope of Antidumping/Countervailing Duty Investigations Issue*, 9 GEO. MASON U. L. REV. 147, 153-54 (1986) (for a discussion of the relationship between the DOC and ITC definitions).

216. 19 U.S.C. § 1677(7)(A) (1994).

217. For an analysis of voting patterns of Commissioners on the ITC, see Jameson, *supra* note 206, at 521 n.26, 530 n.53.

merchandise subject to investigation; (2) the effect of such merchandise on U.S. prices of like merchandise; and (3) the effect of such merchandise on U.S. producers of like products.²¹⁸

With respect to the first variable, the less significant the volume of imports, the less likely it is the ITC will find that material injury exists. The difficulty lies in identifying a "significant" volume. The ITC may consider volume either in absolute terms or relative to U.S. production or consumption.²¹⁹ Market share data alone are not important:

It is clear from the cases that the simple existence of a large importers' [sic] market share is somewhat meaningless as an injury index. Rather, the Commission will be concerned with the dynamics of that share; it would be difficult to show current injury on the sole grounds of a foreign market share of, for example, 30 percent, if that percentage had not been subject to significant change for the past 15 years. A much smaller share, for example, 5 percent, however, could be highly significant as an injury gauge if that share had risen from .5 percent in one year. Such a significant rise in market penetration has been a much more vital concern to the Commission than market share size alone.²²⁰

Similarly, lost sales and revenue attributable to an increased volume of imports cannot be the sole basis for an affirmative injury determination.²²¹

Analyzing the second variable entails a seemingly straightforward inquiry—have the imports forced or kept down U.S. prices?²²² There are different ways, however, to measure the price sensitivity of U.S.-made products to imports. Lost sales or revenue, for example, may indicate price depression or suppression. The most prominent type of evidence may be the elasticity of substitution between the class or kind of merchandise subject to investigation and such or similar merchandise. This type of evidence "reflects the degree

218. 19 U.S.C. § 1677(7)(B)(i) (1994); *see, e.g.*, *SCM Corp. v. United States*, 4 Ct. Int'l Trade 7, 12-16 (1982) (discussing market penetration by dumped imports, price suppression, and lost sales).

Plainly, these variables are also important to the causation determination. This duality of function may help explain the ITC's recent unitary approach referred to above. *See supra* note 208 and accompanying text.

219. 19 U.S.C. § 1677(7)(C)(i) (1994).

220. *PATTISON*, *supra* note 72, § 4.04[2] (footnote omitted); *see also* *SCM Corp. v. United States*, 4 Ct. Int'l Trade 7, 12-16 (1982) (discussing market penetration by dumped imports, price suppression, and lost sales).

221. *USX Corp. v. United States*, 11 Ct. Int'l Trade 82, 86 (1987).

222. 19 U.S.C. § 1677(7)(C)(ii)(II) (1994).

to which competition is based on price.”²²³ Other elasticities, such as the elasticity of substitution between subject and nonsubject imports of aggregate U.S. demand and of domestic producers’ supply, also influence ITC determinations.²²⁴

Underselling may be evidence of price depression or suppression; however, it is not a per se basis for an affirmative material injury determination.²²⁵ The ITC must examine the degree and duration of the underselling and consider whether price is a significant factor in a purchaser’s decision. Underselling need not be predatory for the ITC to consider it evidence of price depression or suppression.²²⁶ The safest generalization with respect to underselling is that “[i]f demand for the product is not price sensitive, but, rather, is the function of other product characteristics, it is likely that price undercutting will not be a central consideration in any injury finding.”²²⁷

Gauging the third variable calls for an assessment of “all relevant economic factors which have a bearing on the state of the [U.S.] industry.”²²⁸ Such factors include:

(I) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity, (II) factors affecting domestic prices, (III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment, [and] (IV) actual and potential negative effects on the development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the allegedly dumped merchandise.²²⁹

223. Daniel W. Klett & Todd T. Schneider, *Price Sensitivity and ITC Injury Determinations*, J. WORLD TRADE, Apr. 1994, at 96 (footnote omitted). This elasticity measures the “percentage change in quantity demanded of domestic product given a percentage change in the price of subject imports.” *Id.* at 96 n.9.

224. *Id.* at 96-99, 109-10.

225. See 19 U.S.C. § 1677(7)(C)(ii) (1994).

226. *Id.* The Omnibus Trade and Competitiveness Act of 1988 changed the statutory term “price undercutting” to “price underselling,” which some observers suggest is more ambiguous and confusing. PATTISON, *supra* note 72, § 4.04[4] n.30.1.

227. PATTISON, *supra* note 72, § 4.04[4].

228. 19 U.S.C. § 1677(7)(C)(iii) (1994); see, e.g., *American Spring Wire Corp. v. United States*, 8 Ct. Int’l Trade 20, 24-26 (1984) (discussing market demand, production, capacity utilization, net sales, inventory levels, capital funding and expenditures, and profitability), *aff’d sub nom. Armco Inc. v. United States*, 760 F.2d 249 (Fed. Cir. 1985).

229. 19 U.S.C. § 1677(7)(C)(iii) (1994); OVERVIEW, *supra* note 30, at 66.

The ITC must evaluate these factors in the context of the business cycle of the affected U.S. industry.²³⁰ No one factor is dispositive, and it is not necessary that each factor be negative to make an injury finding.²³¹ The ITC cannot substitute its own set of factors for determining injury,²³² nor can it "rely on isolated tidbits of data which suggest a result contrary to the clear weight of the evidence."²³³ Interestingly, however, the amount of the dumping margin is not expressly mentioned in the statute as a factor in the material injury determination.²³⁴

The ITC may base an injury determination on a threat of material injury, rather than present material injury.²³⁵ The likelihood of material injury must be "real and imminent" and not simply a matter of "supposition, speculation or conjecture."²³⁶ Although predicting future events is more difficult and controversial than analyzing current data,²³⁷ the ITC must consider certain factors when making a material threat of injury determination: (1) an increase in the exporting country's production capacity likely to result in a significant increase in imports into the United States; (2) a rapid increase in U.S. market penetration that will be injurious; (3) the probability that imports will depress or suppress U.S. prices; (4) a substantial increase in inventories; (5) the presence of

230. 19 U.S.C. § 1677(7)(C)(iii) (1994). Presumably, the ITC takes measures to ensure that lingering effects of past injury do not form the basis for a present injury determination.

231. 19 U.S.C. § 1677(7)(E)(ii) (1994); *see also* *Atlantic Sugar Ltd. v. United States*, 2 Ct. Int'l Trade 18, 22 (1981) (indicating that no single factor is decisive with respect to a material injury determination), *rev'd on other grounds*, 744 F.2d 1556 (Fed. Cir. 1984); *Iwatsu Elec. Co. v. United States*, 15 Ct. Int'l Trade 44, 49 (1991) (stating that the ITC can weigh each factor in light of the circumstances of the case and need not find that all factors point to material injury to render an affirmative injury determination).

232. *Trent Tube Div. v. Avesta Sandvik Tube*, 975 F.2d 807, 814 (Fed. Cir. 1992) (rejecting a five-factor test devised and applied by a commissioner).

233. *USX Corp. v. United States*, 11 Ct. Int'l Trade 82, 84 (1987).

234. *PATTISON*, *supra* note 72, § 4.04[7]; *see also* *Hyundai Pipe Co. Ltd. v. United States*, 11 Ct. Int'l Trade 117, 123 (1987) (rejecting an argument that the ITC must engage in a dumping margin analysis in injury determinations). For discussion of dumping margin analysis under pre-Uruguay Round law, *see* JACKSON, *supra* note 74, 241-42; N. David Palmetier, Note, *Dumping Margins and Material Injury: The USITC is Free to Choose*, J. WORLD TRADE L., Apr. 1987, at 173, 173-175.

235. *PATTISON*, *supra* note 72, § 4.06.

236. *Id.*; *see also* *American Lamb Co. v. United States*, 785 F.2d 994, 1001-04 (Fed. Cir. 1986) (holding that the statutory requirement that the ITC base a preliminary determination on a "reasonable indication" of threat of material injury does not mean the same as a "mere possibility" of threat of injury).

237. H.R. REP. NO. 1156, 98th Cong., 2d Sess. 174 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4910, 5291; *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 17 Ct. Int'l Trade 146, 164 (1993).

underutilized capacity in the exporting country; (6) the actual and potential negative effects on development and production efforts in the United States, including attempts to develop derivative or more advanced products; and (7) the existence of dumping of the subject merchandise in a third country.²³⁸

The ITC rarely uses material retardation of the establishment of a domestic industry as the basis for a material injury determination;²³⁹ the evidentiary requirements are severe.²⁴⁰ There must be a substantial commitment to commence production, demonstrated by information about business plans, market surveys, product designs, and financial commitments.²⁴¹ In addition, "a representative of an 'inchoate' or 'nonexistent' industry is not likely to be financially and commercially postured to complain of imports."²⁴² Nonetheless, the ITC has found material retardation in a few cases. In one instance the ITC held that where a petitioner had made a substantial investment in a product that competed with the class or kind of merchandise subject to investigation, such merchandise would impede the petitioner's market entry.²⁴³ In another instance the ITC considered the commercial viability of a petitioner's start-up operations.²⁴⁴

2. Causation

The 1930 Act requires only that injury to a U.S. industry be caused "by reason of" dumped merchandise.²⁴⁵ A petitioner need not show that the class or kind of merchandise subject to investigation is the direct, immediate or proximate, or even substantial cause of the injury. In contrast, "substantial" causation is a necessary element of an escape clause claim under section 201 of the Trade Act of 1974.²⁴⁶ In addition, a petitioner need not show that

238. 19 U.S.C. § 1677(7)(F)(i), (iii) (1994).

239. See PATTISON, *supra* note 72, § 4.07.

240. See *id.*

241. *Id.*; see, e.g., Motorcycle Batteries from Taiwan, 47 Fed. Reg. 13,609 (Dep't Comm. 1982) (finding no material injury); Memorandum from the General Counsel to the Trade Commission Regarding Legal Issues in Certain Dried Salted Codfish from Canada, Inv. No. 731-TA-199 (preliminary) (Aug. 22, 1984) (recommending that a material injury analysis, rather than material retardation, is appropriate).

242. PATTISON, *supra* note 72, § 4.07.

243. Salmon Gill Fish Netting of Manmade Fibers from Japan, 47 Fed. Reg. 14,979, 14,981 (Dep't Comm. 1982) (finding material retardation in the fish-netting industry).

244. BMT Commodity Corp. v. United States, 11 Ct. Int'l Trade 524, 526-27 (1987) (criticizing the ITC's approach for failing to focus on the effect on the petitioner's ability to produce the merchandise subject to investigation).

245. 19 U.S.C. § 1673(2) (1994) (codification of Tariff Act of 1930 as amended).

246. *Id.* § 2251(a) (codification of Trade Act of 1974 as amended).

dumping is the sole or even primary cause of injury.²⁴⁷ It may show injury through other factors, including: (1) the volume and price of merchandise that is not dumped; (2) a contraction in demand or changes in consumption patterns; (3) competition between foreign and domestic producers; (4) technological developments; and (5) "[t]he export performance and productivity of the domestic industry."²⁴⁸ These factors are irrelevant, however, because "[i]t has been unequivocally established that extraneous factors are not to be weighed or balanced against the injury caused by dumping."²⁴⁹ Therefore,

in reaching an injury determination, the [International Trade] Commission does not ask whether the subject imports are the principal or fundamental cause of injury to the concerned industry. In the words of the House of Representatives in reviewing the injury standard, any such construction of the injury standard would have the "undesirable result of making relief more difficult to obtain for those industries facing difficulties from a variety of sources, precisely those industries that are most vulnerable to . . . dumped imports." In this light, the Commission has explained, the "causative link required in unfair trade circumstances . . . is weaker than when fair trade conditions exist."²⁵⁰

The ITC may consider evidence introduced by a respondent that injury is caused by extraneous factors; however, the petitioner does not bear the burden of proving that injury is not caused by such factors.²⁵¹

With respect to actual injury and threat determinations, the ITC may cumulatively assess the volume and effect of imports of like merchandise from multiple countries, as opposed to imports of merchandise from a single country, under certain conditions. Those imports must: (1) be subject to investigation; (2) compete with each other and a U.S. product; and (3) be marketed in the

247. See POWELL ET AL., *supra* note 4, tab A, at 5.

248. PATTISON, *supra* note 72, § 4.05; see 19 U.S.C. § 1677(7)(B)(ii) (1994).

249. PATTISON, *supra* note 72, § 4.05 (footnote omitted); see also *USX Corp. v. United States*, 12 Ct. Int'l Trade 205, 214 (1988) (rejecting the ITC's use of a five-factor causation test and a causation analysis based on an elasticity estimate); Horlick, *supra* note 13, at 163 (stating that "weighing of causes . . . is specifically forbidden under U.S. law" (footnote omitted)); POWELL ET AL., *supra* note 4, tab A, at 5 (stating that the ITC "lacks authority to weigh other countervailing interests against evidence of injury, such as consumer interests or those of other U.S. industries such as those that rely on 'dumped' components for their own production (which could suffer from dumping duties), or the 'national' interest (e.g., national security, bilateral relations, market access [and] trade strategy)").

250. PATTISON, *supra* note 72, § 4.05 (footnotes omitted).

251. *Id.*

United States in a reasonably contemporaneous period.²⁵² The traditional rationale for a cumulative analysis is that a U.S. industry can be injured by imports whether those imports come from one or many sources.²⁵³ The second requirement for cumulative assessment is met if the imports: (1) are sold in the same U.S. markets as a U.S. product; (2) are distributed through the same channels as a U.S. product; (3) are fungible with a U.S. product; (4) fall within the same price range as a U.S. product; or (5) are present in the U.S. market at the same time as a U.S. product.²⁵⁴ The first requirement is met if the imports are identified by one or more petitions filed simultaneously.²⁵⁵ Curiously, the third requirement is not set forth in the 1930 Act, either because it is redundant or because it requires that the imports compete with one another and U.S. products.²⁵⁶ The ITC may also cumulate imports subject to an antidumping investigation with those subject to a countervailing duty investigation;²⁵⁷ however, the ITC may not cumulate those imports subject to a voluntary restraint agreement that addresses a dumping dispute.²⁵⁸

252. See 19 U.S.C. § 1677(7)(G)(i) (1994); H.R. CONF. REP. NO. 1156, 98th Cong., 2d Sess. 173 (1984), reprinted in 1984 U.S.C.C.A.N. 4910, 5290; OVERVIEW, *supra* note 30, at 66. While the Trade and Tariff Act of 1984 only applied to material injury determinations, Trade and Tariff Act of 1984, § 612(a)(2)(A), 98 Stat. at 3033, the Court of International Trade subsequently held that the ITC may cumulate imports in appropriate cases. *Asociacion Colombiana de Exportadores de Flores v. United States*, 12 Ct. Int'l Trade 634, 642 (1988).

For a discussion of pre-Uruguay Round cumulation practice, see M. Roy Goldberg, *When Unimportant Is Interesting: The Negligible Import Exception to Cumulation in Antidumping and Countervailing Duty Investigations*, 25 GEO. WASH. J. INT'L L. & ECON. 721, 721-36 (1992); William B.T. Mock, Jr., *Cumulation of Import Statistics in Injury Investigations Before the International Trade Commission*, 7 Nw. J. INT'L L. & BUS. 433, 439-77 (1986); Jonathan T. Suder, Note, *Cumulation of Imports in Antidumping and Countervailing Duty Investigations*, 17 GEO. WASH. J. INT'L L. & ECON. 463, 470-85 (1983).

As a result of an amendment to the 1930 Act made by the Omnibus Trade and Competitiveness Act of 1988, the ITC need not cumulatively assess the volume and effects of imports from two or more countries if imports from one country are negligible and have no discernible adverse impact on a U.S. industry. The ITC may deem imports as negligible and having no discernible impact if they are the product of a country with which the U.S. entered into a free trade agreement before January 1, 1987. See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1330(b), 98 Stat. 2948, 3033 (amending section 771(7) of the 1930 Act). Israel satisfies this requirement as a result of the 1985 United States-Israel Free Trade Agreement. No other country satisfies this requirement.

253. MESSAGE, *supra* note 69, at 847.

254. PATTISON, *supra* note 72, § 4.12.

255. *Id.*

256. See *id.* § 4.12 n.6.

257. *Bingham & Taylor Div. v. United States*, 815 F.2d 1482, 1486 (Fed. Cir. 1987).

258. *Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1103 (Fed. Cir. 1990).

E. *Anticircumvention*

A respondent may attempt to circumvent an antidumping order by: (1) assembling merchandise subject to the order in the United States or a third country; (2) altering the merchandise in a minor way; or (3) developing different merchandise, so-called "later-developed" merchandise.²⁵⁹ In these situations the problem of circumvention can raise difficult questions of policy and enforcement:

How different should a product be to be reasonably excluded from the scope of an order? Should the import relief laws reasonably be extended to provide protection for consecutive generations of products? Are the rights of third countries infringed when imports from them are subjected to an order which had originally been targeted against another country?²⁶⁰

In response to these issues, the DOC has been empowered to expand the scope of an antidumping order to include: (1) components imported into the United States and assembled in the United States to make finished merchandise; (2) imported merchandise assembled from components in a third country; (3) altered merchandise; or (4) later-developed merchandise.²⁶¹

Before expanding the scope of an antidumping order to include imported components subsequently assembled in the United States, the DOC must determine that:

(1) merchandise is sold in the United States that is the same as merchandise that is subject to an antidumping . . . order; (2) merchandise is completed or assembled in the United States from parts or components produced in the foreign country to which the antidumping order applies; and (3) the difference between the value of the merchandise sold in the United States and the value of the imported parts and components is small.²⁶²

The third condition is particularly telling because if a small amount of value is added in the United States, the exporter is probably dumping finished merchandise in an unfinished form.

The DOC has similar power with respect to imported merchandise assembled from components in a third country. Before expanding the scope of an order, the DOC must determine that:

259. OVERVIEW, *supra* note 30, at 70; see Cameron & Crawford, *supra* note 202, at 473-80 (discussing changes to the circumvention rules made by the Omnibus Trade and Competitiveness Act of 1988).

260. PATTISON, *supra* note 72, § 10.09.

261. 19 U.S.C. § 1677j(a)-(d) (1994); 19 C.F.R. § 353.29(e)-(h) (1995); OVERVIEW, *supra* note 30, at 70.

262. SENATE REPORT, *supra* note 18, at 81; see 19 U.S.C. § 1677j(a)-(b) (1994).

(1) merchandise imported into the United States is the same class or kind as merchandise subject to an order; (2) before importation, that merchandise was completed or assembled in another foreign country from merchandise subject to an order or was produced in the foreign country to which the order applies; (3) the difference between the value of the imported merchandise and the value of the merchandise completed or assembled in a third country is small; and (4) . . . action is appropriate to prevent evasion of an order.²⁶³

Again, the value added condition is crucial. It may indicate that the exporter is dumping merchandise assembled in a third country.

The DOC is virtually unfettered in expanding the scope of an antidumping order to include altered or slightly modified merchandise. Examples include merchandise of the same class or kind as that subject to an order, merchandise assembled or completed from components from the country subject to the order, and merchandise to which a small value is added in a third country. The DOC need not make an additional determination with respect to altered merchandise because it is presumed to include such merchandise in its underlying order.²⁶⁴

The DOC may also expand an order to include later-developed merchandise if it finds—on the basis of consumer expectations, physical characteristics, use, advertising, and channels of trade—that later-developed merchandise is the same as that subject to the underlying order.²⁶⁵

IV. ASSESSING POST-URUGUAY ROUND ANTIDUMPING LAW

A word here, a phrase there, inserted in the implementing legislation for the Uruguay Round, means that foreign steel exporters and other industries selling in the US market could still find themselves subject to “unfair trade” complaints and years of expensive litigation before winning market access for their products.²⁶⁶

The Agreement and the Act fail to resolve the problem of protectionist abuse of antidumping law by a petitioner that has lost its comparative advantage relative to an exporter. This failure is evi-

263. SENATE REPORT, *supra* note 18, at 81; see 19 U.S.C. § 1677j(b) (1994).

264. See 19 U.S.C. § 1677j(c) (1994). For a discussion of the treatment under pre-Uruguay Round law of circumvention through minor alterations, see George Kleinfeld & Diane Gaylor, *Circumvention of Antidumping and Countervailing Duty Orders through Minor Alterations in Merchandise: Where to Draw the Line?*, J. WORLD TRADE, Feb. 1994, at 77, 79-88 (1994).

265. 19 U.S.C. § 1677j(d) (1994).

266. Nancy Dunne, *US Takes Hard Line on “Dumping”: Hopes Raised By Uruguay Round May Be Dashed*, FIN. TIMES, Aug. 1, 1994, at 4.

dent in five contexts. First, the Agreement and the Act expand opportunities for filing a petition. Second, a petitioner can manipulate a dumping margin calculation to maximize that margin. Third, a petitioner can exploit standards for demonstrating injury and claim that imports are the cause of its woes. Fourth, by invoking anticircumvention or new shipper rules, a petitioner that has obtained an antidumping order can extend the protection afforded by the order. Fifth, despite mandatory "sunset" reviews of outstanding antidumping orders, revocation of an order is unlikely. In each context the root of the failure is ambiguity in the text of the Agreement or the Act, inconsistency with fundamental microeconomic concepts, or both.

A. *Filing a Petition*

1. Conceptual and Practical Flaws

A protectionist abuser benefits from an overly broad standing requirement in antidumping law. At the same time, the meritorious petitioner is harmed by a standing requirement that is too strict.

Article 5.1 of the Agreement explains that a petition must be filed "by or on behalf of" an industry.²⁶⁷ Article 5.4 defines this phrase in terms of a 50% and 25% of production threshold tests.²⁶⁸ These tests are calculated to ensure the support of a critical mass of domestic producers in the importing country. The Agreement requires that both tests be satisfied.²⁶⁹ The 50% test focuses on the size of domestic producers supporting the petition relative to those opposing it. Producers who support the petition must account for more than 50% of the total output of the product.²⁷⁰ This requires that "of [all] those producers expressing a view [on the petition],

267. Agreement, *supra* note 19, at 7.

268. *Id.* at 8. Section 212(a)(2) of the Act implements the 50% and 25% tests. Act, *supra* note 23, § 212(a)(2), 108 Stat. at 4846. It also appears to add a third threshold test not found in the Agreement. Compare Act, *supra* note 23, § 212(a)(2), 108 Stat. at 4846 (disregarding position of domestic producers related to foreign producers and producers who are importers) with Agreement, *supra* note 19, at 8 (imposing no qualification of producers polled).

Suppose a petition does not establish *prima facie* that it is supported by domestic producers or workers accounting for more than 50% of the total production of the domestic like product. The DOC must poll the industry to see whether the 50% and 25% threshold tests are met. See 19 U.S.C. § 1673a(c)(4)(D) (1994); SENATE REPORT, *supra* note 18, at 36; HOUSE REPORT, *supra* note 18, at 48, reprinted in 1994 U.S.C.A.N. 3820.

269. Agreement, *supra* note 19, at 8.

270. *Id.*

more producers support than oppose the petition.”²⁷¹ The 25% test focuses on the absolute size, measured in terms of output, of domestic producers supporting the petition.²⁷² Producers expressing support for the petition must account for at least 25% of the total domestic production of the like domestic product.²⁷³

These tests, in one respect, are a welcome development given the vacuum existing under prior law.²⁷⁴ The tests create bright lines that should provide certainty and predictability. The tests, however, are conceptually and operationally flawed. They rely on an antediluvian distinction between foreign and domestic production, and it is unclear whether they will reduce protectionist abuse. A petitioner remains able to “point the Commerce Department like a guided missile against its foreign competition and let the U.S. government do the rest.”²⁷⁵

Articles 4 and 5 of the Agreement, entitled “Definition of Domestic Industry” and “Initiation and Subsequent Investigation,” do not require a domestic industry, on behalf of which a petition is filed, to be owned or controlled by a party in the importing country.²⁷⁶ These articles are conceptually flawed, however, because they rely on an underlying assumption that manufacturing operations are neatly divided along territorial lines between a petitioner in the importing country and a respondent in a foreign country. In reality, the situation is more complex because such operations are often global.²⁷⁷ For example, a finished good may be the end product of raw materials from South Africa, processed into an intermediate good in Zimbabwe, shipped to the United States, and processed into a final product through the addition of Malaysian components. Suppose the U.S. producer is owned by a Japanese holding company and wants to file a dumping petition against: (1) a Japanese exporter of the same finished merchandise; and (2) a Malaysian exporter of the components used in the finished merchandise. The petitioner has standing to bring the first case but not the second because it is a U.S. producer of the finished merchandise and not the component. Whether this result is just is

271. SENATE REPORT, *supra* note 18, at 35.

272. Agreement, *supra* note 19, at 8.

273. SENATE REPORT, *supra* note 18, at 35.

274. Under prior laws petitioner was assumed to have standing to file an antidumping petition on behalf of an industry unless its standing was challenged by another member of the relevant industry. See *supra* notes 101-104 and accompanying text.

275. BOVARD, *supra* note 1, at 139.

276. Agreement, *supra* note 19, at 6-7.

277. See Horlick, *supra* note 13, at 156.

arguable, but it is artificial because the finished merchandise is a global product. Any distinction between "domestic" and "foreign" manufacturing is drawn on the basis of geopolitical boundaries, not substantive economic reality.

The 50% and 25% tests may enhance opportunities for protectionist abuse. They make filing an antidumping petition easier than under prior law for two reasons.²⁷⁸ First, Article 5.4 of the Agreement broadens the universe of potential petitioners.²⁷⁹ Second, Article 4.1(i) conditionally disenfranchises producers related to the respondent.²⁸⁰

Article 5.4 expands the universe of potential petitioners beyond firms in a domestic industry to include other parties purporting to act on behalf of the industry. Footnote 14 to Article 5.4 states that "[m]embers are aware that in the territory of certain Members, *employees* of domestic producers of the like product or *representatives* of those employees, may make or support an application for an investigation."²⁸¹ Read literally, this language means that, in addition to labor unions or other worker associations, individual employees and ad hoc groups of workers may file petitions.²⁸²

In the United States the effect of footnote 14 is to place management and workers on equal footing with respect to supporting or opposing a petition.²⁸³ As a result, "if workers and management of the same firm express opposing views with respect to a petition, the firm and the production it represents would not be counted as expressing either support for or opposition to the petition."²⁸⁴ The repercussions of footnote 14 may be more dramatic in WTO members other than the United States. Under the pre-Uruguay Round law of some members, unions did not have standing to file petitions and individual employees were certainly prohibited from doing so. There is likely to be an increase in dumping actions filed

278. One practitioner suggests that the bright-line tests could make it more difficult for U.S. producers to gain relief from dumping. Michael H. Stein, *The Uruguay Round and the Trade Laws: Antidumping, Countervailing Duties, Common Provisions*, in THE COMMERCE DEPARTMENT SPEAKS ON INTERNATIONAL TRADE AND INVESTMENT 877, 892 (PLI 1994).

279. Agreement, *supra* note 19, at 8.

280. *Id.* at 6.

281. *Id.* at 8 (emphasis added).

282. See HOUSE REPORT, *supra* note 18, at 48, reprinted in 1994 U.S.C.C.A.N. 3820.

283. The Act clearly intends "labor [to] have [an] equal voice with management in supporting or opposing" a petition. SENATE REPORT, *supra* note 18, at 35; HOUSE REPORT, *supra* note 18, at 48, reprinted in 1994 U.S.C.C.A.N. 3820; MESSAGE, *supra* note 69, at 862.

284. SENATE REPORT, *supra* note 18, at 35; see HOUSE REPORT, *supra* note 18, at 48, reprinted in 1994 U.S.C.C.A.N. 3820.

by foreign unions and workers in such members and successful U.S. exporters could be vulnerable to attack.

With respect to the conditional disenfranchisement of producers related to a respondent, Article 4.1(i) of the Agreement, and the implementing legislation in section 212(a)(2) of the Act, establish a perverse burden of proof for a determination of industry support for a petition.²⁸⁵ Consider the following hypothetical.

Nippon Steel Corporation (NSC) has a U.S. subsidiary, Nippon U.S.A., to which it exports steel. Nippon U.S.A. manufactures both steel and steel-based products like tubing, ball bearings, and chain-linked fences. Nippon U.S.A. opposes the petition of Bethlehem Steel, a U.S. producer, filed against NSC. In addition, the Savannah Steel Company (SSC), a U.S. company unrelated to NSC or Nippon U.S.A., purchases steel and steel-based products from both of these companies for use in its steel processing operations. Should the DOC consider the opposition of Nippon U.S.A. and SSC when determining whether there is sufficient industry support for the petition?

The DOC must exclude from its application of the 50% and 25% tests an opposing domestic producer related to the exporter because of Article 4.1(i).²⁸⁶ The DOC can also exclude an unrelated importer of subject merchandise. A related producer or an unrelated importer may only be included upon a showing that its interests would be adversely affected by an antidumping order. No such rule existed in the 1930 Act.

Plainly, the rule conditionally disenfranchises an affiliate of an exporter, as well as an unaffiliated importer, creating an inherent bias in favor of a petitioner. Nippon U.S.A., an affiliate of the exporter NSC, must prove to the DOC that: (1) it uses steel from NSC in the production of steel-based products; (2) it would be harmed by an increase in the price of steel caused by an antidumping duty; and (3) there is no reliable domestic source of substitut-

285. See Act, *supra* note 23, § 212(a)(2), 108 Stat. at 4846; SENATE REPORT, *supra* note 18, at 35-36.

286. Agreement, *supra* note 19, at 6 n.11. The Senate report states that a producer and an exporter or importer are related if the producer directly or indirectly controls either the exporter or the importer; the exporter or the importer directly or indirectly controls the producer; a third party directly or indirectly controls the producer and exporter or importer; or the producer and the exporter or importer directly or indirectly control a third party and there is reason to believe that the relationship causes the producer to act differently than an unrelated producer would act. . . . [D]irect or indirect control is established if a party is legally or operationally in a position to exercise restraint or direction over the other party.

SENATE REPORT, *supra* note 18, at 53.

able steel or such source is prohibitively expensive. SSC, an unaffiliated importer, must make the same showing. The rationale for such disenfranchisement is unpersuasive: Section 212(a) of the Act is

necessary to ensure that foreign producers, who would not normally be expected to support a petition, are not allowed to prevent investigations from going forward simply by directing or encouraging (implicitly or explicitly) their affiliates in the United States to oppose a petition. . . . Since it would normally be expected that an order would benefit domestic producers at the expense of foreign producers, when there is a relationship between the two producers and the domestic producer opposes an investigation, the Commerce Department needs to be satisfied that the opposition is based on the effect of an order on domestic rather than foreign production interests.²⁸⁷

This rationale has two flaws. First, it is unclear how a related domestic producer that imports subject merchandise can meet the burden of proof. Section 212(a)(2) states only that related domestic producers must "demonstrate that their interests as domestic producers would be adversely affected by the imposition of an antidumping duty order."²⁸⁸ The legislative history is similarly unhelpful:

The Committee does *not* intend that the Commerce Department establish a "bright-line" test for determining whether it is appropriate to exclude importers who are also domestic producers. Rather, the Committee expects Commerce to look at the relevant facts in each case, examining, for example, the volume and value of the producer's imports, the percentage of that producer's production accounted for by imports, and other relevant factors.²⁸⁹

Must Nippon U.S.A. demonstrate that it would have to close down production because of the increased cost of imported materials resulting from an antidumping duty, or is a small drop in the profits of Nippon U.S.A. a sufficient adverse effect? Because of this ambiguity, Bethlehem Steel has ample room to argue that a duty would have no adverse effect on Nippon U.S.A.

Second, Article 4.1(i) of the Agreement, and section 212(a)(2) of the Act, operate in a discriminatory manner by placing the burden of showing harm from an antidumping order on a related

287. SENATE REPORT, *supra* note 18, at 35-36.

288. Act, *supra* note 23, § 212(a)(2), 108 Stat. at 4846 (codified at 19 U.S.C. § 1673a(c)(4)(B)(i) (1994)).

289. SENATE REPORT, *supra* note 18, at 36 (emphasis added).

domestic producer or an unrelated importer.²⁹⁰ No burden, however, is placed on an unrelated domestic producer or, for that matter, a related importer. Suppose the Patriot Steel Corporation (PSC), a U.S. company unrelated to NSC, manufactures steel and steel products. To register its opposition to Bethlehem Steel's petition with the DOC, PSC need not prove it would be injured by an order. By placing the burden on Nippon U.S.A. but not PSC, the Agreement and the Act assume that corporate affiliation alone determines the position a company takes in an antidumping action and essentially treat a foreign-owned company as guilty until proven innocent. The unlikelihood that a U.S. subsidiary would challenge its foreign parent may not justify this discrimination.

If the Agreement and the Act truly sought to minimize protectionist abuse, they would reverse the burden of proof. The presumption should be that both PSC and Nippon U.S.A. are enfranchised. The petitioner ought to be required to prove to the DOC that Nippon U.S.A. should be excluded on the ground that the affiliate assesses its interests from the viewpoint of its Japanese parent and not its U.S. operations.²⁹¹ Reversing the burden might also force the DOC to consider the possible positive effects of steel imports at allegedly dumped prices, rather than to focus on Bethlehem Steel's claims.

2. Third-Country Petitions

Article 14 of the Agreement,²⁹² implemented by section 232 of the Act,²⁹³ expands the scope of protection afforded by antidumping law by authorizing third-country dumping petitions. The protected class now includes a third-country exporter competing in the United States with a foreign exporter.²⁹⁴

Suppose Panasonic of Japan, the third-country exporter, and GoldStar of Korea, the foreign exporter, each sell televisions in the United States. Panasonic believes GoldStar is dumping televisions in the United States but no U.S. company files a petition. Panasonic can request the U.S. Trade Representative (USTR) to

290. See Agreement, *supra* note 19, at 6; Act, *supra* note 23, § 212(a)(2), 108 Stat. at 4846.

291. Circumstantial evidence presented by the petitioner should be accepted because the petitioner may not have access to proprietary information about its competitor during the early phase of a case.

292. Agreement, *supra* note 19, at 19-20.

293. Act, *supra* note 23, § 232, 108 Stat. at 4897 (codified at 19 U.S.C. § 1677n (1994)).

294. *Id.*

file a petition on its behalf.²⁹⁵ In contrast to prior law, the Agreement and the Act obligate the USTR, the DOC, and the ITC to respond to this third-country dumping petition.²⁹⁶ Consequently, any WTO member can seek protection in the United States, even if no U.S. industry is complaining. Approval of the petition, however, is not automatic. First, the petition must allege that an exporter from another WTO member is dumping merchandise in the United States and that such dumping injures an industry producing like merchandise in the country of the petitioning member. Second, the USTR must consult with the DOC and the ITC, obtain the approval of the WTO Council for Trade in Goods, and ensure that the petitioning member affords U.S. exporters an equal opportunity to initiate dumping actions.²⁹⁷

The principal effect of this new provision will likely be an increase in the number of antidumping cases brought in the United States and other WTO members. The microeconomic rationale for accepting a third-country dumping petition is weak, however, because U.S. consumers benefit from competition among foreign exporters, such as Japanese and Korean television exporters.

The issuance of an antidumping order against GoldStar's televisions will generally result in a price increase equivalent to the amount of the duty set by the order or a portion thereof. U.S. consumers are harmed because consumer surplus is reduced or perhaps eliminated.²⁹⁸ Although Panasonic gains from protection in this case, there is no offsetting benefit for a U.S. company. The conventional argument in support of antidumping law—the protection of U.S. companies and workers from unfair foreign competition—is inapplicable. In light of global production, it may even be obsolete. Of course, the conventional argument may be deployed if a U.S. company is the third-country exporter, though in such a case the company would already be eligible to seek protection based on the loss of its comparative advantage relative to a foreign exporter. In any event, antidumping law is a tool for protecting domestic manufacturers, not boosting U.S. exports.

295. *Id.*

296. *See* Act, *supra* note 23, § 232, 108 Stat. at 4897.

297. *See* SENATE REPORT, *supra* note 18, at 87.

298. Section 232 expressly requires the USTR to provide an opportunity for public comment in determining whether to initiate a third-country investigation. Act, *supra* note 23, § 232, 108 Stat. at 4897 (codified at 19 U.S.C. § 1677n(d) (1994)).

Moreover, ambiguity surrounds the treatment of a third-country dumping petition. Neither Article 14 nor section 232 indicate whether the same substantive and procedural standards that apply to a traditional petition also apply to a third-country petition.²⁹⁹ The USTR has discretion to specify the standards the DOC and the ITC must use in conducting a third-country investigation.³⁰⁰ Assuming other WTO members also have such discretion, reciprocal manipulation of standards could occur. Suppose a WTO member lodges a third-country petition with the USTR and, at the same time, a U.S. exporter seeks relief in that same member's market. The U.S. exporter will urge the USTR to look favorably on the third-country petition so that the WTO member will accommodate the petition in which the exporter has an interest. Paradoxically, the U.S. exporter would be arguing in favor of protection in the United States and against protection overseas. The result might be a "race to the bottom," as the USTR and other WTO members relax their standards in response to pressure from companies in their respective countries hoping to enhance the likelihood of a satisfactory resolution of their own petitions.

B. *The Dumping Margin Calculation*

1. The Basic Formula and Problems of De Minimis Thresholds, Averaging, and Comparability

Broadly speaking, Article 2 of the Agreement provides specific rules on dumping margin calculations that substantially resemble the rules in pre-Uruguay Round U.S. antidumping law.³⁰¹ A review of those changes reveals that some are unlikely to have a substantive effect on prior law, others are likely to have a substantive effect, and still others whose impact is uncertain. It is unclear whether Article 2's revision of terminology, relating to the DOC's discretion in calculating dumping margins, will have a practical effect. Changes in basic antidumping nomenclature create less uncertainty because they merely clarify ambiguity under prior law. New standards relating to the de minimis margin inquiry, the practice

299. See Agreement, *supra* note 19, at 19-20; Act, *supra* note 23, 108 Stat. at 4897 (codified at 19 U.S.C. § 1677n (1994)).

300. Act, *supra* note 23, § 232, 108 Stat. at 4897-98 (codified at 19 U.S.C. § 1677n(c) (1994)).

301. Compare Agreement, *supra* note 19, at 1-4 (stating new rules on determination of dumping) with *supra* note 128 and accompanying text (stating pre-Uruguay Round U.S. law on imposition of antidumping duties).

of averaging, and questions of comparability are problematic and are likely to have a felt impact.

Article 2 adopts the standard definition of dumping, based on Article VI of the GATT. A product is dumped if its "export price" (EP) is less than "normal value" (NV).³⁰² The NV is the foreign home market price of a "foreign like product" sold in the ordinary course of trade (i.e., not to a related party or below cost) for consumption in the exporter's country. If home-market sales are incomparable because such sales are few, nonexistent, or at below-cost prices, the DOC uses either the NV in a third country or a constructed value (CV) in lieu of the NV.³⁰³ The EP is the sale price of the allegedly dumped product to an unaffiliated purchaser in the importing country before the date of importation.³⁰⁴ Where the EP is unavailable or unreliable, a "constructed export price" (CEP) is used. The EP may be unusable because the purchaser in the importing country is affiliated with the exporter. The CEP is based on the first sale to a purchaser unrelated to the exporter.³⁰⁵ Article 2 requires a "fair comparison" between the NV and the EP (or CEP).³⁰⁶ The general formula for the calculation remains conceptually the same as under prior law:

302. Agreement, *supra* note 19, at 1.

303. Agreement, *supra* note 19, at 1; see SENATE REPORT, *supra* note 18, at 67-68.

304. SENATE REPORT, *supra* note 18, at 63.

305. Agreement, *supra* note 19, at 3.

306. *Id.*; SENATE REPORT, *supra* note 18, at 67; HOUSE REPORT, *supra* note 18, at 78, 82, reprinted in 1994 U.S.C.C.A.N. 3850, 3854.

The DOC continues to attempt to calculate an individual dumping margin for all exporters subject to an antidumping investigation. Act, *supra* note 23, § 229, 108 Stat. at 4889 (codified at 19 U.S.C. § 1677f-1 (1994)); SENATE REPORT, *supra* note 18, at 78.

As under prior law the DOC bases its determination on data provided by foreign exporters and U.S. producers in response to questionnaires issued by the DOC. If an exporter or producer does not respond to a questionnaire or impedes an investigation, the DOC can make a determination based on "facts available." See Act, *supra* note 23, § 231(c), 108 Stat. at 4896 (codified at 19 U.S.C. § 1677e(a) (1994)); MESSAGE, *supra* note 69, at 869; HOUSE REPORT, *supra* note 18, at 105, reprinted in 1994 U.S.C.C.A.N. 3877. Under prior law the DOC made determinations based on the "best information available" in such situations. Whether the DOC's discretion is reduced because of this change in terminology remains to be seen.

If a large number of exporters are named as respondents, the DOC may not have the resources to calculate margins for each exporter. The DOC, in such cases, may limit its calculation to respondents accounting for the largest volume of exports. Alternatively, it may calculate the dumping margin based on a "statistically valid" sample of exporters. Agreement, *supra* note 19, at 11; Act, *supra* note 23, § 229(a), 108 Stat. at 4890 (codified at 19 U.S.C. § 1677f-1(c)(2)(A) (1994)); SENATE REPORT, *supra* note 18, at 79; HOUSE REPORT, *supra* note 18, at 100, reprinted in 1994 U.S.C.C.A.N. 3872. In both cases, an "all others" rate is calculated for those exporters not included in the calculation. Generally, this rate is based on a weighted average of individual dumping margins calculated for those exporters that are individually investigated. Agreement, *supra* note 19, at 15; Act, *supra* note 23,

Dumping Margin = NV - EP (or CEP),

where NV is determined by home or third-country sales or a CV.

Sections 223 and 224 of the Act implement Article 2 by altering the 1930 Act nomenclature to ensure consistency with new terminology.³⁰⁷ The term "NV" replaces the term "FMV"; "EP" replaces "PP"; "CEP" replaces "ESP"; and the term "USP" is abolished.³⁰⁸ Furthermore, the Agreement uses the term "like product" to refer to both foreign and domestic merchandise and distinguishes between the two by modifying the term with either "domestic" or "foreign."³⁰⁹ Under prior law "like product" referred to a domestic (U.S.-produced) product, whereas "such or similar merchandise" referred to a foreign like product (a foreign export subject to the antidumping investigation).³¹⁰ The Act clarifies the distinction and eliminates this awkward terminology. Finally, the term "subject merchandise" replaces the term "class or kind of merchandise subject to investigation."³¹¹ These changes in terminology are not intended to have any substantive legal ramifications.³¹²

§ 229(a), 108 Stat. at 4856-57 (codified at 19 U.S.C. § 1673d(c)(5) (1994)); MESSAGE, *supra* note 69, at 872-73; SENATE REPORT, *supra* note 18, at 42, 78-79; HOUSE REPORT, *supra* note 18, at 54, reprinted in 1994 U.S.C.C.A.N. 3826.

Under prior law the DOC used "generally recognized sampling techniques" to calculate the dumping margin. See *NTN Bearing Corp. v. United States*, 997 F.2d 1453, 1457-58 (Fed. Cir. 1993). The new law contains a revised reference to a "statistically valid sample" but does not imply any substantive change. MESSAGE, *supra* note 69, at 872. Rather, the new term simply conforms with the language in Article 6.10. Note, however, that the DOC is not obligated to obtain the most representative sample. It is merely obligated to employ a sampling methodology that yields representative results based on known facts. *Id.* at 873.

Note also that the DOC is directed to investigate each known producer in a nonsampling situation. 19 U.S.C. § 1677f-1(c)(1) (1994). It is unclear whether this requirement effectively supersedes the prior DOC regulation concerning 60% coverage, whereby the DOC normally examined at least 60% of the dollar value or volume of merchandise sold 150 days before and 30 days after the first day of the month in which a petition was filed. 19 C.F.R. § 353.42(b) (1995). If so, then the consequent increase in administrative burden is certain to raise the number of instances in which the DOC uses sampling.

307. Act, *supra* note 23, §§ 223-224, 108 Stat. at 4876-86 (codified at 19 U.S.C. §§ 1677a, 1677b (1994)); MESSAGE, *supra* note 69, at 820; SENATE REPORT, *supra* note 18, at 33, 63.

308. SENATE REPORT, *supra* note 18, at 33; HOUSE REPORT, *supra* note 18, at 78-79, reprinted in 1994 U.S.C.C.A.N. 3850-51; MESSAGE, *supra* note 69, at 820.

309. SENATE REPORT, *supra* note 18, at 33; MESSAGE, *supra* note 69, at 820; see also 19 U.S.C. § 1677(10), (16) (1994) (defining "domestic like product" and "foreign like product").

310. SENATE REPORT, *supra* note 18, at 33; MESSAGE, *supra* note 69, at 820; see *supra* note 128 and accompanying text.

311. SENATE REPORT, *supra* note 18, at 33.

312. MESSAGE, *supra* note 69, at 820. For a summary of changes to nomenclature, see Pre- and Post-Uruguay Round Terminology and Abbreviations, *infra* at Appendix A.

In contrast to the innocuous effects of the changes in terminology, Article 5 of the Agreement establishes a problematic two-part *de minimis* margin inquiry. The first question is whether the volume of imports of the subject merchandise is so low that the authorities should ignore the allegation. The second question is whether the dumping margin is so slight that the authorities should ignore it for purposes of dumping margin and injury determinations. Section 2 sets the threshold standards for answering these questions at 3% for the *de minimis* volume test and at 2% for the *de minimis* margin test.³¹³ These standards represent a substantial change from prior law. There was no analog in prior law to the 3% volume test and the standard for the *de minimis* margin threshold was 0.5%, not 2%.³¹⁴

Under the *de minimis* volume test, the DOC does not initiate an investigation if the volume of imports of subject merchandise from the exporter's country is less than 3% of total imports of like merchandise from all countries.³¹⁵ The 3% test is subject to an exception for cases in which more than one country exports subject merchandise.³¹⁶ If the total volume of exports from such countries collectively exceeds 7%, an action may be brought even though no one exporting country's share exceeds 3%. The second test means that a dumping margin of 2% or less, *ad valorem*, is *de minimis* and, therefore, no investigation ensues.³¹⁷ Obviously, no petitioner would allege the existence of a *de minimis* margin or volume; thus, the two-part inquiry may reduce the number of investigations that

313. Agreement, *supra* note 19, at 8.

314. SENATE REPORT, *supra* note 18, at 38; HOUSE REPORT, *supra* note 18, at 49, *reprinted in* 1994 U.S.C.C.A.N. 3821; *see supra* text accompanying notes 131-132. Section 213 of the Act amends the 1930 Act to make it consistent with the Agreement. *See* Act, *supra* note 23, § 213, 108 Stat. at 4850 (codified at 19 U.S.C. § 1673b(b) (1994)).

315. *See* SENATE REPORT, *supra* note 18, at 57; HOUSE REPORT, *supra* note 18, at 71, *reprinted in* 1994 U.S.C.C.A.N. 3843. In other words, the volume of subject merchandise is compared with the total imports from all sources of like merchandise. Section 222(d) of the Act states that subject merchandise is negligible if it accounts for less than 3% of the total volume of all like merchandise imported into the United States in the most recent year preceding the filing of the antidumping petition. *See* Act, *supra* note 23, § 222(d), 108 Stat. at 4871-72 (codified at 19 U.S.C. § 1677(24)(A)(i) (1994)).

316. Act, *supra* note 23, § 222(d), 108 Stat. at 4871-72 (codified at 19 U.S.C. § 1677(24)(A)(i) (1994)); SENATE REPORT, *supra* note 18, at 57; HOUSE REPORT, *supra* note 18, at 71, *reprinted in* 1994 U.S.C.C.A.N. 3843.

317. Interestingly, the 2% *de minimis* margin test applies only to antidumping investigations. The DOC retains its ability to use the 0.5% test in reviews. *See* HOUSE REPORT, *supra* note 18, at 49, *reprinted in* 1994 U.S.C.C.A.N. 3821; Memorandum from Powell, Goldstein, Frazer & Murphy on Analysis and Summary of Antidumping Provisions in GATT Legislation (Oct. 1994) [hereinafter Analysis and Summary] (on file with *The George Washington Journal of International Law and Economics*).

end in antidumping orders, but it will not reduce the number of investigations initiated.

Further, the established thresholds seem to be too low. The challenge is to dismiss marginal petitions by appropriately calibrating the thresholds to eliminate protectionist abusers, not meritorious petitioners. If larger dumping margins and import volumes are required, fewer petitions will satisfy the *de minimis* threshold. Given that almost all petitioners allege dumping margins far in excess of 5%,³¹⁸ perhaps a volume test of 10% and a margin test of 10% might work. Although further empirical research is needed to fine-tune the appropriate threshold levels, the 10% figures provide a basis for further study.

Another unsatisfactory aspect of Article 2 of the Agreement is its ambiguity with respect to averaging.³¹⁹ The basic rule is that the DOC must use either average or individual transaction prices.³²⁰ Authorities are not permitted to combine methods of comparison in a particular case unless there is evidence of a "pattern" of export prices that "differs significantly" among different purchasers, regions, or time periods. The key terms "pattern" and "differs significantly" are undefined. Furthermore, section 229 of the Act, which implements the averaging rule, preserves the ability of the DOC to compare an average NV to an individual EP or CEP if the average-to-average and individual-to-individual methodologies fail to identify targeted dumping.³²¹ The persistent use of individual-to-average price comparisons perpetuates the bias in favor of finding a dumping margin by comparing an average FMV to an individual USP—a situation created by prior law.³²² In addition, individual-to-

318. See *Administration Voluntary Restraint Program Viewed As Successful Only in Isolated Cases*, Int'l Trade Rep. (BNA) No. 22, at 714 (May 28, 1986).

319. See *supra* notes 132-135 and accompanying text.

320. Agreement, *supra* note 19, at 3; see also HOUSE REPORT, *supra* note 18, at 98-99, reprinted in 1994 U.S.C.C.A.N. 3870-71 (stating that "the Committee expects that [the DOC] will use [the individual-to-individual] methodology far less frequently than average-to-average methodology"). The Statement of Administrative Action indicates that the DOC does not like to make average-to-average comparisons. MESSAGE, *supra* note 69, at 842.

321. Act, *supra* note 23, § 229, 108 Stat. at 4889-91 (codified at 19 U.S.C. § 1677f-1 (1994)).

322. The most blatant distortion in the Commerce Department's administration of the U.S. antidumping law is its refusal to average both U.S. and foreign prices in computing dumping margins . . . The Department typically ignores any U.S. import prices above the foreign average and thus counts in its computation of the dumping margin only those below the foreign average price.

The result is dumping margins even when foreign and U.S. pricing is *identical*. For example, a foreign producer who sells three items in its home market at \$9, \$10 and \$11 will be found to have dumped if the same sales are made at the same prices in the U.S. market. The *average* foreign market value in this example would

average price comparisons do not permit an exporter exercising reasonable care and judgment to determine at the time it sets its U.S. prices whether or not it is selling at LTFV. Suppose an exporter makes its first U.S. sale in January. At that time, the exporter cannot know what its weighted-average, home-market prices for the next six months or year will be; thus, it cannot determine a priori what prices may lead to an accusation of dumping.

Interestingly, U.S. implementation of the basic rule that comparisons be made on the basis of either average or individual prices may be inconsistent with at least two provisions of the Agreement. Section 229(a) of the Act indicates that the basic rule is applicable only in the investigatory phase of a case, not in a subsequent annual administrative review, which is when antidumping duties are assessed instead of merely estimated.³²³

In drafting the implementing legislation on price comparison methodology, the [Clinton] administration ignored the fair comparison requirement of article 2.4 of the Agreement and adopted for administrative reviews the current U.S. practice of comparing individual U.S. sales to a monthly weighted-average of sales in the foreign market. The administration also ignored article 18.3 of the Agreement, which applies the agreed rules equally to both investigations and reviews of existing measures. It is quite likely that the United States will be challenged in the WTO on the comparison methodology applied in reviews. This potentiality for challenge follows not only from the express wording of articles 2.4 and 18.3, but also from the practical consequences. That is, if the United States applies different price comparison methodologies in investigations and reviews, it will cause great uncertainty and unpredictability. Further, it will impede the ability of foreign producers and exporters subject to dumping orders to set prices in the United States at a level sufficient to be found selling at nondumped prices.³²⁴

be \$10 (\$30/3), and would result in a \$1 dumping margin when compared *individually* with the \$9 U.S. sale.

POWELL ET AL., *supra* note 4, tab A, at 6-7. *But see* Koyo Seiko Co. v. United States, 20 F.3d 1159 (Fed. Cir. 1994) (stating that the DOC did not abuse "its discretion by refusing to consider averaging U.S. prices").

323. Act, *supra* note 23, § 229(a), 108 Stat. at 4890 (codified at 19 U.S.C. § 1677f-1(d)(2) (1994)); SENATE REPORT, *supra* note 18, at 79-80; HOUSE REPORT, *supra* note 18, at 99, *reprinted in* 1994 U.S.C.C.A.N. 3871; Holmer et al., *supra* note 23, at 492. However, the DOC must limit the averaging of NV to the month closest to the individual export sale with which the average is compared. Thus, the DOC can no longer compare an individual sale price to an average price calculated over a six- or twelve-month period. *See* HOUSE REPORT, *supra* note 18, at 99, *reprinted in* 1994 U.S.C.C.A.N. 3871; Analysis and Summary, *supra* note 317, at 7.

324. Holmer et al., *supra* note 23, at 493 (footnotes omitted).

There may be valid policy reasons for not using the averaging methodology during the phase when antidumping duties are assessed. For instance, averaging during that phase may result in a windfall to buyers of dumped goods because some part of the dumping duties that should be paid are charged to importers paying fair value.³²⁵ However, because averaging is not used during an administrative review, terminating an order may be as difficult as it is easy to find that targeted dumping exists.³²⁶ In sum, not only is the price-averaging rule ambiguous, the limit on the use of averaging to the investigatory phase appears to be at variance with U.S. international obligations.

Finally, the Agreement and the Act purport to guide the DOC in deciding what sales are comparable for purposes of calculating average NV.³²⁷ Nonetheless, ambiguities persist.³²⁸ Suppose a petitioner accuses an exporter of dumping televisions. While it may be obvious that the NV of televisions with thirteen-inch screens should not be averaged with those having twenty-one-inch screens, it is less clear whether the NV of televisions with thirty-inch screens and televisions with thirty-five-inch screens fall into distinct product categories.³²⁹ Nor is it clear that the exporter's sales in its home-country urban areas are comparable with those in rural areas. To limit the effect of averaging, the petitioner will most likely argue for the narrowest possible averaging categories. Undoubtedly, the petitioner will urge the DOC to accept an interpretation of comparability that maximizes the dumping margin. Similarly, with respect to the individual-to-individual methodology, the DOC lacks adequate standards for determining whether merchandise sold overseas is comparable to merchandise sold in the United States.³³⁰ Here, again, the *Sesame Street* game is played: Is a right-hand drive Nissan Sentra sold in Tokyo comparable to a left-hand drive Sentra sold in New York? If so, would differences in the model name, stereo features, or trunk space vitiate comparability? In sum, the problematic *de minimis* tests, coupled with the ambiguity with

325. *Id.* at 494.

326. *But see* Stein, *supra* note 278, at 882 (suggesting that the implementing legislation creates standards for averaging that do not place an undue burden on petitioners).

327. Holmer et al., *supra* note 23, at 494.

328. *See* Agreement, *supra* note 19, at 3; Act, *supra* note 23, § 229, 108 Stat. at 4889-91 (codified at 19 U.S.C. § 1677f-1 (1994)).

329. When merchandise compared is not identical, a DIFMER adjustment is appropriate when there is a difference in the cost of manufacture, but not when there is a difference in market value that is not based on a difference in cost. *See supra* notes 186-187 and accompanying text.

330. *See supra* note 321 and accompanying text.

respect to averaging and comparability, invite a protectionist abuser to manipulate the dumping margin calculation.

2. Concerns About Home-Market Viability

The Agreement alters the home-market viability test in an effort to prevent the calculation of NV on the basis of home-market sales that are too small in volume to present an accurate picture. The new test, in at least one respect, makes calculation of the dumping margin less susceptible to manipulation by petitioners. It provides, however, no guidance on which alternative to home-country sales is appropriate. The test is further flawed because it fails to detect the occurrence of cross-border subsidization.

The home-market viability test determines whether the volume of foreign home-market sales is too small to serve as a basis for calculating the dumping margin. If the exporter's home-market sales are less than 5% of its sales to the importing country, "normally" the home-market sales will be too small in quantity to render the home market viable.³³¹ In such a case, export prices to a third country may be used in lieu of the home-market price. The formula, therefore, for market viability is:

$$MV = (Q_H/Q_I) \times 100$$

where MV is market viability, Q_H is the quantity of sales by an exporter in its home market, and Q_I is the quantity of sales by an exporter in the importing country. If this ratio exceeds 5%, the home market is viable.³³²

This formula represents a departure from prior law. Formerly, the DOC's home-market viability test involved a comparison of the volume of home-market sales to the volume of sales to countries other than the United States, rather than to U.S. sales.³³³ The new test changes the denominator from the volume of sales to countries other than the United States, to the volume of sales to the United States.³³⁴ The purpose behind this change is to prevent the use of NV on the basis of "thin" (low volume) home-market

331. See Agreement, *supra* note 19, at 1 n.2.

332. See Act, *supra* note 23, § 224, 108 Stat. at 4878-79 (codified at 19 U.S.C. § 1677(b) (1994)).

333. See *supra* notes 148-150 and accompanying text.

334. 19 U.S.C. § 1677b(a)(1)(B)(ii)(II) (1994). See also SENATE REPORT, *supra* note 18, at 68 (providing that viability will be measured by comparing home-market sales with sales to the United States); HOUSE REPORT, *supra* note 18, at 83, *reprinted in* 1994 U.S.C.C.A.N. 3855 (stating that home-market viability will depend upon the quantity of sales by the home-market exporter compared with the quantity of sales by the exporter to the U.S. market).

sales.³³⁵ If the DOC uses sales figures from countries other than the United States in which the volume of sales is low, the size of the denominator will be reduced. In turn, the probability of satisfying the benchmark, and thus using a NV based on thin home-market sales, increases. By preventing the use of sales figures from other countries in the denominator, calculation of the dumping margin is less susceptible to manipulation by other countries.

Nevertheless, the new home-market viability test raises at least two concerns. First, the new test offers no guidance on whether third-country sales or CV should be used as an alternative to home-country sales when the home market is not viable. In contrast, under prior DOC regulations, there was an express preference for third-country sales.³³⁶ Second, the new test suggests, without further elaboration, that a "particular market situation" may preclude the use of foreign home-market sales.³³⁷ Would a single sale in the foreign home market that constitutes 5% of sales to the United States be a "particular market situation" rendering the foreign market sale nonviable? If the exporter's government establishes prices that cannot be considered competitively set, would foreign market sales then be incomparable?³³⁸ Would significant price changes associated with holidays that occur at different times of the year in the foreign and U.S. markets mean that prices in the foreign market are not suitable for comparison? These ambiguities are unresolved.

Finally, the new test, while operationally straightforward, ignores a salient microeconomic feature of dumping: it fails to detect whether cross-border subsidization occurs. Dumping consists of cross-border price discrimination as well as cross-border subsidization. A foreign exporter earns super-normal profits in its protected home market where prices are high, thus offsetting below-normal profits or losses incurred in the United States where it sells at dumped prices.³³⁹ Absent this subsidization, it seems difficult to argue that the exporter is deliberately attempting to drive its U.S. competitors out of business. Home-market sales cannot subsidize U.S. sales unless one of two conditions exist. Either home-market

335. HOUSE REPORT, *supra* note 18, at 83, reprinted in 1994 U.S.C.C.A.N. 3855.

336. 19 C.F.R. § 353.48(b) (1995).

337. See Agreement, *supra* note 19, at 1.

338. The Statement of Administrative Action suggests an affirmative answer. See MESSAGE, *supra* note 69, at 822.

339. Admittedly, an exporter has an incentive to maximize profits in its home market by charging an optimum price in that market that is unrelated to the price it charges in the importing country. See DAM, *supra* note 29, at 169.

sales must be so significant in volume that the profits generated plainly offset losses incurred in the United States³⁴⁰ or, where only a small volume of home-market sales exists, each sale must generate an extraordinarily high profit margin so that losses incurred in the United States are offset. The 5% bright-line test, while operationally straight forward, does not consider whether either condition is satisfied. Consequently, home-market sales can be used as a basis for NV, even where a respondent is not cross-subsidizing U.S. sales. The traffic-light system proposed in Part V avoids the issue of home-market viability by eliminating the concept of NV.

3. Wrongfully Excluding Below-Cost Sales

The treatment of below-cost sales in calculating NV is of enormous practical importance. Since 1980 roughly 60% of all antidumping cases in the United States involved allegations of below-cost sales.³⁴¹ Including these sales in the calculation of NV significantly lowers the probability of a final affirmative dumping determination. The NV is calculated on the basis of an average of prices in the home market. It is a mathematical fact that the exclusion of below-cost sales raises the average and therefore increases the likelihood of finding a dumping margin.

The fundamental microeconomic problem with Article 2.2 of the Agreement, and section 222(h) of the Act which implements this article, stems from the ambiguous phrase "ordinary course of trade."³⁴² The Agreement and the Act treat below-cost sales as outside of the "ordinary course of trade"³⁴³ and fail to differentiate among total, variable, and fixed costs of production.³⁴⁴ This helps

340. As one practitioner notes:

Obviously, if dumping is based on the assumption of cross subsidization of export sales by home market sales, a company which sells 95% of its production in the U.S. and 5% in the home market is not likely to be able to cross-subsidize from the home market into the U.S. to a significant degree.

Horlick, *supra* note 13, at 131.

341. *Id.* at 136; see also Gilbert B. Kaplan et al., *Cost Analysis Under the Antidumping Law*, 21 GEO. WASH. J. INT'L L. & ECON. 358, 358(1988) (stating that "approximately two-thirds of the antidumping investigations processed in calendar year 1987 involved cost of production or constructed value analyses").

342. 19 U.S.C. § 1677(15) (1994).

343. "[D]umping is measured by comparing the export price of a product with the comparable price of the like product, in the ordinary course of trade, in the market of the exporting country." SENATE REPORT, *supra* note 18, at 61; see HOUSE REPORT, *supra* note 18, at 76, reprinted in 1994 U.S.C.C.A.N. 3848. Interestingly, in a recent case arising under prior law, the DOC decided that below-cost sales are in the ordinary course of trade. See *Antifurcation Bearings and Parts Thereof from France*, 60 Fed. Reg. 10,900, 10,922-23 (1995). Of course, final DOC and ITC determinations have no precedential effect.

344. See *infra* notes 584-594 and accompanying text.

to perpetuate the bias created under prior law by ignoring the possibility that pricing behavior, which appears unfair or predatory, may be economically justified. For instance, it may be economically rational for a respondent to sell a foreign like product below its average total cost of production, yet above its average variable cost of production,³⁴⁵ because the respondent may be facing either depressed market conditions for foreign like merchandise or a temporary excess inventory of such merchandise in its home country.³⁴⁶ By pricing the merchandise below its minimum average total cost of production, but above its average variable cost of production, the respondent may only be trying to maintain market share. At such a level, the respondent incurs short-run losses; although it can cover all of its fixed costs, it can only cover a portion of its variable costs.³⁴⁷ The respondent expects to recoup these losses when market conditions improve and prices rise to a level above its average total cost of production or when it sells its excess inventory.³⁴⁸

Still other economic rationales may explain the respondent's behavior. The respondent may be attempting to increase its market share without driving competitors out of business or to "move down its learning curve" by developing further knowledge and experience in making the product in question.³⁴⁹ In sum, it is

345. See *infra* notes 584-594 and accompanying text. Interestingly, one practitioner points out that "[b]y the mid-1970s, there was a fair degree of consensus in the U.S. that sales below fully allocated cost, but above some form of average variable cost, would not be penalized as such under the U.S. antitrust laws." Horlick, *supra* note 13, at 134 (footnote omitted). Horlick argues that the United States violates the national treatment clause of Article III of GATT 1947 because the cost-based pricing standard in antidumping law for imported goods differs from the standard in antitrust laws for domestic goods. *Id.*; see also Boltuck & Litan, *supra* note 56, at 15 (noting that foreigners are punished "for pricing practices . . . that are perfectly legal for U.S. firms to engage in when selling in the domestic market") (footnote omitted).

346. Under prior law Congress appears to have recognized this possibility. See S. REP. NO. 1298, 93rd Cong., 2d Sess. 173-74 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7186, 7310.

347. See *infra* notes 584-594 and accompanying text.

348. See Deardorff, *supra* note 29, at 30-31. Note, however, that Deardorff presumes that the exporter prices its product below average cost but not marginal cost. *Id.*; see also BOVARD, *supra* note 1, at 130-131 (explaining that "[t]he real question in cost of production cases should be not what total costs are, but what the variable costs are"); POWELL ET AL., *supra* note 4, tab A, at 6 (stating that the failure of antidumping law to distinguish between truly anticompetitive conduct and legitimate pricing differences based on normal business considerations "forces foreign sellers to keep their prices high to avoid dumping allegations, even when market considerations might warrant reductions and their U.S. competitors may in fact be lowering their own prices").

349. See generally Hoekman & Leidy, *supra* note 28, at 158-59 (explaining further economic rationales for dumping). For a debate on other causes of predation, see Janusz A.

a well-known conclusion of basic microeconomics [that] [e]ven in perfectly competitive markets, profit-maximizing firms with no significant market power may sometimes find it rational to price below average cost. And the new trade theory contains many examples of how such a pricing strategy can lead to efficient outcomes under imperfectly competitive conditions In short, there is often nothing in such pricing behavior to suggest market power, unfair practices, or predatory malice.³⁵⁰

By ignoring this conclusion, the Agreement and the Act consequently maintain the same protectionist bias that existed under prior law.³⁵¹ When a respondent's below-cost sales are excluded from the calculation of NV, the respondent is, in effect, obligated to price its merchandise at a higher level than the petitioner would price its merchandise under similar circumstances.³⁵² This obligation is especially onerous for any respondent which incurs large research, development, and start-up costs, yet has low variable costs.³⁵³

Aside from faulty microeconomic logic, problems of practical application further ensure a continuation of protectionist bias. Under prior law the DOC could launch a below-cost sales investigation if it had "reasonable grounds" to believe or suspect that sales were being made at below-cost prices.³⁵⁴ One practitioner, discussing shortcomings of the prior law, commented: "[t]he threshold of 'reasonable grounds to believe or suspect' for cost investigations frustrates many parties with its ambiguity. The standard is far from self-defining, and can lend great uncertainty to the early stages of investigation when cost and price issues must be identified."³⁵⁵

Ordoover et al., *Predatory Systems Rivalry: A Reply*, 83 COLUM. L. REV. 1150 (1983); Joseph G. Sidak, *Debunking Predatory Innovation*, 83 COLUM. L. REV. 1121 (1983).

350. LAURA D'ANDREA TYSON, INSTITUTE FOR INT'L ECONOMICS, WHO'S BASHING WHOM? TRADE CONFLICT IN HIGH-TECHNOLOGY INDUSTRIES 268 (1992).

351. See *supra* notes 151-159 and accompanying text.

352. For a version of this point under prior law, see JACKSON, *supra* note 74, at 235.

353. High-technology companies are an example:

Especially for high-tech products, variable costs are usually far lower than fully allocated costs. Assume a company's fully allocated cost for producing chips is \$1.40, and its variable cost is 70 cents. Is the company better off selling 5 million chips at \$1.50, or 100 million chips at \$1 each? Selling 5 million chips at \$1.50 provides a total revenue of \$7.5 million; selling 100 million chips at \$1 each provides \$100 million. The greater the volume of sales that occur above variable cost of production, the more irrelevant the fully allocated cost standard becomes. [The DOC]'s method pressures foreign companies to sell a small number of items above fully allocated costs rather than a great number of items above variable costs.

BOVARD, *supra* note 1, at 131.

354. 19 U.S.C. § 1677b(b) (1994)

355. PATTISON, *supra* note 72 § 5.05[6]; see also *Al Tech Specialty Steel Corp. v. United States*, 6 Ct. Int'l Trade 245, 250 (1983), *aff'd*, 745 F.2d 632 (Fed. Cir. 1984) (drawing on

Article 2.4 of the Agreement and section 224 of the Act, which implements this article, ensure that it remains relatively easy for a petitioner to trigger a below-cost sales investigation, also called a cost-of-production investigation.³⁵⁶ As under pre-Uruguay Round law, the DOC is required to merely have "reasonable grounds" to believe or suspect that sales under consideration for the determination of NV have been made at below-cost prices.³⁵⁷ This minimum standard is met if the petitioner provides information on costs and prices (either observed or constructed) indicating that sales in the foreign home market are at below-cost prices. However, contrary to the law as applied by the DOC prior to the Act, the information provided by the petitioner need not relate to a particular exporter alleged to be engaged in dumping; the allegation may be country-wide, as opposed to company-specific.³⁵⁸

Under prior law the DOC was required to have independent reasonable grounds for launching a below-cost price investigation. The new regime merely requires the DOC to have information "reasonably available to petitioners." Considering these changes, it appears that the Agreement and the Act have lowered the standard for initiating an investigation.³⁵⁹ Worse yet, the Agreement and the Act do not tighten the criteria for excluding below-cost sales, thus replicating the opportunities for protectionist abuse inherent in the 1930 Act. Below-cost sales may be disregarded if they are made "in substantial quantities," "within an extended period of time," and "at prices which do not provide for the recovery of all costs within a reasonable period of time."³⁶⁰ These criteria closely resemble the ambiguous language in prior law.³⁶¹

Consider the first condition. The Agreement establishes alternative tests for determining whether sales below cost of production are substantial and, therefore, whether they may be excluded from

the law of criminal procedure relating to "reasonable suspicion" and holding that "absent a *specific* and *objective* basis for suspecting that a *particular* foreign firm is engaged in home market sales at prices below its cost of production, [the] threshold requirement of 'reasonable grounds to believe or suspect' has not been satisfied").

356. Agreement, *supra* note 19, at 3; Act, *supra* note 23, § 224, 108 Stat. at 4881 (codified at 19 U.S.C. § 1677b(b) (1994)).

357. See *supra* note 152 and accompanying text; SENATE REPORT, *supra* note 18, at 72; HOUSE REPORT, *supra* note 18, at 90, reprinted in 1994 U.S.C.C.A.N. 3862.

358. See *Torrington Co. v. United States*, 15 Ct. Int'l Trade 456, 460 (1991); *Al Tech Specialty Steel Corp.*, 6 Ct. Int'l Trade at 250; MESSAGE, *supra* note 69, at 833.

359. See MESSAGE, *supra* note 69, at 833 (stating that "[t]he changes . . . are intended to permit [the DOC] to initiate below-cost inquiries at the outset of a case").

360. Agreement, *supra* note 19, at 1-2; Act, *supra* note 23, § 224, 108 Stat. at 4878-81 (codified at 19 U.S.C. 1677b(b)(1) (1994)).

361. See *supra* note 153 and accompanying text; SENATE REPORT, *supra* note 18, at 72.

the calculation of NV.³⁶² Such sales are substantial if they equal or exceed 20% of the exporter's total sales in its home market. Alternatively, such sales are substantial if the weighted-average unit price of the home-market sales is less than the weighted-average unit cost of production for such sales.³⁶³ The first test should reduce the likelihood of a final affirmative dumping determination. Under pre-Uruguay Round law the DOC used a 10% threshold to determine whether to exclude below-cost sales.³⁶⁴ By using the second test and raising the threshold to 20%, it is more likely that below-cost sales will be included in the computation of NV. The amount assigned to NV, therefore, is likely to be lower and it will be harder for the DOC to find a positive dumping margin. Nothing in the Agreement or the Act indicates whether or when the first or second test should be used. Clearly, a petitioner will argue for whichever test leads to the exclusion of below-cost sales. As two practitioners point out,

[s]ome U.S. steel industry lobbyists claim that the 20 percent threshold will reduce the likelihood of a finding of dumping and permit exporters to engage in significant sales below the cost at home. This concern is misplaced, however, because the Antidumping Agreement expressly provides that, if the weighted-average sales price is below the weighted-average cost, the administering authorities *may disregard* the below cost sales even if they account for less than 20 percent of total home market sales.³⁶⁵

In effect, the Agreement and the Act raise the threshold for exclusion but then provide a petitioner with a means of circumventing the threshold.

The second condition differs from prior law in two seemingly innocuous ways. Under prior law below-cost sales had to occur "over" an extended period of time. Below-cost sales must now occur "within" the period.³⁶⁶ As a result of the change, it is no longer necessary for the DOC to find that below-cost sales occur throughout some minimum number of months. The word "over"

362. Agreement, *supra* note 19, at 2; Act, *supra* note 23, § 224, 108 Stat. at 4882 (codified at 19 U.S.C. § 1677b(2)(C) (1994)); SENATE REPORT, *supra* note 18, at 72.

363. It is unclear whether the second test corresponds to the pre-Uruguay Round rule used by the DOC for highly perishable agricultural products. Compare MESSAGE, *supra* note 69, at 832 (suggesting consistency) with PATTISON, *supra* note 72, § 5.05[6] (stating that the DOC "has established a higher threshold for below cost sales in cases involving perishable products").

364. See *supra* note 154 and accompanying text; SENATE REPORT, *supra* note 18, at 72; HOUSE REPORT, *supra* note 18, at 89, reprinted in 1994 U.S.C.C.A.N. 3861.

365. Horlick & Shea, *supra* note 20, at 26 (emphasis added).

366. See *supra* note 153 and accompanying text; SENATE REPORT, *supra* note 18, at 72.

suggests that below-cost sales must occur for a sustained period, such as in each month for a six-month period. "Within," however, suggests that such sales occur at any point within the period, such as during the second month in a six-month period. Also, under prior law, the DOC interpreted "extended period of time" to mean six or possibly three months, and thereby confined its below-cost inquiry to a six-month period.³⁶⁷ The Agreement and the Act define "extended period of time" as one year but not less than six months.³⁶⁸ Consequently, the DOC can double the length of time it surveys for below-cost sales. Obviously, the longer the period of investigation, the greater the chance of finding below-cost sales to exclude from NV.

With respect to the third condition—intended as a safe harbor—the Agreement and the Act provide a flawed mechanism for identifying prices that allow for cost recovery within a reasonable period of time. The definition dictates that if a price falls below per-unit cost at the time of sale but remains above weighted-average per-unit cost for the period of investigation, the price allows for cost recovery within a reasonable period of time.³⁶⁹ This test can be met only in rare circumstances, such as when costs fluctuate during the period of investigation and all subject merchandise is manufactured at a time of unusually high costs. The definition is further flawed because it fails to distinguish among variable, fixed, and total costs. These distinctions are important in understanding the economic rationale behind an exporter's pricing behavior.³⁷⁰ Finally, the definition is somewhat circular; it essentially states that a price provides for cost recovery if it is above weighted-average costs.

A petitioner can exploit these flaws to maximize NV and any dumping margin. A petitioner, for example, can urge a measure of cost recovery that is based on a speculative estimate of future production costs. Further, a petitioner can take advantage of events that might complicate the weighted-average production cost calcu-

367. SENATE REPORT, *supra* note 18, at 72; HOUSE REPORT, *supra* note 18, at 88, *reprinted in* 1994 U.S.C.C.A.N. 3860.

368. Agreement, *supra* note 19, at 2; Act, *supra* note 23, § 224, 108 Stat. at 4882 (codified at 19 U.S.C. § 1677b(2)(B) (1994)); SENATE REPORT, *supra* note 18, at 72; HOUSE REPORT, *supra* note 18, at 88, *reprinted in* 1994 U.S.C.C.A.N. 3860.

369. Stated differently, a price below cost at the time of sale provides for recovery of costs within a reasonable period of time if it is above weighted-average cost of production at the time of sale. *See* Agreement, *supra* note 19, at 1-2; Act, *supra* note 23, § 224, 108 Stat. at 4882 (codified at 19 U.S.C. § 1677b(2)(D) (1994)); SENATE REPORT, *supra* note 18, at 71-72; HOUSE REPORT, *supra* note 18, at 88, *reprinted in* 1994 U.S.C.C.A.N. 3860.

370. *See supra* notes 342-350 and accompanying text.

lation. For instance, suppose there are temporary disruptions to production because of maintenance work at the foreign factory where the merchandise is made. As a direct result, production is temporarily suspended or reduced and unit costs are artificially inflated. Should these unit costs be excluded from the weighted-average calculation? A petitioner seeking to exclude below-cost sales in order to obtain the highest weighted-average production cost possible will claim that the unit costs are not representative. The petitioner will claim that it is appropriate to allocate the effect of this work over time so that a proportional effect is realized.³⁷¹ However, a respondent, seeking the lowest possible weighted-average costs to satisfy the third condition for inclusion of below-cost sales, will claim that the maintenance work is periodic and foreseeable.

In sum, the three-part criteria engenders protectionist abuse. It is wrong to exclude sales below the cost of production from the calculation of NV sales. Below-cost sales may be rational and economically justified, yet their exclusion shows a blatant bias in favor of a petitioner. This problem is eliminated under the proposed traffic-light system, suggested in Part V, due to the elimination of the NV concept.

4. Maximizing the Dumping Margin by Adjusting NV

Article 2.4 of the Agreement, which is implemented in part by section 224 of the Act, establishes a general obligation that the comparison between EP and NV be "fair."³⁷² The comparison would be more fair if LTFV sales were offset by non-LTFV sales. However, like prior law, the Agreement does not contemplate offsets.³⁷³ Failure to offset inevitably increases the probability of a final affirmative dumping determination, resulting in a clear and systematic bias in favor of petitioners. Offsets are a logical means of reducing the risk of protectionist abuse; thus, offsets are required in the traffic-light system proposed in Part V.

More fundamentally, a key feature of Article 2.4 is its articulation of adjustments to NV designed to ensure a fair comparison between EP and NV. The Agreement mandates adjustments for dif-

371. The legislative history expresses a preference for the DOC to adopt the latter approach. See HOUSE REPORT, *supra* note 18, at 89, reprinted in 1994 U.S.C.C.A.N. 3861; MESSAGE, *supra* note 69, at 832.

372. Agreement, *supra* note 19, at 3; Act, *supra* note 23, § 224, 108 Stat. at 4878 (codified at 19 U.S.C. § 1677b(a) (1994)).

373. See *supra* note 129 and accompanying text. Of course, it could be argued that averaging is a type of offset system.

ferences between foreign and U.S. markets that affect the comparability of the EP and NV. Such differences include trade levels, sales conditions, quantities, physical characteristics, and taxation.³⁷⁴ A benign assessment of Article 2.4's scheme for making adjustments is that its effect on a dumping margin determination is a priori inconclusive. Several adjustments are deductions that will decrease NV and, in turn, decrease the likelihood of a final affirmative dumping determination. For example, as under prior law, the cost of packing for shipment in the exporting country must be deducted from NV.³⁷⁵ Further, if the cost of transportation—including warehousing expenses, incurred in bringing a foreign like product to the place of delivery in the exporting country and the amount of any rebated or uncollected indirect taxes imposed on a foreign like product—were included in the calculation of NV, they must be deducted.³⁷⁶ Petitioners fought hard to exclude deductions for freight and taxes from the Act. These deductions are important victories over the forces of protectionism and overturn two pre-Uruguay Round court cases, *Federal-Mogul Corp. v. United States*³⁷⁷ and *Ad Hoc Committee v. United States*.³⁷⁸ The deduction from NV for transportation charges incurred in the exporting country mirrors the deduction from EP for movement charges and helps ensure that NV and EP are ex-factory prices.³⁷⁹ The deduction for indirect taxes alters prior law; such taxes were previously added to USP. The change is intended to ensure that dumping margins will be tax neutral.³⁸⁰

At the same time, however, other adjustments may result in additions to NV that increase the probability of an affirmative dumping determination. For example, NV is increased by the cost of containers and coverings associated with packing and readying the subject merchandise for shipment to the United States.³⁸¹ Because of

374. Agreement, *supra* note 19, at 3; Act, *supra* note 23, § 224, 108 Stat. at 4878 (codified at 19 U.S.C. § 1677b (1994)).

375. See *supra* note 182 and accompanying text; 19 U.S.C. § 1677b(a)(6)(B)(i) (1994).

376. Agreement, *supra* note 19, at 3; Act, *supra* note 23, § 224, 108 Stat. at 4880 (codified at 19 U.S.C. § 1677b(a)(6)(B)(ii)-(iii) (1994)); SENATE REPORT, *supra* note 18, at 70; HOUSE REPORT, *supra* note 18, at 84, reprinted in 1994 U.S.C.C.A.N. 3856.

377. 17 Cl. Int'l Trade 88, 92-100 (1993).

378. 13 F.3d 398, 401-03 (Fed. Cir. 1994).

379. HOUSE REPORT, *supra* note 18, at 84, reprinted in 1994 U.S.C.C.A.N. 3856.

380. *Id.*; see also Analysis and Summary, *supra* note 317, at 5 (explaining that the adjustment for indirect taxes will guarantee a neutral effect on an antidumping margin calculation).

381. Act, *supra* note 23, § 224, 108 Stat. at 4880 (codified at 19 U.S.C. § 1677b(a)(6)(A) (1994)).

this provision and the deduction of home-market packing costs, the Act ensures that the exact same amount of packing costs are incorporated into NV and EP.³⁸² However, it is unclear why all packing costs are not removed from both prices in the same manner that freight and taxes are wholly excluded from NV and EP. As another example, differences in the physical characteristics, conditions, and terms of sale between subject merchandise and a foreign like product may necessitate a "circumstances of sale adjustment to NV."³⁸³ On balance, it is impossible to predict whether additions to or deductions from NV will dominate the dumping margin calculation.

A more critical assessment of adjustments to NV suggests that adjustments spawn opportunities for protectionist abuse. It remains true that " '[d]umping' often occurs as the result of American bureaucrats' manipulation of numbers, rather than actual foreign business practices."³⁸⁴ Specifically, a petitioner can continue to exploit the defects of the 1930 Act provisions on the COS and LOT adjustments to FMV and the ESP cap-offset scheme and thus maximize a dumping margin.³⁸⁵ With respect to the COS adjustment, neither the Agreement nor the Act suggest a test for distinguishing "direct" from "indirect" sales expenses. Consequently, a petitioner remains free to urge the DOC to increase NV by arguing that an adjustment is inappropriate because it does not reflect a direct sales expense. What one observer wrote about prior law remains true: "[t]he question of whether a price is fair often depends on whether a low-level Commerce bureaucrat ordains that certain sales expenses are direct or indirect."³⁸⁶

Important precautions, which are lacking in the Agreement, are needed regarding a LOT adjustment.³⁸⁷ Ideally, this adjustment should be made only where a difference in the level of trade affects

382. See *supra* note 375.

383. Act, *supra* note 23, § 224, 108 Stat. at 4880 (codified at 19 U.S.C. § 1677b(a)(6)(C)(ii) (1994)); HOUSE REPORT, *supra* note 18, at 85, *reprinted in* 1994 U.S.C.A.N. 3857; MESSAGE, *supra* note 69, at 828.

384. BOVARD, *supra* note 1, at 115.

385. See *supra* notes 188-204 and accompanying text; SENATE REPORT, *supra* note 18, at 70-71; MESSAGE, *supra* note 69, at 828.

386. BOVARD, *supra* note 1, at 123. While judicial review by the Court of International Trade and Court of Appeals for the Federal Circuit may force the "bureaucrat" to turn square corners when exercising discretion, these courts invariably accord tremendous deference to agency determinations. Charlene Barshefsky & Michael J. Firth, *International Trade Decisions of the United States Court of Appeals for the Federal Circuit During the Year 1987*, 37 AM. U. L. REV. 1167, 1168 (1988).

387. See *supra* notes 192-193 and accompanying text.

price comparability. There should be evidence of a pattern of price differences between sales at different levels of trade in an exporter's home-country market. If wholesale and retail prices in the exporter's home-country market are not substantially different over time, a LOT adjustment may be inappropriate. Mere reference to a company as a "wholesaler" should not automatically trigger the adjustment. What should matter is whether that company actually performs the role of an intermediary between a producer and exporter. Similarly, a sales subsidiary that is created merely to perform the role of a de facto sales department should not trigger a LOT adjustment. The Act provides little guidance and merely states that an adjustment is necessary if differences in the level of trade involve the "performance of different selling activities" and affect price comparability "based on a pattern of consistent price differences" between sales in the exporter's home market and the United States.³⁸⁸ What selling activities are "different?" What price patterns are "consistent?" While neither the Agreement nor the Act guarantees that the DOC will make a LOT adjustment, a petitioner is free to attempt to exploit these ambiguities to maximize the dumping margin.³⁸⁹

Finally, controversy surrounding ESP caps and offsets—now called CEP caps and offsets—persists. Under prior law petitioners argued that the ESP offset should be eliminated because a respondent can manipulate the amount of indirect sales expense it incurs in its home market to reduce FMV and thereby reduce any dumping margin.³⁹⁰ Respondents countered that the ESP cap should be eliminated, stating that opportunities for manipulation are exaggerated and that total indirect sales expenses should be deducted from FMV. The Court of Appeals for the Federal Circuit, in two cases, upheld the ESP cap-offset scheme.³⁹¹

388. See 19 U.S.C. § 1677b(a)(7)(A) (1994); MESSAGE, *supra* note 69, at 829; SENATE REPORT, *supra* note 18, at 70-71; HOUSE REPORT, *supra* note 18, at 87, reprinted in 1994 U.S.C.C.A.N. 3859.

389. A respondent also could exploit the ambiguities by, for instance, attempting to fool the DOC with a fake chain of sales.

390. Horlick, *supra* note 13, at 145.

391. In *Smith-Corona Group v. United States*, the court stated that "[w]ere it not for the exporter's sales price offset, comparisons based on purchase price would be fair, yet comparisons based on exporter's sales price would be skewed in favor of a higher dumping margin." 713 F.2d 1568, 1578 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984). In *SCM Corp. v. Silver Reed America, Inc.*, the court reversed a Court of International Trade decision in which the ESP cap was held invalid and a deduction from FMV for all indirect expenses was allowed. 753 F.2d 1033 (Fed. Cir. 1985). The court explained that "[f]oreign producers had claimed indirect expense deductions under the rubric of 'differences in circumstances of sale' to the point where price disparity routinely disappeared" and that

Both the Agreement and the Act appear to favor petitioners by placing conditions on when a CEP offset to NV for indirect sales expenses may be made. First, the amount of this deduction is limited to the amount of the deduction from CEP for indirect sales expenses—the ESP cap is reincarnated as the CEP cap.³⁹² Second, the CEP offset may be made only if there is no home-market sale at the same level of trade as the sale in the United States and the DOC does not have adequate information to make a LOT adjustment.³⁹³ The rationale for this limitation provided in the legislative history is opaque:

Only where different functions at different levels of trade are established under section 773(a)(7)(A)(i), but the data available do not form an *appropriate* basis for determining a level of trade adjustment . . . will [the DOC] make a constructed export price offset adjustment The adjustment will be “capped” by the amount of indirect expenses deducted from constructed export price In some circumstances, the data may not permit [the DOC] to determine the amount of the level of trade adjustment. For example, there may be no, or very few sales of a sufficiently similar product by a seller to independent customers at different levels of trade. This could be the case where there is only one foreign respondent and all sales are to affiliated purchasers. Also, there could be restrictive business practices which result in too few appropriate sales to determine a price effect. Similarly, the data could indicate a clearly contradictory result, for example contradictory patterns during different periods. In such situations, although an adjustment might have been warranted, [the DOC] may be unable to determine whether there is an effect on price comparability. In such situations, although there is a difference in levels of trade, [the DOC] may be unable to quantify the adjustment. Where this occurs, [the DOC] will make a capped “constructed export price offset” adjustment . . . *in lieu of the level of trade adjustment that would be warranted*

The constructed export price offset adjustment will be made only where normal value is established at a level of trade more remote from the factory than the level of trade of the constructed export price; *i.e.*, where the [level of trade] adjustment

deducting all such expenses “could distort the computations in favor of foreign manufacturers.” *Id.* at 1038-40.

392. See Act, *supra* note 23, § 224, 108 Stat. at 4881 (codified at 19 U.S.C. § 1677b(a)(7)(B) (1994)); SENATE REPORT, *supra* note 18, at 71; HOUSE REPORT, *supra* note 18, at 87, *reprinted in* 1994 U.S.C.C.A.N. 3859.

393. See Act, *supra* note 23, § 224, 108 Stat. at 4881 (codified at 19 U.S.C. § 1677b(a)(7)(B) (1994)); SENATE REPORT, *supra* note 18, at 71; HOUSE REPORT, *supra* note 18, at 87, *reprinted in* 1994 U.S.C.C.A.N. 3859; Analysis and Summary, *supra* note 317, at 5.

... , if it could have been quantified, would likely have resulted in a reduction of the normal value.³⁹⁴

The highlighted language suggests that a CEP offset is a proxy for the LOT adjustment, yet the two deductions serve entirely different purposes.³⁹⁵ The former is aimed at equalizing differences in NV and CEP arising from indirect sales expenses, while the latter ensures that these prices are based on either wholesale or retail transactions. In other words, the highlighted language calls into question whether the CEP offset continues to operate or is effectively replaced by LOT adjustments. The outcome depends on how the DOC applies the statutory provision on LOT adjustments.³⁹⁶

The DOC could theorize that a LOT adjustment is predicated on an amalgamation of direct expenses, indirect expenses, and profit. Further, it could find that direct expenses can be equalized through a COS adjustment.³⁹⁷ Accordingly, the key practical difference between a LOT adjustment and CEP offset may be that only the former can equalize profit. Thus, the DOC might apply a CEP offset only if it cannot determine how to make a LOT adjustment. Undoubtedly, petitioners and respondents will argue about whether data are "appropriate" to make a LOT adjustment.

An additional factor that makes it difficult to know how the DOC will treat LOT adjustments concerns the CEP concept, which is designed to be roughly equivalent to a stripped-down wholesale, retail, or other price. Theoretically, the DOC is supposed to find an actual sales price in the home market that is equivalent to the CEP. Yet, in practice, this undertaking seems virtually impossible. Overall, if the result of the conditions limiting the application of a CEP offset is that it is generally unavailable to respondents and any LOT adjustment is small, then dumping margins are certain to increase. Overall, the Agreement and the Act preserve and possibly extend opportunities for a protectionist abuser to manipulate the dumping margin calculation by adjusting NV. In contrast, the proposed traffic-light system in Part V eliminates such opportunities by abolishing the concept of NV.

394. HOUSE REPORT, *supra* note 18, at 87-88, *reprinted in* 1994 U.S.C.C.A.N. 3859-60 (emphasis added); MESSAGE, *supra* note 69, at 830-31.

395. See *supra* notes 189-191, 199-201, 392-394 and accompanying text.

396. 19 U.S.C. § 1677b(7)(A) (1994).

397. See MESSAGE, *supra* note 69, at 828.

5. Maximizing the Dumping Margin by Adjusting EP or CEP

Article 2.4 of the Agreement also addresses adjustments to EP and CEP.³⁹⁸ Such adjustments, covered in section 223 of the Act, do little to minimize the risk that a protectionist abuser will maximize a dumping margin.³⁹⁹ Shortcomings include an absence of guidance on how to make allowances for costs and profits or how to designate comparable levels of trade. Also, the final balance between deductions and additions in calculation of EP or CEP is unclear.

The basis for EP and CEP—the starting price—continues to be the first sale made to an independent buyer in the United States.⁴⁰⁰ The Agreement, however, indicates that CEP must include adjustments for costs—such as duties and taxes incurred between importation and resale, and for profits—and further specifies that the NV to which the EP or CEP is compared must reflect the same level of trade.⁴⁰¹ Exactly how should allowances for costs and profits be made? What levels of trade are comparable? These questions are unanswered. Further, large deductions from EP or CEP, which increase the likelihood of a final affirmative dumping determination, are possible. The subtractions in prior law from PP and ESP,⁴⁰² and the deductions specific to ESP,⁴⁰³ are retained under the new law with respect to EP or CEP⁴⁰⁴.

A new deduction from CEP—an allowance “for profit allocable to selling, distribution, and further manufacturing in the United States”—is created.⁴⁰⁵ The DOC must determine the percentage of total profit allocable to U.S. sales on the basis of the ratio of U.S. manufacturing and selling expenses to total manufacturing and

398. Agreement, *supra* note 19, at 3.

399. See Act, *supra* note 23, § 223, 108 Stat. at 4876 (codified at 19 U.S.C. § 1677a (1994)).

400. See *supra* notes 136-141 and accompanying text.

401. Agreement, *supra* note 19, at 3.

402. See *supra* notes 167-176 and accompanying text; 19 U.S.C. § 1677a(c)(2) (1994); SENATE REPORT, *supra* note 18, at 63-64; HOUSE REPORT, *supra* note 18, at 79-80, *reprinted in* 1994 U.S.C.C.A.N. 3851-52.

403. See *supra* notes 177-180 and accompanying text; 19 U.S.C. § 1677a(d) (1994); SENATE REPORT, *supra* note 18, at 64-65; HOUSE REPORT, *supra* note 18, at 79-80, *reprinted in* 1994 U.S.C.C.A.N. 3851-52.

404. Act, *supra* note 23, § 223, 108 Stat. at 4876 (codified at 19 U.S.C. § 1677a(c)-(d) (1994)).

405. MESSAGE, *supra* note 69, at 824; Act, *supra* note 23, § 223, 108 Stat. at 4877 (codified at 19 U.S.C. § 1677a(d)(3) (1994)); SENATE REPORT, *supra* note 18, at 66; HOUSE REPORT, *supra* note 18, at 80, *reprinted in* 1994 U.S.C.C.A.N. 3852.

selling expenses.⁴⁰⁶ Total profit accrued in the United States and home markets is multiplied by this ratio to yield profit allocable to the United States. The theory behind the new deduction is that it will ensure that CEP is “a price corresponding to an export price between nonaffiliated exporters and importers.”⁴⁰⁷ The profit deduction, however, creates a perverse incentive for a respondent: A respondent is discouraged from engaging in direct investment in the United States because such investment may lead to greater U.S. profits and therefore higher dumping margins. Moreover, the profit deduction is operationally ambiguous. How should total profit be calculated? Some practitioners suggest that it should be calculated by subtracting manufacturing and selling expenses from total sales revenue.⁴⁰⁸ Section 223 of the Act is silent on this point. A petitioner may exploit this ambiguity in an effort to maximize any dumping margin.⁴⁰⁹ Finally, there appears to be an inherent propetitioner bias resulting from the profit deduction from CEP. There is no compensating deduction from the NV. One practitioner argues that a LOT adjustment should be made to the NV that is sufficient to compensate for the profit deduction from CEP: The DOC

will be faced with the requirement to ensure that the level of trade adjustment to the normal value yields a fair comparison with the U.S. price after deductions of direct and indirect expenses and an allocated portion of profit. The automatic assumption that a comparison of sales at the same level of trade

406. Act, *supra* note 23, § 223, 108 Stat. at 4877-78 (codified at 19 U.S.C. § 1677a(f) (1994)). Specifically, the numerator of the ratio consists of expenses incurred by the foreign exporter and affiliated U.S. seller with respect to the production and sale of subject merchandise sold in the United States. The denominator of this ratio is the sum of all expenses incurred by the foreign exporter and affiliated U.S. seller with respect to the production and sale of the subject merchandise sold in the United States and the foreign like product sold in the home market. *Id.*; SENATE REPORT, *supra* note 18, at 66; HOUSE REPORT, *supra* note 18, at 80, *reprinted in* 1994 U.S.C.C.A.N. 3852; MESSAGE, *supra* note 69, at 824-25. For a formulaic presentation of the ratio, see Holmer et al., *supra* note 23, at 494-95.

407. HOUSE REPORT, *supra* note 18, at 80, *reprinted in* 1994 U.S.C.C.A.N. 3852.

408. See, e.g., Analysis and Summary, *supra* note 317, at 3-4 (concluding that total actual profit will be calculated as total sales revenue in the United States and home market minus total manufacturing and general expenses in the United States and home market). The legislative history of the Act indicates that losses (negative profits) will not be allocated. See MESSAGE, *supra* note 69, at 825.

409. Suppose the exporter and importer are affiliates but the product is not resold to an independent buyer, or it is not resold in the same condition. What is the CEP in this situation? Article 2.3 of the Agreement states that a “reasonable” basis may be used to determine that price but provides no further guidance. See Agreement, *supra* note 19, at 3. Thus, substantial discretion is left to domestic authorities. The consequent uncertainty could benefit a petitioner.

requires no adjustment is based on the fiction that sales to two different parties at the same level of trade are identical in all respects. Unless the [DOC] can establish, based on positive evidence, that the activities of the two parties at the same level of trade are, in fact, identical (which is often unlikely for commercial entities in different countries), [the DOC] will not be able to assume that such sales are identical.⁴¹⁰

Admittedly, the Agreement and the Act retain the pre-Uruguay Round additions for costs and profits to PP and ESP, which lead to a higher value for these prices, and, therefore, reduce the chance of a final affirmative dumping determination.⁴¹¹ At the same time, however, it is uncertain whether the effect of such additions on dumping margin calculations overwhelms or even balances the effect of deductions. What is clear is that complicated arguments, made under prior law, about adjusting PP and ESP will be raised again with respect to EP and CEP respectively, and renewed complaints by practitioners of a bias against respondents are likely.⁴¹² These arguments are not entirely resolved by the traffic-light system proposed in Part V, because the proposed system relies on the concepts of EP and CEP in dumping margin determinations.

6. Calculating CV

Calculating CV is a complicated exercise rife with opportunities for protectionist abuse. Article 2.2 of the Agreement, implemented by section 224 of the Act, calls for the inclusion of the costs of manufacture, sales, general and administrative expenses, (collectively referred to as "SG&A expenses" or "general expenses") and profit in the CV calculation.⁴¹³ As under prior law these items are added together to calculate CV.⁴¹⁴ However, the new law works a dramatic change with regard to statutory minimum criteria. Profit and general expense figures must be based on actual data pertain-

410. Holmer et al., *supra* note 23, at 498 n.58.

411. See Act, *supra* note 23, § 223, 108 Stat. at 4876 (codified at 19 U.S.C. § 1677a(c) (1994)); SENATE REPORT, *supra* note 18, at 63; HOUSE REPORT, *supra* note 18, at 79, *reprinted in* 1994 U.S.C.C.A.N. 3851. There is one small change in the 1930 Act regarding additions. Under pre-Uruguay Round law, an addition to the PP or ESP was made for taxes imposed in the country of exportation on the exported merchandise which were rebated. Section 224 of the Act requires that such taxes be deducted from the NV. Act, *supra* note 23, § 224, 108 Stat. at 4880 (codified at 19 U.S.C. § 1677b(a)(6)(B)(iii) (1994)).

412. See, e.g., Horlick, *supra* note 13, at 146 (stating that while the DOC "shows no perceptible bias in favor of or against those claiming adjustments[,] . . . [c]ertain standard [DOC] practices . . . in effect 'tilt' against respondents").

413. See Agreement, *supra* note 19, art. 2.2, at 1; Act, *supra* note 23, § 224, 108 Stat. at 4884-85 (codified at 19 U.S.C. § 1677b(e) (1994)).

414. See *supra* notes 160-162 and accompanying text.

ing to the exporter's sales of the foreign like product in the ordinary course of trade, i.e., its above-cost sales.⁴¹⁵ Mandating the use of actual data precludes reliance on fixed minimum percentages, such as the 10% general expense and 8% profit amounts used by the DOC under prior law.⁴¹⁶ This change is a welcome development. During a recessionary period in an exporter's home country, adding a minimum 8% profit may inflate the "true" CV because the exporter's profit margin may be only 1 or 2%.⁴¹⁷ CV, however, is a concept that requires DOC administrators to decide cost questions that have no answers. Hence, any law relying on the concept of CV is problematic.

In the post-Uruguay Round regime, three significant difficulties are apparent. First, profits can be calculated on the basis of selected sales instead of generally accepted accounting principles.⁴¹⁸ A dumping margin, therefore, may be enlarged by carefully selecting which sales to use and by excluding sales below the cost of production on the ground that they are, by definition, not in the ordinary course of trade.⁴¹⁹

Second, neither the Agreement nor the Act resolves the issue of what time period to use to compute the elements of CV.⁴²⁰ Should the DOC consider data on cost of manufacturing, general expenses, and profits for the week, month, quarter, year, or some other period prior to the respondent's alleged dumping in the United States? There is no doubt that a petitioner will argue in favor of whatever period maximizes CV and the dumping margin.

Third, what if actual data concerning the sales of a foreign like product are unavailable? Under the Agreement three alternatives exist for calculating profit and general expense figures. Profit and general expenses can be calculated using: (1) actual profits realized and general expenses incurred by the exporter in connection with sales of the same general category of merchandise in the exporter's home market; (2) weighted averages of actual profits realized and actual general expenses incurred by other exporters from home-market sales of the foreign like product in the ordinary

415. Agreement, *supra* note 19, at 2; Act, *supra* note 23, § 224, 109 Stat. at 4884 (codified at 19 U.S.C. § 1677b(e)(2)(A) (1994)); SENATE REPORT, *supra* note 18, at 73.

416. SENATE REPORT, *supra* note 18, at 33, 74.

417. JACKSON, *supra* note 74, at 235.

418. Horlick & Shea, *supra* note 20, at 26.

419. *See id.*

420. This issue has remained unresolved since the decision in *F.W. Meyers & Co. v. United States*, 12 Cust. Ct. 219, 239 (1974) (stating generally that a preexportation period of far less than one year would be appropriate).

course of business (profitable sales); or (3) any other reasonable method, as long as the amount calculated for profit does not exceed the profit normally realized by other exporters or producers on home-market sales of the same general category of products.⁴²¹ One weakness of the Agreement lies in its failure to prescribe a hierarchy among these alternatives.⁴²² The DOC has discretion to select among the three alternatives on a case-by-case basis.⁴²³ Petitioners will urge the DOC to select the alternative that maximizes the dumping margin. Furthermore, these alternatives for calculating profit and general expense figures are inherently ambiguous. With respect to the first alternative, for example, what does the term "general category of merchandise" mean? Arguably, it encompasses more products than the term "foreign like product" used in the second alternative, but again, there is no a priori rule. With respect to the third alternative, when is it fair to say that profits are "normally realized?"⁴²⁴

Calculation of the CV is susceptible to protectionist abuse not only because of the problem of manipulation of the CV, but also because of difficulties relating to cost allocation. Cost of manufacturing must be allocated on the basis of records kept by the producer, provided they are kept "in accordance with the generally accepted accounting principles . . . and reasonably reflect the costs associated with the production and sale of the product" in question.⁴²⁵ The DOC must consider all available evidence on the

421. Agreement, *supra* note 19, at 2-3; SENATE REPORT, *supra* note 18, at 73-74; HOUSE REPORT, *supra* note 18, at 94, *reprinted in* 1994 U.S.C.C.A.N. 3866; MESSAGE, *supra* note 69, at 840. The third alternative is known as the "profit cap" method. HOUSE REPORT, *supra* note 18, at 94, *reprinted in* 1994 U.S.C.C.A.N. 3866; MESSAGE, *supra* note 69, at 840.

422. See SENATE REPORT, *supra* note 18, at 74; HOUSE REPORT, *supra* note 18, at 94, *reprinted in* 1994 U.S.C.C.A.N. 3866.

423. SENATE REPORT, *supra* note 18, at 74.

424. Another example further illustrates the ambiguity that exists in this scheme. Consider a U.S. producer in an industry plagued by endemic dumping. Its profits are likely to be low. On the one hand, the petitioner may argue that profits from the exporter's above-cost sales should be included in the calculation of CV. If such sales do not exist, the petitioner may argue for the use of profits from above-cost sales of different products exported by the same exporter (alternative (1)), or for the use of profits from above-cost sales of the same product exported by a different exporter (alternative (2)). Ultimately, the petitioner will choose the alternative that yields the highest profit figure in CV to maximize the chance of a positive dumping margin. In contrast, the respondent will urge the use of the U.S. producer's artificially low profit figure (alternative (3)) in an attempt to establish a cap on what constitutes a reasonable profit. This use of alternative (3) will decrease CV, thereby reducing the likelihood that dumping will be found. See Stein, *supra* note 278, at 883.

425. See Agreement, *supra* note 19, at 2; Act, *supra* note 23, § 224, 108 Stat. at 4885 (codified at 19 U.S.C. § 1677b(f)(1)(A) (1994)); SENATE REPORT, *supra* note 18, at 74; HOUSE REPORT, *supra* note 18, at 91, *reprinted in* 1994 U.S.C.C.A.N. 3863.

proper allocation of cost and adjust costs appropriately for non-recurring items, such as research and development expenses that benefit current or future production, or for circumstances in which costs are affected by start-up operations.

For example, suppose an exporter spends one million dollars on market testing and advertising over a five-year period before introducing a product into the U.S. market. The life cycle of this product in the United States is not determinable. Should the DOC factor these costs into the cost of manufacturing when determining the CV? If so, how should it allocate these costs—over one year, five years, or ten years? Because the product's life cycle is uncertain, any *a priori* allocation seems arbitrary. Suppose a foreign exporter uses the same factory or assembly line to make two products. The exporter can theoretically shift production costs from one product to another through its internal cost-allocating procedures. While the exporter's allocation may be partly designed to minimize the cost of manufacturing the allegedly dumped product, the allocation could also be grounded in economic reality and may not be inconsistent with true production costs. What criteria should the DOC use to determine whether the allocation is manipulative? Should the DOC insist on an on-site inspection of the exporter's assembly line and examination of its books and records? Should the DOC attempt to reallocate costs when determining the cost of manufacturing? Without detailed information on the production processes for both products, any reallocation can only be speculative.

Finally, suppose the exporter incurs one-time start-up costs for research and development that lead to a new product based on the design of existing merchandise. Should the DOC characterize this as a start-up situation and therefore deduct start-up costs from the cost of manufacturing? The Agreement provides no guidance.⁴²⁶ Section 224 of the Act defines start-up situations narrowly. In order for start-up costs to be deductible, the exporter must use a new production facility or produce a new product that requires substantial additional investment and production levels must be limited by technical factors associated with the initial phase of commercial production.⁴²⁷ What is the distinction between improvements to existing merchandise or on-going improvements to present manu-

426. See Agreement, *supra* note 19, at 2.

427. See Act, *supra* note 23, § 224, 108 Stat. at 4885-86 (codified at 19 U.S.C. § 1677b(f)(1)(C) (1994)); SENATE REPORT, *supra* note 18, at 75; HOUSE REPORT, *supra* note 18, at 91-92, *reprinted in* 1994 U.S.C.A.N. 3863-64.

facturing facilities on the one hand, and new products and production facilities on the other? Should the DOC include only part of the cost in the first instance to prevent a distortion in the cost of manufacturing and the CV?⁴²⁸

The legislative history of section 224 of the Act is sure to fuel arguments between petitioners and respondents. A new product "is one requiring substantial additional investment, including products which, though sold under an existing nameplate, involve the complete revamping or redesign" of an existing product.⁴²⁹ Thus, the complete redesign of a model would result in a new product, while a routine model-year change in merchandise would not. The example in the legislative history illustrates the difficulty in understanding this distinction. It states that a sixteen-megabyte computer chip is a new product if the previous version was a four-megabyte chip, but not if the previous version was merely a physically larger sixteen-megabyte chip.⁴³⁰ Yet, there should be no reason a sixteen-megabyte chip should not be considered a new product, regardless of the previous chip's byte capacity, if it is smaller, faster, more accurate, or more durable than the previous version.

Once a decision is reached on whether a start-up situation exists, the dispute shifts to the measurement of start-up costs. A key factor is the determination of the duration of the start-up period. Again, the Agreement provides no real guidance on this matter. Article 2.2.1.1 note 6 is of little help:

The issue addressed in article 2.2.1.1 n.6 of the Antidumping Agreement on what, if any, adjustment should be made for start-up was a compromise between countries who wanted to have the ability to base decisions upon actual data within the context of ongoing investigations and those who wanted to have the opportunity to provide estimates of future or life-cycle costs. The compromise reached indicated that "the adjustment made for start-

428. Under prior law the DOC examined factors such as the nature of the expense, the frequency of its occurrence, and its relationship to the product. *See, e.g.*, *Floral Trade Council v. United States*, 16 Ct. Int'l Trade 1014 (1992) (explaining that to be considered "extraordinary, the event must be unusual in nature and infrequent in occurrence"); *Certain Hot-Rolled Carbon Steel Flat Products from Japan*, 58 Fed. Reg. 37,154, 37,174 cmt. 42 (1993) (final determination) (considering the relationship of the expense to the product); *Certain Hot-Rolled Carbon Steel Flat Products from Belgium*, 58 Fed. Reg. 37083, 37088 cmt. 6 (1993) (final determination) (examining frequency of occurrence and the nature of the expense); *Steel Wire Rope from Korea*, 58 Fed. Reg. 11,029, 11,035 cmt. 12 (1993) (final determination) (rejecting expense as "extraordinary" because it was neither unusual in nature nor infrequent). However, there were no clear rules to resolve these issues.

429. MESSAGE, *supra* note 69, at 836.

430. *Id.* The legislative history also indicates that a new production facility is one that involves substantially complete retooling, i.e., replacement of nearly all production of a facility or rebuilding of existing machinery. *See id.*

up operations shall reflect the costs at the end of the start-up period or if that period extends beyond the period of investigation, the most recent costs which can reasonably be taken into account by the authorities during the investigation.⁴³¹

The Act seems to give the DOC discretion to resolve the issue on a case-by-case basis.⁴³² Section 224 of the Act provides that the start-up period ends at the time the level of commercial production characteristic of the merchandise, producer, or industry is achieved.⁴³³ Section 224 does not, however, state how the DOC should decide when this level is reached. The DOC will not give weight to the exporter's own projections of future volume or use the attainment of peak production levels as the standard because the start-up period may end well before an exporter achieves optimum capacity utilization.⁴³⁴ Instead, the DOC will examine the actual production experience for the merchandise in question, historical data regarding the exporter's experience with similar products, seasonal changes in demand, and business cycles.⁴³⁵ However, if the product is new to the market, no such data will exist. In effect, the Act lacks a clear test, requiring the DOC to engage in a fact-intensive inquiry when some important facts are unavailable.⁴³⁶ Obviously, a petitioner will urge the use of a short start-up period to minimize the amount of start-up costs deducted from the cost of manufacturing, thus maximizing the CV.

Once this dispute is settled, a methodology for making a start-up adjustment must be selected. Precisely what costs should be deducted from the cost of manufacturing? The larger the number and size of items deemed indirectly related to the manufacture of a new product—and, consequently, not deducted from the cost of manufacturing—the larger the CV and, in turn, the larger the dumping margin.⁴³⁷ The Agreement is silent on this issue. The leg-

431. Holmer et al., *supra* note 23, at 486 (footnotes omitted).

432. See MESSAGE, *supra* note 69, at 836-37.

433. See Act, *supra* note 23, § 224, 108 Stat. at 4885-86 (codified at 19 U.S.C. § 1677b(f)(1)(C)(ii)-(iii) (1994)); SENATE REPORT, *supra* note 18, at 75; HOUSE REPORT, *supra* note 18, at 92-94, reprinted in 1994 U.S.C.C.A.N. 3864-66.

434. See MESSAGE, *supra* note 69, at 836-37.

435. See Act, *supra* note 23, § 224, 108 Stat. at 4885 (codified at 19 U.S.C. § 1677b(f)(1)(C)(ii) (1994)); SENATE REPORT, *supra* note 18, at 75-76; HOUSE REPORT, *supra* note 18, at 92-93, reprinted in 1994 U.S.C.C.A.N. 3864-65; MESSAGE, *supra* note 69, at 836-37.

436. See MESSAGE, *supra* note 69, at 837.

437. Conversely, one practitioner observes that

[t]he Agreement does not provide a definition of what constitutes the end of a start-up process, how broadly or narrowly the concept of start-up should be viewed (for example, annual model changes vs. a new product) or what costs should be adjusted (variable or fixed or both). . . . [A]n overly broad construction

islative history of the Act does state that "any adjustment for . . . start-up costs must be carefully limited to ensure that such an adjustment is not transformed into a license to dump."⁴³⁸ Further, while Article 2.2.1.1 of the Agreement refers expressly to a deduction for start-up costs associated with "the *production and sale* of the product under consideration,"⁴³⁹ section 224 of the Act restricts the deduction to *production* costs.⁴⁴⁰ Finally, the Act does not restrict deductions to fixed costs; both fixed and variable start-up costs may be subtracted from the cost of manufacturing.

The DOC will not deduct unit production costs incurred during the start-up period from the cost of manufacturing. Rather, the DOC deducts such costs at the end of the period.⁴⁴¹ But inclusions in unit production costs are problematic. As defined by the DOC, such costs include wages, depreciation of plant and equipment, expenses for materials, overhead, insurance, rent, and leases.⁴⁴² Suppose an exporter hires new workers, buys extra raw materials, and leases additional factory space to make a new product. Suppose further that these inputs are also used simultaneously to manufacture existing merchandise. When the start-up period ends, the workers are retained and the exporter continues to order materials and lease the space. Are all of the inputs directly related to the new product and thereby deductible from the cost of manufacturing, or should the DOC attempt to allocate only the relevant portion of the input costs to the new product?⁴⁴³

of start-up situations will permit unsustainable pricing practices, that is, prices below cost over time, to be viewed as "fair pricing."

Holmer et al., *supra* note 23, at 487.

438. MESSAGE, *supra* note 69, at 835.

439. Agreement, *supra* note 19, at 2 (emphasis added).

440. Act, *supra* note 23, § 224, 108 Stat. at 4885-86 (codified at 19 U.S.C. § 1677b(f)(1)(C)(ii)-(iii) (1994)).

441. Act, *supra* note 23, § 224, 108 Stat. at 4885 (codified at 19 U.S.C. § 1677b(f)(1)(C)(iii) (1994)); MESSAGE, *supra* note 19, at 837.

442. MESSAGE, *supra* note 19, at 837.

443. The effects of section 222(i) of the Act, which harmonizes the definitions of "affiliated persons," are unclear. See Act, *supra* note 23, § 222(i), 108 Stat. at 4875-76 (codified at 19 U.S.C. § 1677(33) (1994)); SENATE REPORT, *supra* note 18, at 76. Suppose an exporter purchases inputs from a related company. The exporter owns, directly or indirectly, less than 50% of the supplier, or vice versa, and the inputs are sold by the affiliate to the exporter at below market value. Under prior law, for purposes of deciding whether the exporter sells merchandise in its home market at below the cost of production, the DOC determined the exporter's cost of production by using generally accepted accounting principles and consolidating related companies. Consequently, the exporter and supplier were treated as unrelated parties and the below-market input price was not adjusted. Thomas H. Fine & Marie E. Parker, *The Cost of Production and the Constructed Value—After GATT*, in THE COMMERCE DEPARTMENT SPEAKS ON INTERNATIONAL TRADE AND INVESTMENT 775, 780-81, 791 (PLI 1994).

Similarly, exclusions from unit production costs raise difficulties. The DOC plans to exclude sales and advertising expenses because these expenses are not directly linked to the manufacture of a new product.⁴⁴⁴ However, direct or otherwise, the link exists. When bringing a new product to market, expenditures for advertising and marketing are often as crucial as those for traditional factor inputs such as wages, materials, and land. Suppose the exporter in the above example hires Michael Jordan to endorse the new product through television and radio advertisements as well as an around-the-world marketing tour. The exporter incurred these expenses because forecasts indicated that without these efforts sales of the product would be negligible and the manufacturing operation would shut down. In this scenario it makes little sense to exclude sales and advertising expenses; without these expenses there would be no product.

In sum, calculating a CV is a highly subjective exercise in which opportunities for protectionist abuse abound. The proposed traffic-light system in Part V may help reduce such opportunities by clarifying the elements included in the cost of manufacturing.

7. Changing the Presumption About Intermediate Country Sales

The odds of obtaining a final affirmative dumping determination may increase if intermediate sales occur. The Agreement and the Act make it easier for a petitioner to persuade the DOC to use an intermediate-country sales price as the basis for the NV,⁴⁴⁵ thereby increasing the dumping margin. They also spawn contro-

However, for purposes of determining the cost of manufacturing when calculating CV, the DOC relied on a different concept. It determined the cost of a major input sold to a related party at below cost on the basis of the best evidence available. 19 U.S.C. § 1677b(e)(2)-(3) (1994).

Section 222(i) of the Act defines affiliated parties in the same way for purposes of both the cost of production and CV calculations. See Act, *supra* note 23, § 222(i), 108 Stat. at 4875 (codified at 19 U.S.C. § 1677(33) (1994)). "Affiliated persons" include cases where one company owns the stock of another company, and where one company controls another company even in the absence of an equity relationship. *Id.*

The ramification of this change on the outcome of the AD [antidumping] proceedings for each company will vary depending on their relationships with their suppliers and the percentage, as well as the value, of inputs purchased from related suppliers. The outcome for some industries and/or some countries could significantly change.

Fine & Parker, *supra*, at 792.

444. MESSAGE, *supra* note 69, at 837.

445. Act, *supra* note 23, § 224, 108 Stat. at 4879 (codified at 19 U.S.C. § 1677b(a)(3) (1994)).

versy about a respondent's knowledge of the subsequent disposition of its merchandise.

Suppose the Tata Steel Company of India (Tata) sells steel for Indian consumption at \$1100 per ton and sells steel to the Madras Exporters Group (MEG), also an Indian company, for \$1000 per ton. MEG exports the steel to the United States through Indonesia. It sells the steel to the Jakarta Trading Company (JTC) for \$1200 per ton. JTC resells some of that steel for Indonesian consumption at \$1300 per ton and exports the balance to Ford at \$1100 per ton. Bethlehem Steel files a petition alleging that Tata, MEG, and JTC dump steel in the United States. Should the Indian domestic price of \$1100 per ton or the Indonesian domestic price of \$1300 per ton be used as the basis for NV?

Bethlehem Steel will argue for the intermediate-country sales price of \$1300 per ton, and both the Agreement and the Act provide ample basis for Bethlehem Steel to do so.⁴⁴⁶ Essentially, the Agreement and the Act change the presumption in the 1930 Act regarding intermediate-country sales. The 1930 Act presumes that FMV is based on sales of such or similar merchandise in the country where the merchandise originated.⁴⁴⁷ Under prior law the DOC could base NV on sales in the intermediate country only if the producer did not know that the seller intended to export the merchandise and the merchandise was not substantially transformed in the intermediate country.⁴⁴⁸ The 1930 Act presumed that a foreign producer was aware of the proposed disposition of its merchandise after the first sale in the country of origin.

Under the old law if Tata knew the steel it sold to MEG was intended for export to the United States, it would presumably discount its usual domestic consumption price of \$1100 per ton for MEG to effect its dumping strategy of charging the highest feasible price in India and the lowest such price in the United States.⁴⁴⁹ Accordingly, under prior law, the intermediate-country price was not used because it was considered tainted—it could have been a dumped price.⁴⁵⁰ Under prior law, therefore, the price in the country of origin (\$1100 per ton) was selected as the basis for NV. Given a PP of \$1100 (the price Ford pays), to the chagrin of Bethlehem Steel, there is no dumping margin (\$1100 - \$1100).

446. *See id.*

447. *See id.*

448. SENATE REPORT, *supra* note 18, at 69.

449. *Id.*

450. *Id.*

In contrast, the Agreement and the Act reverse the presumption—sales in the intermediate country are now the basis for NV.⁴⁵¹ To the delight of Bethlehem Steel, a dumping margin of two hundred dollars (\$1300 - \$1100) exists. The new presumption assumes a producer is unaware of the planned subsequent disposition of its merchandise. If Tata does not know the steel it sells to MEG will be exported, it will not discount its usual domestic consumption price of \$1100 per ton in the sale to MEG to effect cross-border price discrimination. In turn, the intermediate-country price is not tainted. In general, this new presumption benefits petitioners because intermediate-country sales prices are usually higher than country-of-origin prices. An exporter in the country of origin will charge a mark-up to a trading company in the intermediate country, just as MEG charged JTC \$1200 for the steel MEG obtained for \$1000.

The Agreement and the Act do specify four different scenarios in which NV must be derived from sales prices in the country of origin.⁴⁵² However, these scenarios are consistent with prior law and appear unlikely to undermine the advantage petitioners will obtain from the new presumption.⁴⁵³ The first three scenarios are straightforward. NV is to be derived from sales price in the country of origin when: (1) the subject merchandise is merely transshipped through the intermediate country; (2) a foreign like product is not produced in the intermediate country; and (3) sales in the intermediate country do not satisfy the 5% market viability test (sales in the intermediate country are less than 5% of sales to the United States), or when a particular market situation in the intermediate country does not permit a proper comparison.⁴⁵⁴ In these three scenarios Bethlehem Steel cannot claim that \$1300 is the NV if TATA uses Indonesia as a conduit for its steel and JTC either, does not substantially transform the steel in Indonesia, or does not make a significant number of sales in Indonesia. The fourth scenario provides that the NV is to be derived from the sales price in the country of origin if the producer knew, at the time of the sale, that the subject merchandise was destined for export because of the possibility that the intermediate-country price was a dumped

451. See Agreement, *supra* note 19, at 4; Act, *supra* note 23, § 224, 108 Stat. at 4878 (codified at 19 U.S.C. § 1677b(a)(1)(B)(i) (1994)); SENATE REPORT, *supra* note 18, at 68-69.

452. See Agreement, *supra* note 19, at 4; Act, *supra* note 23, § 224, 108 Stat. at 4879 (codified at 19 U.S.C. § 1677b(a)(3) (1994)).

453. See SENATE REPORT, *supra* note 18, at 68-69.

454. *Id.* at 69.

price.⁴⁵⁵ Thus, if Tata knows its steel is destined for export, the India sales price of \$1300 per ton is the basis for the NV.

The central problem with both the old and new presumptions is their underlying assumptions about a producer's knowledge. Basing the source of NV on awareness, or lack thereof, of the subsequent disposition of merchandise creates ambiguity. The DOC is instructed to examine all relevant evidence,⁴⁵⁶ but in practice it may be difficult for the DOC to ascertain what a producer, especially a large foreign one, did or did not know. Must the producer have actual knowledge or is constructive knowledge sufficient? What if it did not know, but should have known that its product was destined for export? Suppose different officials have different information. Which officials' knowledge should matter, or should the knowledge of officials be aggregated? The petitioner has an incentive to engage in results-oriented behavior and exploit these ambiguities. The producer can check the prices in both the intermediate country and the country of origin and then make an argument about the respondent's knowledge based on which of the two prices is highest.

In conclusion, intermediate sales transactions provide yet another opportunity for a protectionist abuser to attempt to maximize a dumping margin. The extent to which this opportunity is exploited will depend upon the frequency of intermediate-country cases. These cases may arise largely with respect to China and Hong Kong. Intermediate-country sales and a producer's knowledge about the subsequent disposition of its merchandise are irrelevant in the proposed traffic-light system in Part V because it eliminates the concept of NV.

8. Spikes, Sustained Movements, and Currency Conversion

To calculate NV, figures denominated in a foreign currency must be converted into U.S. dollars. The dumping margin calculation should not, however, be distorted by the conversion.⁴⁵⁷ Article 2.4.1 of the Agreement indicates that the currency conversion should be made on the date of sale—the date when the material terms of the sale are established.⁴⁵⁸ If there is a sustained change in the exchange rate during the period of investigation, a respondent

455. *Id.*

456. *Id.*

457. See *supra* notes 165-166 and accompanying text.

458. Agreement, *supra* note 19, at 3.

is expected to adjust its prices.⁴⁵⁹ Section 225(a) of the Act purports to implement Article 2.4.1 by requiring conversion of foreign currencies at the dollar exchange rate in effect on the date of sale.⁴⁶⁰ This requirement changes the DOC's existing practice of using a quarterly rate "unless the daily rate varies by more than five percent from the rate in effect on the first day of the quarter."⁴⁶¹

While in many cases application of the new rule will not generate controversy, two questions remain. First, how should intra-day "spikes" in exchange rates be treated? Reliance on an intra-day rate is dangerous because exchange rates may move dramatically within a single day. For example, suppose a Mexican exporter is accused of dumping. The NV is 100 pesos and the EP is \$23 dollars. Suppose further that the dollar-peso exchange rate is 3.65 pesos to the dollar at 9:00 a.m. on the date of the sale of the subject merchandise, but at noon the Mexican finance minister announces an immediate 20% devaluation in the peso, which is followed by selling of pesos against dollars. By 4:00 p.m., \$1 dollar is worth 5 pesos. If the 9:00 a.m. rate is used to convert the NV into dollars, the NV is \$27.40. The petitioner will argue in favor of the morning rate because this rate results in a dumping margin of \$4.40 (\$27.40 - \$23.00). If the 4:00 p.m. rate is used, the NV is \$20 dollars. The respondent will argue that the afternoon rate should be used since it leads to a negative dumping margin of \$3 dollars (\$20.00 - \$23.00).⁴⁶² Absent a clear rule for spikes, a petitioner benefits if the foreign currency appreciates relative to the dollar after the measurement time. If appreciation occurs, FMV denominated in dollars increases and a dumping margin is created or increases.

Conversely, a respondent benefits if the currency depreciates after the measurement time. If depreciation occurs, FMV denominated in dollars falls and a dumping margin is reduced or eliminated. In cases where the period of investigation is short, whether a

459. See Agreement, *supra* note 19, at 3; MESSAGE, *supra* note 69, at 810. Suppose an exporter being paid in U.S. dollars for its merchandise sells the dollar forward against its home-country currency to hedge against the risk that the dollar might depreciate relative to its home currency before it is actually paid. The Agreement and Act, in this scenario, call for use of the forward rate as the rate at which to convert the exporter's prices and costs into dollars. For a discussion of foreign exchange hedging, see Bhala, *supra* note 165.

460. Act, *supra* note 23, § 225(a), 108 Stat. at 4886 (codified at 19 U.S.C. § 1677b-1(a) (1994)); SENATE REPORT, *supra* note 18, at 76; HOUSE REPORT, *supra* note 18, at 96, *reprinted in* 1994 U.S.C.C.A.N. 3868.

461. MESSAGE, *supra* note 69, at 842; see *supra* notes 164-166 and accompanying text.

462. To be sure, the Federal Reserve Bank of New York certifies the "noon buying rate" as "the" foreign exchange rate. 31 U.S.C. § 5151 (1988). But, this certification is made to the U.S. Customs Service for purposes of customs valuation.

dumping margin exists or the magnitude of such a margin will depend substantially on the exchange rate selected. Neither the Agreement nor the Act sets forth the needed rule. Article 2.4.1 states that "[f]luctuations in exchange rates shall be ignored."⁴⁶³ This statement cannot be taken literally because every rate could be viewed as a fluctuation and thus ignored.

Second, what accommodations should be made to allow an exporter to respond to a long-term trend in an exchange rate? The recent dramatic appreciation of the Japanese yen relative to the U.S. dollar serves as an illustration. Because of competition in the United States, many Japanese exporters cannot raise the price of the goods they export to the United States quickly enough to compensate for this appreciation. However, U.S. antidumping law assumes that rapid price adjustments are possible, except in cases where a currency appreciation is an aberrational spike. By focusing on the difference between pricing in the United States and home markets, the law ignores the fact that a Japanese respondent may already be charging a price that is the same as or more than its U.S. competitors.

Article 2.4.1 says that the authorities shall allow exporters a minimum sixty-day "lag" time to adjust their export prices to compensate for sustained movements in exchange rates during the period of investigation.⁴⁶⁴ But, the key phrase "sustained movement" is undefined. Is a sustained movement a change in one direction that occurs over a week, sixty days, or six months? Further, suppose the time period is one week. During that week the exporter's currency appreciates relative to the dollar on Monday, Tuesday, and Friday, but depreciates relative to the dollar on Wednesday and Thursday. The net result is an appreciation. Is this uneven movement "sustained?" Because the lag rule is ambiguous, it is difficult for an exporter to judge when a "sustained movement" is taking place. Perhaps a consensus among Wall Street currency analysts about the strength or weakness of the dollar relative to a foreign currency may emerge after several months of study. Yet, by then it is too late for an exporter that has not adjusted its prices—the exporter will have run afoul of the lag rule. Of course, the exporter's customers may not agree. A cautious exporter must assume almost every change in an exchange rate will be sustained and consider changing its prices every day—and certainly within sixty days—to satisfy the lag rule.

463. Agreement, *supra* note 19, at 3.

464. *Id.*

The currency conversion provisions of the Agreement and the Act are also hypocritical. Foreign companies exporting to the United States must adjust their prices in response to exchange rates; however, U.S. companies exporting to foreign countries are encouraged to maintain their price levels when the dollar depreciates relative to a foreign currency.⁴⁶⁵ When depreciation occurs, for example, when the dollar fell from 150 yen per dollar in 1990 to ninety yen per dollar in 1995,⁴⁶⁶ U.S. exports become cheaper for foreign buyers. Government officials and economists often urge U.S. exporters to maintain their price levels to increase their share in the foreign market instead of raising their prices to maximize profits. One rationale for this recommendation is the hope that maintenance of prices will help improve the U.S. bilateral merchandise trade balance with the foreign country. In theory, foreign buyers will substitute cheaper U.S. products for more expensive domestic and third-country products. However, if the lag rule is enforced rigorously in the foreign country, U.S. exporters face the dilemma of trying to maximize foreign market share while minimizing the risk of being accused of dumping in a foreign country.

A petitioner can exploit the ambiguities surrounding spikes and sustained movements in a foreign currency by choosing an exchange rate that maximizes the dumping margin. The conversion rules also lead to conflicting incentives for U.S. exporters. The traffic-light proposal in Part V partly resolves these problems by eliminating the concept of NV, although the same problems continue to plague the cost-of-production calculation.

C. *The Injury Determination*

1. Troublesome Material Injury Standards

The standards for a material injury determination, set forth in the 1930 Act, remain unchanged by the Agreement. Article 3.1 of the Agreement identifies three variables to be considered in making a material injury determination: (1) the volume of subject merchandise in the importing country; (2) the effect of such merchandise on prices for a domestic like product; and (3) the consequent impact of such merchandise on domestic producers of the like product.⁴⁶⁷ The continuity of pre- and post-Uruguay Round material injury standards leaves three ambiguities

465. *See id.*

466. Bank Credit Analyst, *supra* note 166, at 57; Philip Gawith et al., *Currency Turmoil Boosts D-Mark*, FIN. TIMES, Mar. 7, 1995, at 1.

467. *See* Agreement, *supra* note 19, at 4.

unresolved and the ITC's investigation susceptible to protectionist abuse.⁴⁶⁸

First, the variables examined in connection with a material injury determination do not expressly include the cost structure of either the petitioner or the respondent.⁴⁶⁹ Microeconomic theory indicates that differential cost structures are a principal source of comparative advantage.⁴⁷⁰ These structures should be the primary variable in the ITC's investigation. Next, the three injury variables articulated in Article 3.1 of the Agreement are extraordinarily broad. Consider the second variable: Article 3.2 of the Agreement explains that the effect of such merchandise on prices for a domestic like product is measured through an assessment of whether there has been significant price undercutting by the allegedly dumped imports.⁴⁷¹ This is accomplished by comparing the price of the allegedly dumped import with the price of the like product in the importing country to determine whether the imports have the effect of depressing prices significantly, or whether the imports prevent price increases which otherwise would have occurred.⁴⁷² Any competition, whether from imported or domestic products, will cause undercutting or price decreases or will inhibit price increases.⁴⁷³ The benefits return to consumers and outweigh losses to producers; hence, such results should be encouraged. Finally, consider the third variable: Article 3.4 of the Agreement provides a nonexhaustive list of items used to gauge the impact of dumped imports on the domestic industry. Factors to be considered include: (1) all relevant economic factors that bear on the state of the domestic industry, such as any actual or potential decline in sales, profits, output, market share, productivity, return on invest-

468. The ITC bases its material injury determination on data provided by foreign exporters and U.S. producers in response to questionnaires issued by the ITC. As under prior law, if an exporter or producer does not respond to a questionnaire or impedes an investigation, the ITC can issue a subpoena for the information or make a determination based on "information available." See Agreement, *supra* note 19, at 11, 25-26; Act, *supra* note 23, § 224, 108 Stat. at 4849 (codified at 19 U.S.C. § 16736(a)(1) (1994)). While issuing a subpoena to a U.S. importer is straightforward and, indeed, under prior law was common, issuing one to a foreign producer could raise issues of jurisdiction and foreign state compulsion.

469. Arguably, costs may be considered in the second stage of the ITC's analysis; namely, causation. Yet, the lax causation standard set forth in Article 3.5 of the Agreement, discussed below, is itself a problem.

470. See *supra* note 81 and accompanying text.

471. Agreement, *supra* note 19, at 4.

472. See *id.*

473. See JACKSON, *supra* note 74, at 239. See generally SAMUELSON, *supra* note 53, at 457-88 (discussing perfect competition).

ments, or utilization; (2) all factors affecting domestic prices; (3) the magnitude of the dumping margin; and (4) the actual and potential negative effects on cash flow, inventories, employment, wages, growth, and ability to raise capital or make investments.⁴⁷⁴ Again, it seems certain that competition, whatever its source, will have an impact on some, if not all, of these items and that a final affirmative injury determination is virtually inevitable. Moreover, no single variable is dispositive of an injury; therefore, the ITC is invited to look at several factors to find injury.⁴⁷⁵

It should be recognized, however, that the Agreement broadens the ITC's discretion in one manner that could reduce the risk of protectionist abuse. Under pre-Uruguay Round law the magnitude of the dumping margin was not an explicitly listed factor, resulting in confusion as to whether it should be considered.⁴⁷⁶ Article 3.4 of the Agreement, implemented by section 222(b)(1)(B) of the Act, states that the magnitude of the dumping margin is a factor that the ITC may consider in making its injury determination.⁴⁷⁷ Thus, the ITC can exercise its discretion to render negative injury determinations in cases where the dumping margin is small.

Finally, protectionist abuse may occur because of a failure to distinguish between direct and circumstantial evidence of injury. A decline in profits, wages, or the ability to raise capital is direct evidence.⁴⁷⁸ A large dumping margin or a decline in output, productivity, or capacity utilization is, at best, an indicator of injury or causation.⁴⁷⁹ The ITC is statutorily required to rely on both the direct and the circumstantial evidence equally when rendering an injury determination.⁴⁸⁰ This requirement "can lead to a paradoxical situation in which the U.S. government determines that the industry has been injured when the marketplace, in the form of share prices, has judged its prospects to be improving by investing more money in the industry and raising its stock prices."⁴⁸¹

The traffic-light system proposed in Part V attempts to resolve these ambiguities in the material injury determination. The traffic-

474. See Agreement, *supra* note 19, at 5.

475. See *id.* at 4.

476. See *supra* note 234 and accompanying text.

477. See Agreement, *supra* note 19, at 5; Act, *supra* note 23, § 222(b)(1)(B), 108 Stat. at 4870 (codified at 19 U.S.C. § 1677(7)(C)(iii)(V) (1994)); SENATE REPORT, *supra* note 18, at 54, 80; HOUSE REPORT, *supra* note 18, at 66-67, reprinted in 1994 U.S.C.C.A.N. 3838-39.

478. Horlick, *supra* note 13, at 159.

479. *Id.*

480. See 19 U.S.C. § 1677(7)(c)(iii) (1994).

481. Horlick, *supra* note 13, at 159 (footnote omitted).

light system emphasizes cost differentials, eliminates the magnitude of a dumping margin as a basis for a final affirmative determination, and requires direct evidence of material injury.⁴⁸²

2. A Lax Causation Standard

Article 3.5 of the Agreement retains, in substantial part, the lax causation standard set out in the 1930 Act.⁴⁸³ Interestingly, the Federal Trade Commission reported in 1994 that "the vast majority of domestic industries competing with dumped and subsidized imports are *not* severely injured by unfair imports."⁴⁸⁴ In light of this finding, the fact that the causation standard in the Agreement remains lax is a great boon to petitioners.⁴⁸⁵ The causation standard, set forth in Article 3.5 of the Agreement, states that

demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.⁴⁸⁶

While this list is not exhaustive, the failure to mention costs is remarkable. A theoretically sensible list would focus attention on differential cost structures.⁴⁸⁷

The lack of a precise definition for the term "causal relationship" leaves open the question of whether the United States is precluded from imposing antidumping duties when the imports are a remote or partial cause of an industry's woes. Arguably, a negative

482. See *supra* notes 245-258 and accompanying text; Agreement, *supra* note 19, at 5; HOUSE REPORT, *supra* note 18, at 67, reprinted in 1994 U.S.C.C.A.N. 3839.

483. Agreement, *supra* note 19, at 5.

484. Morris E. Morkre & Kenneth H. Kelly, FEDERAL TRADE COMMISSION, EFFECTS OF UNFAIR IMPORTS ON DOMESTIC INDUSTRIES: U.S. ANTIDUMPING AND COUNTERVAILING DUTY CASES, 1980 TO 1988, at 69 (1994) (emphasis added).

485. See generally Angelos Pangratis & Edwin Vermulst, *Injury in Anti-Dumping Proceedings*, 28 J. WORLD TRADE 61, 73-83 (1994) (proposing an analytical framework for resolving causation issues, including strengthening the standard to eliminate de minimis injuries from the dumping analysis).

486. Agreement, *supra* note 19, at 5.

487. See *supra* notes 469-470 and accompanying text.

answer may be inferred from the fact that the ITC remains barred from weighing causes.⁴⁸⁸ This prohibition makes it easier for a protectionist abuser to obtain protection. It is necessary to require a direct and substantial causal relationship to minimize abuse. The traffic-light system proposed in Part V utilizes the "substantial" causation standard applied in escape clause actions under section 201 of the Trade Act of 1974.⁴⁸⁹

A problem related to the lax causation standard is the ITC's continued ability to cumulate imports. Article 3.3 of the Agreement expressly condones the practice of cumulatively assessing the impact on a domestic industry of imports that are the subject of different antidumping petitions "if imports are simultaneously subject to investigation, the margins of dumping . . . are greater than *de minimis*, and a determination is made that cumulative assessment is appropriate in light of the conditions of competition between the imported products and between the imported products and the domestic like product."⁴⁹⁰ Generally, this provision is consistent with the 1930 Act;⁴⁹¹ thus, the ITC's cumulation practice has become the international standard. Cumulation increases the probability of a final affirmative injury determination because it

488. See *supra* notes 249-250 and accompanying text.

489. Trade Act of 1974, Pub. L. No. 93-618, § 201(b)(4), 88 Stat. 1978, 2012 (repealed 1988).

490. SENATE REPORT, *supra* note 18, at 58; Agreement, *supra* note 19, at 4-5.

491. See *supra* notes 252-256 and accompanying text; SENATE REPORT, *supra* note 18, at 33, 40-41, 58. Under prior law cumulation was permitted for all imports that were simultaneously subject to investigation. Section 222(e) of the Act allows for cumulation of imports that result from petitions filed on the same day. See Act, *supra* note 23, § 222(e)(G)(i)(I), 108 Stat. at 4873 (codified at 19 U.S.C. § 1677(7)(G)(i)(I) (1994)); HOUSE REPORT, *supra* note 18, at 73, reprinted in 1994 U.S.C.C.A.N. 3845. This welcome change should limit the range of imports cumulated.

Minor necessary changes to the 1930 Act were implemented by § 222(e) of the Act. Act, *supra* note 23, § 222(e), 108 Stat. at 4873 (codified at 19 U.S.C. § 1677(7)(G)(i)(I) (1994)). Article 3.3 of the Agreement, for example, establishes three prerequisites for the use of cumulation. To implement the third prerequisite concerning competitive conditions, section 222(e) of the Act explains that the ITC may not cumulate imports for which the DOC has made a preliminary negative dumping determination, unless the DOC subsequently reaches a final affirmative determination before the ITC renders its final determination. *Id.* § 222(e)(2)(G)(ii)(I), 108 Stat. at 4873 (codified at 19 U.S.C. § 1677(7)(G)(ii)(I)); see MESSAGE, *supra* note 69, at 847-50. Section 222(e) of the Act also preserves two important exceptions to the use of cumulation. Exports from beneficiary countries under the Caribbean Basin Economic Recovery Act may be cumulated only with exports from other beneficiary countries. Act, *supra* note 23, § 222(e)(2)(G)(i)(III), 108 Stat. at 4873 (codified at 19 U.S.C. § 1677(7)(G)(i)(III) (1994)). Second, exports from Israel may not be cumulated unless the ITC finds that Israeli exports cause or threaten to cause material injury to a U.S. industry. *Id.* § 222(e)(2)(G)(ii)(IV) (codified at 19 U.S.C. § 1677(7)(G)(ii)(IV) (1994)); see SENATE REPORT, *supra* note 18, at 59; HOUSE REPORT, *supra* note 18, at 75, reprinted in 1994 U.S.C.C.A.N. 3847; MESSAGE, *supra* note 69, at 850.

makes dumping a strict liability offense. The absence of an agreement or intent among exporters to drive U.S. rivals into bankruptcy is irrelevant. If a U.S. competitor is injured, the exporters are presumed responsible. Moreover, cumulation penalizes a small exporter by grouping it with large exporters.⁴⁹² Consequently, the small exporter is subject to final affirmative dumping and injury determinations based essentially on the practices of the large exporters.⁴⁹³ The result is particularly unfortunate in the case of developing countries whose nascent industries are important to their economic growth. They rely on a comparative advantage, vis-à-vis developed country producers, that is based on low costs. The antidumping duty wipes out the advantage. Accordingly, cumulation is prohibited in the traffic-light system proposed in Part V.

3. Troublesome Threat Standards

A petitioner unable to obtain a final affirmative material injury determination is likely to argue that a threat of material injury exists. Article 3.7 of the Agreement sets forth standards, implemented by section 222(c) of the Act, concerning threat determinations.⁴⁹⁴ A change in circumstances that would create a situation in which dumping would cause injury must be "clearly foreseen and imminent."⁴⁹⁵ The Agreement and the Act give the ITC a nonexclusive list of variables to consider, such as: (1) whether there is a significant rate of increase in subject merchandise in the United States, indicating that substantially increased importations are likely; (2) whether the exporter has sufficient freely disposable capacity, or whether it will imminently and substantially increase its capacity, suggesting that a substantial increase in imports of subject merchandise is likely; (3) whether the subject merchandise enters the United States at prices that will have a significant depressing effect on U.S. prices, which would likely increase demand for fur-

492. See JACKSON, *supra* note 74, at 240.

493. *Id.* For example, suppose the DOC finds that steel producers in Japan, Korea, and Britain dump steel in the United States. Suppose it also finds that steel exports from India and Turkey, which are not negligible but amount to a far smaller volume than those from the other three countries, are dumped. Because Indian and Turkish steel is imported in small quantities, it could not possibly damage the U.S. steel industry. Nevertheless, the ITC cumulates the steel exports from the five countries and renders a final affirmative determination of injury. Undoubtedly, the cause of injury to the U.S. steel industry is the dumping of Japanese, Korean, and British steel, yet an antidumping duty is imposed on Indian and Turkish steel as well.

494. See Agreement, *supra* note 19, at 5-6; Act, *supra* note 23, § 222(c), 108 Stat. at 4870-71 (codified at 19 U.S.C. § 1677(7)(F)(i) (1994)).

495. Agreement, *supra* note 19, at 5.

ther imports; and (4) whether large inventories of subject merchandise exist. No single variable is dispositive. The totality of the circumstances must be considered before determining that further dumped imports are imminent and, absent protection, that these imports will lead to material injury.⁴⁹⁶ With the exception of the last variable discussed below, Article 3.7 is generally consistent with prior law.⁴⁹⁷

As with the standards for a material injury determination, ambiguities surround the standards for a threat determination and opportunities for protectionist abuse abound. Like the concept of CV, the concept of threat may be intrinsically susceptible to abuse. Still, the Agreement raises four serious concerns. First, the relative cost structures of the petitioner and the respondent are not express factors. Microeconomic logic suggests that whether a U.S. industry is likely to be injured will depend upon the industry's ability to cut costs and thereby maintain or regain a comparative advantage.

Second, under prior law, the ITC could consider only substantial increases in inventories of the subject merchandise in the United States.⁴⁹⁸ Now, the ITC must consider inventories of subject merchandise wherever the inventory is located. Yet, it is a mistake to infer an intent to dump in the United States from offshore inventory accumulation. Such increases may result from recessionary conditions in offshore markets, seasonal changes in consumption or production patterns, or consolidation of inventory facilities. The critical issue, which may be difficult to resolve, is whether the respondent intends to dump its increased inventories in the United States.

Third, the United States appears to have taken advantage of the fact that the list of articulated variables in Article 3.7 is not exhaustive. Section 222(c) of the Act indicates that the United States shall retain its more extensive pre-Uruguay Round list of factors.⁴⁹⁹ Items on that list include export subsidies; production shifting in

496. *Id.* at 5-6; Act, *supra* note 23, § 222(c), 108 Stat. at 4870-71 (codified at 19 U.S.C. § 1677(7)(F) (1994)); SENATE REPORT, *supra* note 18, at 56; HOUSE REPORT, *supra* note 18, at 70, *reprinted in* 1994 U.S.C.C.A.N. 3842.

497. See SENATE REPORT, *supra* note 18, at 56; HOUSE REPORT, *supra* note 18, at 70, *reprinted in* 1994 U.S.C.C.A.N. 3842.

498. SENATE REPORT, *supra* note 18, at 56; MESSAGE, *supra* note 69, at 854.

499. Compare Agreement, *supra* note 19, at 5-6 (listing four factors the authorities should consider in determining the threat of material injury) with Act, *supra* note 23, § 222(c)(i), 108 Stat. 4870-71 (codified at 19 U.S.C. § 1677(7)(F)(i)(I)-(IX) (1994)) (explaining nine factors that the commission is to consider "among other relevant economic factors" when determining the existence of the threat of material injury).

the foreign country; raw and processed agricultural products; actual and potential negative effects on existing development and production efforts; and any other demonstrable adverse trends.⁵⁰⁰ By offering a more extensive list of variables than those set forth in Article 3.7, the Act enhances a petitioner's ability to make a successful threat of an injury claim.

Finally, perhaps the greatest uncertainty surrounding threat determinations is their predictive and speculative nature. Admittedly, Article 3.8 reminds WTO members to take "special care" when making threat determinations⁵⁰¹ and the legislative history of Section 222(c) implements this reminder, cautioning that "the ITC's threat determinations must not be made on the basis of mere conjecture or supposition."⁵⁰² Nonetheless, any threat determination requires the ITC to engage in prognostication. The ITC must ask whether continued imports of subject merchandise will cause injury, and if the ITC answers in the affirmative, whether such an injury would occur in spite of the elimination of such imports. The possibility that an antidumping duty may be imposed on the basis of these inherently uncertain determinations invites protectionist abuse. Thus, in the traffic-light system proposed in Part V, threat of injury is not a basis for an injury determination.

4. Dealing with Captive Production

Ambiguities surrounding the new rules on captive production create opportunities for petitioners who have lost their comparative advantage to an exporter to argue that they are being injured by imports. The rules, set forth in section 222(b)(2) of the Act, go beyond the provisions in the Agreement.⁵⁰³ Captive production "refers to production of the domestic like product that is not sold in the merchant market and that is processed into a higher-valued downstream article by the same producer."⁵⁰⁴ A sale in the "merchant market" is a sale made to an unrelated customer, and a "downstream article" is an article that is distinct from a domestic

500. Act, *supra* note 23, § 222(c)(i), 108 Stat. 4870-71 (codified at 19 U.S.C. § 1677(7)(F)(i)-(IX) (1994))

501. See Agreement, *supra* note 19, at 6.

502. SENATE REPORT, *supra* note 18, at 56; see also HOUSE REPORT, *supra* note 18, at 70, reprinted in 1994 U.S.C.C.A.N. 3842.

503. Act, *supra* note 23, § 222(b)(2), 108 Stat. at 4870 (codified at 19 U.S.C. § 1677(7)(C)(iv) (1994)).

504. SENATE REPORT, *supra* note 18, at 55; HOUSE REPORT, *supra* note 18, at 68, reprinted in 1994 U.S.C.C.A.N. 3840.

like product but is produced from that product.⁵⁰⁵ Captive production typically occurs when a company is vertically integrated and internally transfers a significant portion of its production volume for further internal processing into a distinct downstream article (captive production),⁵⁰⁶ while at the same time selling some of its domestic production to unrelated U.S. customers (the merchant market).⁵⁰⁷ The problem the ITC encounters is whether it should focus exclusively on the merchant market, or whether it should also consider captive production when making an injury determination.

Whether the ITC renders a final affirmative injury determination may depend on the resolution of this issue. First, the ITC's focus will affect its determination of the market share of imports in the domestic industry. A petitioner generally seeks to define the relevant market narrowly to exacerbate purported injury to its industry by showing a higher import-penetration ratio.⁵⁰⁸ Accordingly, the petitioner will then urge the ITC to consider only merchant-market sales. Second, the manner in which the ITC resolves the issue also influences its evaluation of the financial performance of U.S. producers. Here again, the narrower the definition of the affected market, the easier it is for a petitioner to claim it has been injured by the subject merchandise. Adverse financial performance in one market niche is not offset by positive financial performance in a different niche because the latter is excluded from consideration.

The ITC's pre-Uruguay Round practice was to ignore this distinction and examine domestic production regardless of the destination of the merchandise.⁵⁰⁹ The Agreement is silent on captive production. Through section 222(b)(2) of the Act, the United States unilaterally amended the 1930 Act to deal with the problem.⁵¹⁰ As one practitioner points out, this amendment raises an immediate concern:

There is no basis in the Antidumping Agreement for singling out captive production for special treatment for purposes of material injury analysis. The Agreement requires that the effects

505. SENATE REPORT, *supra* note 18, at 55.

506. *Id.* at 54; HOUSE REPORT, *supra* note 18, at 68, *reprinted in* 1994 U.S.C.C.A.N. 3840.

507. SENATE REPORT, *supra* note 18, at 54; HOUSE REPORT, *supra* note 18, at 68, *reprinted in* 1994 U.S.C.C.A.N. 3840; *see also* MESSAGE, *supra* note 69, at 852; Analysis and Summary, *supra* note 317, at 9 (defining captive production as production of a product that is primarily consumed internally in the manufacture of a finished article).

508. *See* POWELL ET AL., *supra* note 4, tab A, at 4-5.

509. *See* Analysis and Summary, *supra* note 317, at 9-10.

510. Act, *supra* note 23, § 222(b)(2), 108 Stat. at 4870 (codified at 19 U.S.C. § 1677(7)(c)(iv) (1994)).

of the dumped imports be assessed in relation to the domestic production of the like product. In addition, with two limited exceptions, neither of which relates to captive production, the Agreement defines the domestic industry to be the domestic producers "as a whole" of the like product. *Thus, injury analysis that is premised upon the exclusion of captive production is likely to be challenged as inconsistent with the Agreement.*

Still writhing from defeat in the 1993 hot-rolled steel cases, the U.S. integrated steel mills actively lobbied for the inclusion of the captive production provision in the implementing legislation The [Clinton] administration eventually caved to political pressure . . . and the captive production provision made its way into the implementing legislation.⁵¹¹

In other words, as a threshold matter, any distinction made by the ITC between the merchant market and captive production, pursuant to section 222(b)(2) of the Act, may be invalid under the Agreement and subject to challenge in the WTO.

Section 222(b)(2) of the Act authorizes the ITC to decide on a case-by-case basis whether to consider only merchant-market sales when examining market share and financial performance.⁵¹² The rationale for distinguishing between the merchant and the captive market is clear. In a captive production situation, imports compete primarily with sales of a domestic like product in the merchant market, not with inventory internally transferred for processing into separate downstream articles.⁵¹³ Hence, the ITC should include imports that are captively consumed for processing into downstream articles in its analysis only if the imports compete with merchant-market sales of the domestic like product.⁵¹⁴

511. Holmer et al., *supra* note 23, at 490-91 (emphasis added) (footnotes omitted).

512. Act, *supra* note 23, § 222(b)(2), 108 Stat. at 4870 (codified at 19 U.S.C. § 1677(7)(C)(iv) (1994)); MESSAGE, *supra* note 69, at 852.

513. SENATE REPORT, *supra* note 18, at 55; HOUSE REPORT, *supra* note 18, at 68, *reprinted in* 1994 U.S.C.C.A.N. 3840; MESSAGE, *supra* note 69, at 852.

514. MESSAGE, *supra* note 69, at 853. The legislative history states:

Imports which are sold in the merchant market shall be included in the import penetration ratio for the merchant market. Imports which are captively consumed by the related-party importer for processing into a downstream article should be included in the import penetration ratio for the merchant market only if the imports compete with sales of the domestic like product. If such imports do not compete with sales of the domestic upstream like product in the merchant market, the ITC shall include such imports in the total import share of the industry's total production, but not in the import penetration ratio for the merchant market or in any other calculation in which captive domestic production is excluded.

Id.; see also SENATE REPORT, *supra* note 18, at 55-56; HOUSE REPORT, *supra* note 18, at 69, *reprinted in* 1994 U.S.C.C.A.N. 3041. Note that the ITC can calculate the market share of imports in the merchant market and include allegedly dumped products in the calculation.

The challenge is to develop a practical, bright-line test to determine whether an analysis of market share and financial performance focused on the merchant market is needed. Section 222(b)(2) utterly fails in this regard. Section 222(b)(2) directs the ITC to pursue four inquiries: (1) whether the volume of merchant sales and internal captive production transfers is “significant”; (2) whether the production of the domestic like product that is transferred internally for further processing into a separate downstream article enters the merchant market for the upstream like product; (3) whether the domestic like product is the “predominant” material input used in the production of the separate downstream article; and (4) whether the domestic like product sold in the merchant market is “generally used” in the production of the downstream article.⁵¹⁵ The lack of clear definitions renders these inquiries inherently ambiguous and enables a petitioner to argue for exclusion of captive production by simply demonstrating greater import penetration in the allegedly injured domestic industry.

Consider the first inquiry. There is no standard for determining what volume of production is “significant.” The legislative history provides little guidance; it merely states that “[c]aptive production and merchant sales are significant if they are of such magnitude that a more focused analysis of market share and financial performance is needed for the ITC to obtain a complete picture of the competitive impact of imports on the domestic industry.”⁵¹⁶

With respect to the third inquiry, there is no definition of “predominance.” Again, the legislative history is little help; it indicates that the domestic like product is considered “predominant” only if it is the “primary” material used in the production of the downstream article.⁵¹⁷ Is this a 50% test, where the domestic like product is the “predominant” or “primary” input if it exceeds 50% of the total value of the product, or is a super-majority threshold amount required?

Finally, with respect to the fourth inquiry, the petitioner and respondent are certain to disagree over whether a domestic like product is “generally used” in the production of the downstream

515. Act, *supra* note 23, § 222(b)(2), 108 Stat. at 4870 (codified at 19 U.S.C. § 1677(7)(C)(iv) (1994)); HOUSE REPORT, *supra* note 18, at 68-69, *reprinted in* 1994 U.S.C.C.A.N. 3840-41.

516. SENATE REPORT, *supra* note 18, at 55; HOUSE REPORT, *supra* note 18, at 68, *reprinted in* 1994 U.S.C.C.A.N. 3840 (explaining significant captive production).

517. SENATE REPORT, *supra* note 18, at 55; HOUSE REPORT, *supra* note 18, at 68, *reprinted in* 1994 U.S.C.C.A.N. 3841; MESSAGE, *supra* note 69, at 853.

article. Yet again, the legislative history does not help; it defines "general use" in terms of significance. If a "significant" portion of the production of the domestic like product that enters the merchant market is actually processed into the same downstream article as that produced from the internally transferred captive production, the domestic like product is "generally used" in downstream production.⁵¹⁸ Worse yet, the legislative history increases the opportunity for protectionist abuse by stating that whether a domestic like product sold in the merchant market is physically capable of being processed into a downstream article is irrelevant.⁵¹⁹ The legislative history states that the only question for consideration is whether the domestic like product is actually used in downstream production.⁵²⁰ Conceivably, a petitioner could deliberately abstain from using a domestic like product to create the impression that the merchant and captive production markets should be distinguished.

It is unclear how these four inquiries relate to one another and how they should be applied to particular situations. Several questions and examples will help to illustrate this point. First, what priority should be given to the inquiries? Suppose the volumes of merchant and captive production sales are significant (the first inquiry), and the domestic like product is not used in the downstream article (the third inquiry). These two factors, considered in isolation, suggest that the merchant and captive production markets should be treated separately. But, suppose also that the second and fourth inquiries yield an affirmative answer, suggesting that the markets are not distinct; what should the ITC do? Second, which producers are relevant to the fourth inquiry? Suppose one auto producer files an antidumping petition against exporters of certain Japanese auto parts. Two other auto producers, but not the first, use a domestic like product from the merchant market in their downstream production of cars. Should the ITC only examine data from the first producer? Finally, does the second inquiry create a *per se* rule? Does any sale of the domestic like product in the merchant market constitute "entry" into that market? Suppose a domestic producer sells its "over-run" production in

518. SENATE REPORT, *supra* note 18, at 55; HOUSE REPORT, *supra* note 18, at 69, *reprinted in* 1994 U.S.C.C.A.N. 3841; MESSAGE, *supra* note 69, at 853.

519. SENATE REPORT, *supra* note 18, at 55; HOUSE REPORT, *supra* note 18, at 69, *reprinted in* 1994 U.S.C.C.A.N. 3841.

520. SENATE REPORT, *supra* note 18, at 55; HOUSE REPORT, *supra* note 18, at 69, *reprinted in* 1994 U.S.C.C.A.N. 3841.

the merchant market to unrelated businesses. Has the steel entered the merchant market?

In sum, a petitioner can exploit the ambiguous terms and nature of the four inquiries to encourage the ITC to artificially narrow its investigation. If the petitioner is successful in this endeavor, the result is an exaggeration of the market share of imports and injury to the financial condition of the affected domestic industry. The traffic-light system proposed in Part V returns to the rule of the earlier law, under which the ITC ignored the distinction between the merchant and captive markets.

D. *Anticircumvention and the Expansion of Protection*

Ambiguous post-Uruguay Round anticircumvention rules allow for the scope of an antidumping order to be expanded to include imported parts. As a result, a U.S. parts manufacturer can obtain undeserved protection from imported parts. In turn, by raising the cost of these parts by the amount of the antidumping duty, such protection unjustly harms U.S. companies that rely on such parts.

Suppose RCA produces portable pagers in the U.S. from components imported from Malaysia.⁵²¹ Suppose also that RCA files an antidumping petition against Sony, who produces pagers in Japan and exports them to the United States. Suppose finally that the DOC issues an antidumping order against Sony covering the pagers. Consider two possible scenarios that could arise after the order: (1) Sony exports pager components to its U.S. subsidiary, Sony-U.S.A., which makes pagers from the components; or (2) Sony exports pager components to a related company in Seoul, Sony-Korea. Sony-U.S.A. then imports pager components from Sony-Korea, as well as from Sony, for use in the production of pagers.

A threshold question in both cases is whether RCA should be entitled to petition the DOC to expand the scope of the original order to cover components even though RCA is not a domestic producer of the components. Both pre- and post-Uruguay Round law both provide an affirmative answer to this question.⁵²² A party

521. This hypothetical is adapted from an antidumping investigation and determination of sales at LTFV. Certain Radio Paging and Alerting Receiving Devices from Japan, 48 Fed. Reg. 36,349 (Dep't Comm. 1983); High-Capacity Pagers from Japan, 48 Fed. Reg. 28,682 (Dep't Comm. 1983) (final determination); High-Capacity Pagers from Japan, 47 Fed. Reg. 40,679 (Dep't Comm. 1982) (initiation).

522. With respect to pre-Uruguay Round law, see Horlick, *supra* note 13, at 156. The Act did not change the prior law on this matter.

with standing to file a petition regarding a finished product but not components, can seek to extend the order to components. To reduce protectionist abuse, the law should be revised to deny standing to RCA and bar it from seeking this result.

The substantive questions raised in both cases further highlight the risk of protectionist abuse. In the first case is Sony circumventing the order by exporting components to the United States for assembly into finished merchandise? In the second case is Sony circumventing the order by causing its U.S. subsidiary to use parts from a third country? The DOC cannot answer either question unless it identifies a minor assembly operation in the United States that permits an exporter to continue dumping finished merchandise by substituting exports of finished merchandise, which are subject to an antidumping order with exports of parts, which are not covered by the order. Put differently, the DOC must distinguish between a minor assembly operation and an instance of a bona fide direct foreign investment made by an exporter in a U.S.-based manufacturing operation that contributes substantial added value to imported parts resulting in finished merchandise.

Prior law was helpful in resolving only the first case. As discussed above, to expand an antidumping order prior law required that a "small" difference exist between the value of parts imported into the United States from a country subject to an antidumping order and the finished product made from those parts.⁵²³ Thus, with respect to the first scenario, the key inquiry would be whether a "small" difference in value exists between the pager components exported by Sony to Sony-U.S.A. and the pagers produced by Sony-U.S.A. Prior law, however, failed to prevent the sort of circumvention suggested in the second case, i.e., the "third-country parts" problem that is encountered when an exporter circumvents an antidumping order by establishing a "screwdriver," or minor assembly operation in the United States that purchases as many parts as possible from a third country.⁵²⁴ In determining whether the difference in value between parts imported from the country subject to the order and the finished product was "small," the DOC could not consider these third-country parts.⁵²⁵

523. See *supra* note 262 and accompanying text.

524. HOUSE REPORT, *supra* note 18, at 102, reprinted in 1994 U.S.C.C.A.N. 3874; MESSAGE, *supra* note 69, at 893.

525. *Smith-Corona Corp. v. United States*, 17 Ct. Int'l Trade 47, 49-51 (1993) (holding that an antidumping order applicable to Japanese portable electronic typewriters (PETs) dumped in the U.S. was not circumvented and that the DOC acted correctly in excluding from its investigation third-country components of the PETs).

Section 230 of the Act now provides help in the second scenario.⁵²⁶ Section 230 addresses the third-country parts problem by requiring the DOC to focus its anticircumvention investigation on two "mandatory factors."⁵²⁷ First, the DOC must determine whether a "minor or insignificant" assembly is occurring in the United States or a third country.⁵²⁸ Second, the DOC must determine the value of parts imported from the country, subject to the order into the United States, or whether a third country is a "significant" portion of the total value of the finished product.⁵²⁹ In brief, section 230 "shift[s] the focus of the anticircumvention inquiry away from a test of the difference in *value* between the subject merchandise and the imported parts or components, towards *nature of the process* performed in the United States or a third country."⁵³⁰

Despite this improvement in the prior law, there are two difficulties with this section. First, section 230 is inconsistent with the Agreement. The Agreement is silent on anticircumvention.⁵³¹ As two practitioners point out, "there is no provision permitting anti-circumvention measures or the imposition of antidumping duties on products which have not been fully investigated and found to be dumped and causing injury."⁵³² Indeed, Article 18.1 of the Agreement forbids a WTO member from taking action against

526. Act, *supra* note 23, § 230, 108 Stat. at 4891 (codified at 19 U.S.C. § 1677j(b)(1)(C)-(D) (1994)).

527. MESSAGE, *supra* note 69, at 893.

528. *Id.*

529. *Id.* Section 230 of the Act retains the requirement that before expanding the scope of an antidumping order to include imported parts, the DOC must consider whether: (1) there are changes in the pattern of trade regarding the sourcing of parts to produce the finished product; (2) the producer of the finished product subject to the order is related to the U.S. or third-country assembler; and (3) imports of parts from the country subject to the order into the United States or a third country have increased after the investigation that led to the original order. *See id.* at 894; SENATE REPORT, *supra* note 18, at 82; HOUSE REPORT, *supra* note 18, at 101, *reprinted in* 1994 U.S.C.C.A.N. 3873.

530. SENATE REPORT, *supra* note 18, at 81-82.

531. *See* SENATE REPORT, *supra* note 18, at 80. The Uruguay Round Ministerial Decision (Decision) recognizes the "problem" of circumvention and the desirability of having *uniform* rules on anticircumvention as soon as possible. *See* MESSAGE, *supra* note 69, at 819. This decision does not provide a foundation for section 230. The Decision is reprinted in MESSAGE, *supra* note 69, at 1694. The December 20, 1991, Dunkel Draft of the Agreement contained provisions that the United States regarded as weak. The United States successfully persuaded other contracting parties to delete these provisions from the final Agreement. MESSAGE, *supra* note 69, at 819. For a critique of the Dunkel Draft, see Gary N. Horlick, *How the GATT Became Protectionist*, 27 J. WORLD TRADE 5 (1993).

532. Horlick & Shea, *supra* note 20, at 28; *see also* Holmer et al., *supra* note 23, at 499-500 (noting the inconsistency of the U.S. government's interpretation of the Decision and its obligations under Article VI of the 1947 GATT and the Agreement).

dumping except in accordance with the Agreement.⁵³³ Furthermore, Article VI of the 1947 GATT provides that antidumping duties cannot be imposed without a finding of dumping and injury with respect to a like product from the country subject to investigation.⁵³⁴ Thus, section 230 is a unilateral modification, without foundation in the Agreement, of U.S. anticircumvention rules.

Second, the statutory language utilizes but does not define critical terms. What assembly operation is "minor or insignificant?" What value of imported parts is "significant?" For example, with respect to the first mandatory factor, section 230 lists a number of variables the DOC may consider in deciding whether an assembly operation is "minor or insignificant."⁵³⁵ These variables include the levels of investment, research, and development; the nature of the production process; the extent of production facilities; and whether the value of the processing performed in the United States is a "small" proportion of the value of finished merchandise sold in the United States.⁵³⁶ No hierarchy among or weighing system for these variables is suggested; the DOC must proceed on a case-by-case basis.

As another example, with respect to the second mandatory factor, the legislative history of section 230 indicates Congress did not "intend to replace one problematic test—the 'small' value test—with another."⁵³⁷ Ironically, this result is not avoided because it is no easier to define "significant" than "small." No quantitative test is established to determine when the value of import parts is a "significant" portion of the total value of finished merchandise. While a bright-line test was rejected in order to preserve the DOC's flexibility, the result is that it is now necessary for an uncertain case-by-case adjudication.⁵³⁸ What is clear, however, is the legislature's goal of enhancing the ability of a petitioner to expand an antidumping order. The legislative history indicates that Congress "expects and intends that the new standard will be less difficult to meet, thereby improving our ability to prevent circumvention."⁵³⁹

533. Agreement, *supra* note 19, at 22.

534. GATT, *supra* note 2, art. VI, 61 Stat. at A3, A23, 55 U.N.T.S. at 188, 212.

535. Act, *supra* note 23, § 230, 108 Stat. at 4891 (codified at 19 U.S.C. § 1677j (1994)).

536. *Id.* § 230, 108 Stat. at 4892; *see also* MESSAGE, *supra* note 69, at 893; SENATE REPORT, *supra* note 18, at 82; HOUSE REPORT, *supra* note 18, at 101, *reprinted in* 1994 U.S.C.C.A.N. 3873.

537. SENATE REPORT, *supra* note 18, at 82.

538. *Id.*; HOUSE REPORT, *supra* note 18, at 101, *reprinted in* 1994 U.S.C.C.A.N. 3873.

539. SENATE REPORT, *supra* note 18, at 82.

In sum, the Act may have gone beyond the bounds of the Agreement. In any event, the Act's mandatory factors do not qualify as rigorous tests for deciding when to expand the scope of an antidumping order or protection to cover imported parts or merchandise. One solution would be to use quantitative tests for defining "minor or insignificant" assembly operations and "significant" added value to provide greater discipline. An alternative solution, suggested in the proposed traffic-light system, is to treat the suggestion of expanding any extant order as a new case and require new dumping margin and injury determinations.

E. *Reviewing an Order*

1. The Irony of Sunset Reviews

Traditionally, the United States has revoked only a small number of outstanding antidumping orders and has done so only after they have been in effect for a long period of time.⁵⁴⁰ As two practitioners point out,

[b]etween January 1, 1980 [sic] and July 31, 1994, a total of 533 antidumping and countervailing duty orders had been, at some time, placed into effect. During this same period of time, 162 orders (30.39%) were revoked. The average period of time a revoked duty order remained in effect was 8.28 years.⁵⁴¹

Another observer's results were even more startling: "Over ninety percent of all companies convicted of dumping since 1980 are still restricted by dumping orders."⁵⁴² Reviewing and revoking an order raises two competing concerns:

On the one hand, the purpose of an antidumping order is to provide relief from imported goods that are unfairly competing in one's domestic market. Once domestic industry has proven its case—that the goods are being dumped and the dumping injures or threatens injury to a U.S. industry—the order and resulting duty should remain in effect during the existence of that conduct. It is an expensive and time-consuming exercise to go from allegation to order, both for the parties and for the administrative agencies charged with determining whether the allegations are true. This first view reflects the concern that once the domestic industry has proven that it is, in fact, injured by dumping or subsidies, it should not be asked to reprove its case.

540. See Barbara R. Stafford & Linda S. Chang, *The Sunset Provisions, Mortality and the Uruguay Round*, in THE COMMERCE DEPARTMENT SPEAKS ON INTERNATIONAL TRADE AND INVESTMENT 1994, 721, 727 n.12 (PLI 1994).

541. *Id.* (emphasis added).

542. BOVARD, *supra* note 1, at 140.

On the other hand, an order and the ensuing duty should not remain in place for any longer than necessary. It is blatantly unfair to keep an order in effect, whether by design or inertia, when it is no longer needed. As with many of the issues addressed in the Uruguay Round, the approach to the sunset issue preferred by individual GATT member states was based on whether their principal concerns were anxiety over placing an undue burden on injured domestic parties, or vexation with an unnecessary and, therefore, unfair encumbrance on exporters.⁵⁴³

Article 11.3 of the Agreement purports to balance these competing concerns by mandating, pursuant to a provision known as the "sunset" rule,⁵⁴⁴ the termination of an order no later than five years from the date of its imposition.⁵⁴⁵ The sole exception to the sunset

543. Stafford & Chang, *supra* note 540, at 729-30.

544. Act, *supra* note 23, § 220(a), 108 Stat. at 4859 (codified at 19 U.S.C. § 1675(a)(3)(A) (1994)).

545. The sunset review, as well as the "new shipper" review discussed in the next section, should not be confused with a "normal" administrative review or a "changed circumstances" review.

Under pre-Uruguay Round law almost all antidumping orders were subject to a normal administrative review within one year from the date they were issued. 19 U.S.C. § 1675(a) (1988). Upon request of an interested party, the DOC calculated final liability for an antidumping duty on an entry of merchandise subject to an order. SENATE REPORT, *supra* note 18, at 43. The amount calculated during the investigation phase was thereby regarded as an estimate. The DOC revoked the order if it concluded that: (1) one or more producers subject to the order had not sold merchandise at LTFV for three consecutive years; (2) it is unlikely that they will sell their merchandise at LTFV in the future; and (3) they agree to reinstatement of the order should they resume LFTV sales. 19 U.S.C. § 1675(c) (1988); 19 C.F.R. § 353.25(a) (1995). See, e.g., Antifriction Bearings (other than Tapered Roller Bearings) and Parts Thereof from France, 60 Fed. Reg. 10,900 (1995) (notice of final administrative review).

Article 9.3.1 of the Agreement establishes deadlines for an administrative review; normally 12 months and in no case more than 18 months. MESSAGE, *supra* note 69, at 1466. Section 220(a) of the Act implements these deadlines. Act, *supra*, note 23, § 220(a), 108 Stat. at 4859 (codified at 19 U.S.C. § 1675(a)(3)(A) (1994)).

With respect to a "changed circumstances" review, under pre-Uruguay Round law, an interested party not only had to request the review but also show there were "changed circumstances sufficient to warrant a review." 19 U.S.C. § 1675(b)(1) (1988). A decision by the DOC as to whether this standard is met was not subject to judicial review. AOC Int'l Proton Elec. Indus. Co. v. United States, No. 93-06-00341, 1993 Ct. Intl. Trade LEXIS 238, at *9-12 (Ct. Intl. Trade Dec. 22, 1993). If an interested party made the requisite showing, the DOC recalculated FMV, USP, and the dumping margin. 19 U.S.C. § 1675(b)(2) (1988). A changed circumstances review of a final determination by the DOC and ITC could not be made within two years of the date of the determination. 19 U.S.C. § 1675(b)(4) (1988); see also OVERVIEW, *supra* note 30, at 70 (stating that no review may occur within 24 months of notice of final determination without good cause).

In connection with a changed circumstances review, Article 11.2 of the Agreement requires the appropriate authority to determine whether dumping and injury would be likely to continue or recur if the antidumping order were revoked. Agreement, *supra* note 19, at 17. Section 220(a) implements this requirement. Agreement, *supra* note 19, at 17;

rule occurs when the appropriate authority—the DOC—as a result of a review it initiates or a review initiated by an interested party, concludes that termination “would be likely” to lead to a continuation or recurrence of dumping and injury. This ambiguous exception brings to the fore the failure of Article 11.3 to successfully balance the competing concerns raised in the above-quoted passage. Ironically, a sunset review is *unlikely* to lead to revocation.

The irony of the ineffectiveness of Article 11.3 is suggested by two subtleties in sections 220(a) and 221(a) of the Act, which implement Article 11.3.⁵⁴⁶ First, an antidumping duty may remain

SENATE REPORT, *supra* note 18, at 44-45; HOUSE REPORT, *supra* note 18, at 55-56, *reprinted in* 1994 U.S.C.C.A.N. 3827-28; MESSAGE, *supra* note 69, at 878.

Under pre- and post-Uruguay Round law, revocation of an antidumping order may also result from a review initiated by the DOC without the request of any party. If the DOC determines that an order is no longer of interest to any party or that other changed circumstances warrant revocation, it will initiate a review. 19 C.F.R. § 353.25(d) (1995). Lack of interest is demonstrated by an affirmative statement of a petitioner or the absence of a request for a review for four years (which, in essence, means that five annual review periods have transpired). In practice, any unsupported statement of interest would prevent revocation.

Neither the Agreement nor the Act correct three key problems with administrative and changed circumstances reviews—their cost, scope, and attendant burdens of proof. These problems are inherent biases against commencing a review and lifting an order. First, because these reviews are triggered only upon request of an interested party, the mechanism “uses the transaction cost of participation in a proceeding as the criterion for deciding whether a review will be conducted.” Horlick, *supra* note 13, at 128. Theoretically, the DOC could initiate an administrative review, but it rarely does so. *Id.* at 129. The price tag for revocation can exceed \$100,000. *Id.*

Second, “[i]n practice a respondent can only request review of the order to the extent it itself is covered,” whereas “[a] domestic petitioner can request a review of all companies specifically named in the order, as well as any new entrants or other companies specifically named.” *Id.* at 128-29. A petitioner could cause an antidumping duty on several companies to be raised, whereas a respondent could cause only the duty it owes to decrease. Arguably, a respondent should be able to trigger a review of all respondents—even though some may be its competitors—that are covered by an order.

Third, the burden of persuasion rests on the party seeking revocation of an order. For example, a petitioner need not show that dumping and injury persist; rather, a respondent must prove that there are changed circumstances sufficient to warrant a review. This burden reflects a “guilty until proven innocent” approach.

546. Act, *supra* note 23, §§ 220(a), 221(a), 108 Stat. at 4857, 4865 (codified at 19 U.S.C. §§ 1675(a), 1675a (1994)). In one sense, the sunset rule is consistent with prior law. Under pre-Uruguay Round DOC regulations, the DOC could revoke an order if there had been no request for review of that order for four years. 19 C.F.R. § 353.25(d)(4) (1995); *see supra* note 544. However, in two respects, the sunset rule is inconsistent with prior law.

First, there was no such rule in the 1930 Act. SENATE REPORT, *supra* note 18, at 33; HOUSE REPORT, *supra* note 18, at 56, *reprinted in* 1994 U.S.C.C.A.N. 3828; *see also* Horlick, *supra* note 13, at 129 (explaining that the United States previously did not have a sunset rule for dumping). Under prior law antidumping duties were imposed as long as dumping or injury continued. Indeed, the failure of the United States to review antidumping orders was a source of concern throughout the GATT negotiations. *See* 2 THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992), at 1424-25 (Terrence P. Stewart ed., 1993).

in force pending the outcome of a sunset review, which may take one year.⁵⁴⁷ Interestingly, under pre-Uruguay Round law, time lim-

Under an Executive Order issued pursuant to the Trade Agreements Act of 1979, authority for calculating dumping margins and issuing orders was transferred in 1980 from the Department of the Treasury to the DOC. *See* Reorg. Plan No. 3 of 1979, §§ 2(a), 5(a)(1)(C), 3 C.F.R. §§ 513-515 (1979), *reprinted in* 5 U.S.C. app. at 1590 (1994); Exec. Order No. 12,188, 3 C.F.R. 131, 135 (1980). The Treasury regulations called for modification or revocation of an order, either upon request of a party or on the initiative of the secretary of the Treasury, if there was a change in circumstances. *See* 19 C.F.R. § 153.41(a)-(b) (1975). Section 751(a) of the 1979 Act called for the DOC to undertake annual reviews of all antidumping orders. This requirement imposed an unnecessarily heavy burden on the DOC that was alleviated by the Trade and Tariff Act of 1984. As a result of the 1984 Act, reviews were conditioned upon request. *See* 19 U.S.C. § 1675(a)(1) (1984); *see also* HOUSE SUBCOMM. ON TRADE, HOUSE COMM. ON WAYS AND MEANS, 98TH CONG., 2D SESS., REPORT ON H.R. 4784 TRADE REMEDIES REFORM ACT OF 1984 16 (Comm. Print 1984) (stating purpose of conditional reviews).

Second, under prior law the ITC could notify the DOC of its determination that circumstances in the affected market or industry had changed so significantly that injury was unlikely to recur if an order were revoked. 19 C.F.R. §§ 207.45(a), (c) (1995). In turn, the DOC could revoke the order. The burden of proof rested on an exporter engaged in dumping to show that injury would not recur and, therefore, revocation was justified. The Agreement shifts that burden from the respondent to the DOC. This shift has caused one practitioner to suggest that the sunset rule weakens U.S. antidumping law because it is easier than under prior law for the respondent to obtain revocation. *See* Stein, *supra* note 278, at 890-91. This suggestion is disputed above.

547. Article 11.4 specifies that a sunset review normally should be completed within one year of its commencement. Agreement, *supra* note 19, at 17. Normally, the DOC will complete its review within 240 days and the ITC will complete its review within 360 days. 19 U.S.C. § 1675(c)(5) (1994); SENATE REPORT, *supra* note 18, at 46; HOUSE REPORT, *supra* note 18, at 57, *reprinted in* 1994 U.S.C.C.A.N. 3829; MESSAGE, *supra* note 69, at 881. Depending on the amount of interest in a sunset review, measured by submissions from companies in the relevant domestic industry, exporters, and the exporters' government, the DOC and the ITC may decide not to conduct a full-fledged sunset review. Indeed, if there is no interest, no review is conducted and the order is revoked automatically. *See* MESSAGE, *supra* note 69, at 879-81. In addition, if an antidumping order was not revoked after a previous sunset or changed circumstances review, a sunset review must be conducted within five years of that prior order. *See* HOUSE REPORT, *supra* note 18, at 58, *reprinted in* 1994 U.S.C.C.A.N. 3830.

When the Act took effect on January 1, 1995, there were approximately 400 orders eligible for review on the ground that they had been in effect for at least five years. *See id.* The Agreement contains a "procrastination" provision to deal with these transition cases. Article 18.3.2 allows WTO Members to treat all orders in effect on the date the Agreement enters into force as if they had been issued on the date of entry into force. Agreement, *supra* note 19, at 22. Thus, there will be no sunset review revocation for five years from the date of enactment. To ensure timely completion of reviews of a backlog of over 400 transition cases, the DOC and the ITC will start the reviews 18 months before this date and complete them within 18 months after this date. *See* SENATE REPORT, *supra* note 18, at 47; HOUSE REPORT, *supra* note 18, at 58, *reprinted in* 1994 U.S.C.C.A.N. 3830; MESSAGE, *supra* note 69, at 882; Stafford & Chang, *supra* note 540, at 742. In addition, section 220(a) of the Act indicates that sunset reviews may take up to 18 months. Act, *supra* note 23, § 220(a), 108 Stat. at 4863 (codified at 19 U.S.C. § 1675(c)(6) (1994)). In summary, with respect to transition cases, the United States took advantage of the flexible language in Article 11.4, which provides that a sunset review "normally" should be completed within 12 months of

its for annual reviews were hortatory, not mandatory.⁵⁴⁸ Some "annual" reviews have dragged on for ten years, in part because of the backlog of reviews that the DOC inherited from the Department of the Treasury.⁵⁴⁹ Courts have adopted this approach to sunset reviews, thereby stretching out the review process. Second, section 220(a) and its legislative history state that the DOC and the ITC must conduct a sunset review "after" five years from the imposition of an order.⁵⁵⁰ Article 11.3, however, uses the phrase "not later than five years from" the imposition of an order. While post-Uruguay Round U.S. law is not inconsistent with Article 11.3, it does take advantage of the outermost permissible limit.⁵⁵¹

The substantive standard for sunset reviews allows the DOC and the ITC to render likelihood determinations that are susceptible to protectionist abuse. The DOC must determine whether the revocation of an outstanding antidumping order "would be likely" to lead to a continuation or recurrence of dumping within a reasonably foreseeable time.⁵⁵² Similarly, the ITC must decide whether revocation of the order "would be likely" to result in continued or recurring material injury within a reasonably foreseeable time.⁵⁵³ It is impossible to determine with precision what will happen if an order is revoked. Applying the "likelihood" standard entails making a predictive determination which is speculative and plagued with ambiguity.⁵⁵⁴

the date of its initiation. The United States viewed its situation as abnormal because of the large volume of transition cases. For nontransition cases, sunset reviews will begin 30 days before the expiration of the five-year period and will be completed within one year. Stafford & Chang, *supra* note 540, at 745.

548. See *supra* note 547.

549. For example, in one case concerning import entries of tapered roller bearings from Japan during 1974-1979, the DOC did not issue the final results of its annual review until June 1990. *Koyo Seiko Co. v. United States*, 20 F.3d 1160, 1163 (Fed. Cir. 1994).

550. Act, *supra* note 23, § 220(a), 108 Stat. at 4861 (codified at 19 U.S.C. § 1675(c)(1) (1994)); SENATE REPORT, *supra* note 18, at 45.

551. See HOUSE REPORT, *supra* note 18, at 56, *reprinted in* 1994 U.S.C.C.A.N. 3828. There may be a third subtlety to sections 220(a) and 221(a) of the Act. Because it may be simple and inexpensive to request a sunset review, a petitioner is likely to do so.

552. MESSAGE, *supra* note 69, at 883, 889-91.

553. *Id.* at 883; SENATE REPORT, *supra* note 18, at 48; HOUSE REPORT, *supra* note 18, at 59-60, *reprinted in* 1994 U.S.C.C.A.N. 3831-32. This standard must be distinguished from that applied by the ITC in material injury and threat determinations. In the former situation the ITC looks for current material injury by reason of dumped imports. In the latter situation the ITC looks for imminent material injury. *Id.* at 60.

554. See MESSAGE, *supra* note 69, at 883; HOUSE REPORT, *supra* note 18, at 59, *reprinted in* 1994 U.S.C.C.A.N. 3831; see also, *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (stating that a likelihood determination in a changed circumstances review is "inherently predictive").

Consider the DOC's "likelihood" determination. The Agreement offers no guidance on calculating the likelihood of future dumping; thus, the matter is left to each WTO member. One solution might be to calculate a future margin based on estimated future prices in the exporting and importing countries' markets. The DOC rejected this formula and decided to rely on its original dumping calculation, "as that would be indicative of respondents' behavior without the discipline of an order."⁵⁵⁵ But this decision presumes past actions are a reliable indicator of future behavior and ignores the possibility that supervening events may cause an exporter to dramatically alter its behavior.

For instance, the factors the DOC examines in making its likelihood determination under section 221(a) of the Act are

the relationship between dumping margins, or the absence of margins, and the volume of imports of the subject merchandise, comparing the periods before and after the issuance of an order For example, *declining import volumes accompanied by the continued existence of dumping margins after the issuance of an order may provide a strong indication that, absent an order, dumping would be likely to continue*, because the evidence would indicate that the exporter needs to dump to sell at pre-order volumes. In contrast, declining (or no) dumping margins accompanied by steady or increasing imports may indicate that foreign companies do not have to dump to maintain market share in the United States and that dumping is less likely to continue or recur if the order were revoked.⁵⁵⁶

Declining import volumes or the existence of dumping margins after an order may not be probative of the likelihood of continued or recurred dumping. Declines could result from cyclical economic factors in the United States, such as a recession; from changes particular to the exporter, such as a shift in export strategy (a decision to export a lower volume of goods to the United States and a higher volume of goods to another importing country); or from a change in costs, such as an increase in wages, leading to lay-offs

A related avenue for protectionist abuse may exist when the DOC deems a response to its notice of initiation of a sunset review "inadequate." Act, *supra* note 23, § 220(a), 108 Stat. at 4862 (codified at 19 U.S.C. § 1675(c)(3)(B) (1994)). In such a case the DOC may make a determination on the basis of facts available. This determination is subject only to a relaxed standard of review by the Court of International Trade. 19 U.S.C. § 1516a(b)(1)(B)(ii) (1994).

555. Stafford & Chang, *supra* note 540, at 747; see also MESSAGE, *supra* note 69, at 890 (stating that a company that dumps despite an order would likely continue to dump if the order were removed).

556. MESSAGE, *supra* note 69, at 889-90 (emphasis added); 19 U.S.C. § 1675a(c) (1994); SENATE REPORT, *supra* note 18, at 52; HOUSE REPORT, *supra* note 18, at 63, reprinted in 1994 U.S.C.C.A.N. 3835.

and the closure of a production facility. Similarly, the persistence of a dumping margin after an order has been issued could result from changes in conditions in the exporter's home market, such as an increase in prices caused by inflation which would result in an increase in NV; a change in exchange rates, such as an appreciation of the exporter's home currency relative to the U.S. dollar which would result in an increase in NV; or a change in the U.S. market, such as increased market competition resulting in a lower export price.⁵⁵⁷ Nevertheless, there is a built-in bias against an exporter based on its preorder behavior.⁵⁵⁸ The onus is put squarely on the exporter to prove that declining import volumes and dumping margins are not indicative of the likelihood of a continuation or recurrence of dumping. The exporter remains guilty until it proves its innocence.⁵⁵⁹ Not surprisingly, some practitioners "expect that in practice the [DOC] will be very likely to find that dumping is likely to continue or recur in almost every sunset review."⁵⁶⁰

Furthermore, the ITC's likelihood analysis makes a change in the status quo unlikely. While section 221(a) of the Act articulates specific factors that the ITC must consider,⁵⁶¹ the ITC's likelihood determination remains "inherently speculative" and calls for "predictive inquiries [which] may suggest a number of possible outcomes."⁵⁶² Like the DOC, the ITC assumes the role of a soothsayer

557. MESSAGE, *supra* note 69, at 890.

558. See *id.* at 889-90.

559. Still another example of this conclusion is a provision in section 221(a) on the magnitude of the dumping margin. The size of the dumping margin calculated by the DOC in the original investigation may be used by the ITC to decide whether there is a likelihood of material injury. See Act, *supra* note 23, § 221(a), 108 Stat. at 4868 (codified at 19 U.S.C. § 1675a(c)(3) (1994)). Hence, the exporter is encumbered by its past behavior with respect to both the DOC and ITC likelihood determinations. To be sure, section 221(a) allows the DOC to consider other information like price, cost, market, or economic factors that the DOC deems relevant. However, it will do so only "[i]f good cause is shown." *Id.*

560. POWELL, GOLDSTEIN, FRAZER & MURPHY, UPDATE OF ANALYSIS OF HOUSE WAYS AND MEANS COMMITTEE REPORT 1 (OCT. 1994) (on file with *The George Washington Journal of International Law and Economics*).

561. Act, *supra* note 23, § 221(a), 108 Stat. at 4865-67 (codified at 19 U.S.C. § 1675a(a) (1994)).

562. SENATE REPORT, *supra* note 18, at 47-48. The likelihood of material injury standard is applicable and the same factors are considered, regardless of whether the ITC's initial affirmative determination concerned material injury, threat of material injury, or material retardation of an industry. MESSAGE, *supra* note 69, at 883; SENATE REPORT, *supra* note 18, at 48. In addition to the factors discussed below, section 221(a) calls for the ITC to consider duty absorption (i.e., whether an importer affiliated with an exporter of dumped merchandise pays the antidumping duty after imposition of an order, rather than eliminating the dumping in order to insulate the first unrelated buyer in the United States from the effects

when it considers the question of how an exporter might respond if the order to which it has been subject is lifted. Specifically, the ITC evaluates whether removal of an order would be likely to result in a significant increase of the following: (1) in the volume of imports; (2) in price underselling and consequent price suppression or depression with respect to a domestic like product; and (3) in impact on the domestic industry.⁵⁶³ Some of the evaluative factors, which are set forth in section 221(a) of the Act, plainly discourage the ITC from revoking an order.⁵⁶⁴

For example, the ITC considers whether the state of the relevant domestic industry has improved during the pendency of the order.⁵⁶⁵ This factor should cause the ITC to determine whether the industry has taken measures, such as reducing costs and investing in new technology, to meet foreign competition. Instead, the legislative history urges the ITC to maintain an order to protect a U.S. industry.

[T]he ITC [is required] to consider whether any improvement in the state of the industry is related to the existence of the order The Committee believes that this is an important inquiry. An antidumping . . . order . . . is expected to have a beneficial effect on the domestic industry. The Committee does *not*, therefore, believe that the ITC should find that there is no likelihood of continuation or recurrence of material injury simply because the industry has improved after an order was imposed Moreover, *an improvement in the condition of the industry after an order is imposed . . . may indicate that the industry is likely to deteriorate if the order is revoked . . .*.⁵⁶⁶

The legislative history also suggests that the ITC may make an affirmative likelihood determination without data showing that the current state of the relevant domestic industry is likely to deteriorate if the order is lifted.⁵⁶⁷ This factor invites the ITC to confuse correlation and causation. The ITC may conclude that if the domestic industry improves during the order period, then "termi-

of the order) and the magnitude of the dumping margin. SENATE REPORT, *supra* note 18, at 49, 51.

563. SENATE REPORT, *supra* note 18, at 50-51; *see also* HOUSE REPORT, *supra* note 18, at 60, *reprinted in* 1994 U.S.C.C.A.N. 3842 (comparing the continuing material injury standard and current material injury standard).

564. *See* SENATE REPORT, *supra* note 18, at 50.

565. *See id.* at 48.

566. *Id.* at 49 (emphasis added).

567. The legislative history states that the ITC may make an affirmative likelihood determination "*notwithstanding the lack of any likely further deterioration of the current condition of the domestic industry if revocation of the order . . . would be likely to lead to the continuation or recurrence of material injury.*" *See* HOUSE REPORT, *supra* note 18, at 60, *reprinted in* 1994 U.S.C.C.A.N. 3832 (emphasis added); MESSAGE, *supra* note 69, at 884.

nation of the order would result in continuing or recurring injury.”⁵⁶⁸ Such a conclusion may be erroneous because the improvement may be attributable to factors other than the order, such as a change in market conditions during the order period.

Vulnerability of the U.S. industry is another factor that discourages revocation. The indicia of “vulnerability” are not set forth in the Act, but generally the term connotes susceptibility to material injury.⁵⁶⁹ It does not matter if the industry is vulnerable because of past dumping or poor management, mere vulnerability is sufficient.⁵⁷⁰ Thus, the ITC can renew an order where the cause of the weakening of a domestic industry is not principally attributable to imports.⁵⁷¹ Equally irrelevant is the fact that causes other than future imports may contribute to future injury.⁵⁷² Consequently, the ITC may renew an order if the likely causes of future injury to a vulnerable industry are economic recession and technological change.

Finally, the DOC and the ITC likelihood determinations share common ambiguities. For instance, how far into the future should

568. Stafford & Chang, *supra* note 540, at 749. The legislative history states that [t]he ITC's prior injury determination] is an important consideration since this is the most recent period in which imports of the merchandise under review competed in the U.S. market free of the discipline of an order . . . [and that] if the ITC finds that the conditions that led to the initial finding of material injury, threat, or material retardation are likely to recur, it would be reasonable for the ITC to conclude . . . that there is a likelihood of continuation or recurrence of material injury.

SENATE REPORT, *supra* note 18, at 48.

569. SENATE REPORT, *supra* note 18, at 49; MESSAGE, *supra* note 69, at 885.

570. The legislative history states that

the concept of “vulnerability” is derived from existing standards for material injury and threat of material injury. In material injury determinations, the ITC considers other factors These other factors may account for the injury, but they may also demonstrate that an industry is facing difficulties from a number of sources and is vulnerable to dumped . . . imports.

SENATE REPORT, *supra* note 18, at 49.

571. Stafford & Chang, *supra* note 540, at 750.

572. MESSAGE, *supra* note 69, at 885. Another factor arises in a sunset review of a case involving an order affecting a regional U.S. industry. Section 221(a) gives the ITC discretion to base its sunset review on its original injury determination for a particular regional industry. If the original determination is no longer valid, the ITC may redefine the region or examine the United States as a whole. Act, *supra* note 23, § 221(a), 108 Stat. at 4865 (codified at 19 U.S.C. § 1675a(a)(8) (1994)); SENATE REPORT, *supra* note 18, at 51. This flexibility allows the ITC to account for the potential effects on marketing and distribution of a dumped good after imposition of an order. SENATE REPORT, *supra* note 18, at 51. This discretion, however, allows the ITC to switch petitioners and thereby reincarnate an obsolete order. This discretion is potentially incongruous with the fundamental purpose of sunset reviews. For instance, if an original determination applicable to producers in Virginia becomes obsolete, the ITC should not be able to reincarnate the order by considering Alabama producers.

the DOC and the ITC look in an attempt to assess the likelihood of a continuation or recurrence of dumping? The unsatisfactory answer found in the legislative history to section 221(a) is for "the reasonably foreseeable future."⁵⁷³ What if there are several "likely" outcomes upon revocation? The legislative history of section 221(a) of the Act lacks a relative weighing system for different outcomes. Section 221(a) merely indicates that a decision to retain an order is not erroneous where there are several "likely" outcomes, as long as the likelihood determination is "reasonable in light of the facts of the case."⁵⁷⁴

In conclusion, the sunset review process resembles the midnight sun. The DOC and the ITC likelihood determinations associated with the sunset review process are, ironically, unlikely to lead to an improvement in the United States's record of revoking orders, since more orders may be renewed than revoked on their fifth anniversary. To prevent the entrenchment of orders, the proposed traffic-light system in Part V requires automatic termination of an order after one year.

2. The Presumption of New Shipper Guilt

Unfortunately, during the Uruguay Round negotiations the United States rejected as unreasonable a proposal that exempted new shippers.⁵⁷⁵ The proposal required a new investigation before imposing an antidumping duty on a new shipper.⁵⁷⁶ The United States, however, agreed to a proposal, embodied in Article 9.5 of the Agreement⁵⁷⁷ and implemented by section 220(a) of the Act, that provides a new shipper with an expedited review to establish an individual dumping margin on the basis of that shipper's own sales.⁵⁷⁸

573. MESSAGE, *supra* note 69, at 883. With respect to the ITC's likelihood determination, this period normally exceeds an "imminent" time frame which it uses in its initial threat of material injury analysis. *Id.* at 887.

574. *Id.* at 883.

575. Section 220(a) of the Act defines a "new shipper" as an exporter who did not export the merchandise in question to the United States during the original period of the antidumping investigation and is not affiliated with any exporter who did export the merchandise to the United States during that period. Act, *supra* note 23, § 220(a), 108 Stat. at 4866 (codified at 19 U.S.C. § 1675(a)(2)(B)(i) (1994)).

576. MESSAGE, *supra* note 69, at 875.

577. Agreement, *supra* note 19, at 15.

578. Act, *supra* note 23, § 220(a), 108 Stat. at 4858-59 (codified at 19 U.S.C. § 1675(a)(2)(B) (1994)); SENATE REPORT, *supra* note 18, at 43-44; HOUSE REPORT, *supra* note 18, at 55, *reprinted in* 1994 U.S.C.A.N. 3827.

The new shipper review rule suffers from a conceptual weakness. Automatically covering a new shipper in an antidumping order results in an order which is overly broad in scope; a new shipper is initially presumed guilty of dumping and a petitioner is initially presumed worthy of protection from that new shipper. The rule also suffers from practical defects. A new shipper review may impose significant monetary and time costs on a new shipper. Article 9.5 states that antidumping duties cannot be imposed on a new shipper's products during the period of review.⁵⁷⁹ Under the 1930 Act a new shipper paid estimated antidumping duty deposits.⁵⁸⁰ The legislative history of the current Act indicates that cash deposits, bonds, or other security can be posted, at the importer's option, until the review is completed.⁵⁸¹ Undoubtedly, posting a bond is less costly than depositing cash; however, a new shipper still incurs the cost of a lost opportunity when required to purchase a bond. Further, it is unclear how long an "accelerated" review will take. A reasonable estimate, based on the DOC's past performance and the fact that there is no mandatory date for completion, is at least one year. The effect of the rule may be to discourage new shippers facing an antidumping duty from exporting to the United States, thereby making the industry less competitive and making consumers worse off. To avoid these defects, the traffic-light system proposed in Part V eliminates the automatic extension of an order to a new shipper and requires a new investigation before an order can be imposed on that shipper.

V. TOWARD A TRAFFIC-LIGHT SYSTEM

Both in the United States and elsewhere, antidumping laws go beyond preventing anti-competitive practices—which *should* be their rationale—and often have the effect of protecting domestic industries from foreign competition.⁵⁸²

A. System Overview

Part IV argued that ambiguities in the Agreement and the Act, coupled with a neglect of fundamental microeconomic principles, facilitate protectionist abuse. What should the Uruguay Round negotiators have done? First, the negotiators should have placed

579. Agreement, *supra* note 19, at 15.

580. 19 C.F.R. §§ 353.14, 353.15 (1995). The deposit amounts are based on "all others" rates.

581. SENATE REPORT, *supra* note 18, at 44.

582. ECONOMIC REPORT OF THE PRESIDENT 239 (Feb. 1994).

greater emphasis on certainty and predictability; they should have made greater use of bright-line rules and clearly defined terms and phrases to curtail opportunities for protectionist abuse. Second, the negotiators should have paid more attention to the underlying microeconomic rationales for cross-border price discrimination, rather than focusing on the mere act of such discrimination. The negotiators should have attempted to classify the behavior of an exporter according to its cost structure and based on this classification, they should have narrowed the range of actionable dumping situations.

These prescriptions suggest parameters for a new antidumping scheme that would be less susceptible to protectionist abuse. A proposal for such a scheme—the “traffic-light” system—is offered below. The system is akin to that established for countervailing duty law in the 1994 Uruguay Round Agreement on Subsidies and Countervailing Measures.⁵⁸³ It outlaws only predatory dumping that is a substantial cause of material injury; it limits the duration of an antidumping order; and it eliminates anticircumvention rules. The system, therefore, is simpler and less susceptible to abuse than the system set out under the Agreement and the Act.

B. *System Theory*

The microeconomic theory underlying the traffic-light system is the cost structure of a firm. The theory is graphically represented at Appendix B.⁵⁸⁴ The total cost of production a firm incurs rises as the quantity of output produced by that firm increases.⁵⁸⁵ Total cost is defined as the sum of fixed and variable costs.⁵⁸⁶ Fixed costs arise from short-run contractual commitments, such as wages and salaries, rental and lease payments, interest on outstanding debt,

583. See Agreement on Subsidies and Countervailing Measures, Dec. 15, 1993, Hein's No. KAV 3778; MESSAGE, *supra* note 69, at 1533. The traffic-light proposal might also result in a closer alignment between antidumping law and antitrust law on predatory pricing.

Interestingly, in 1923, Viner proposed a tripartite system. He distinguished among three different kinds of dumping: sporadic, short-run, and long-run dumping. Viner argued that firms can adapt to sporadic dumping and long-run dumping leads to gains for consumers that outweigh losses to producers in the importing country. However, short-run dumping was predatory—the exporter might intentionally undercut producers of the like product in the importing country to drive them out of business, establish a monopoly, recoup its losses from dumping, and earn monopoly rents. Thus, short-run dumping should be actionable in order to protect consumers in the importing country. See Hoekman & Leidy, *supra* note 28, at 160 n.13 and accompanying text.

584. The discussion below is drawn in part from SAMUELSON, *supra* note 53, at 427-32, 439-46.

585. *Id.* at 439-40.

586. *Id.* at 440-42.

and depreciation.⁵⁸⁷ Even if a firm halts production, it must continue to meet these obligations. Fixed costs, therefore, are expenses incurred even with zero output.⁵⁸⁸ As output rises, average fixed costs fall.⁵⁸⁹ Variable costs consist of that portion of total costs other than fixed costs. Variable costs equal zero when no output is produced and increase as the level of output increases. Average variable costs decrease as output increases because of economies of scale in production and the pattern of marginal costs. Later, when these economies of scale are exhausted, average variable costs will rise as output increases.⁵⁹⁰ Average total costs consist of the sum of averaged fixed and average variable costs. Average total costs initially fall but later rise as output increases because of the pattern of average variable costs.⁵⁹¹

Finally, the marginal cost of the firm's output is the increment of total cost that results from producing one additional unit of output. As the firm begins to produce, its marginal costs decline to a minimum positive number because of increasing economies of scale that result from using some or all factors of production. Each additional unit of a variable factor of production yields more than one additional unit of output.⁵⁹² When marginal costs fall, each incremental unit of output pulls down average variable and average total costs. Eventually, however, marginal costs will begin to rise. This increase, known as the law of diminishing returns, operates to reduce the extra output that results from an incremental variable factor.⁵⁹³ In turn, average variable and average total costs begin to rise with incremental units of output. Accordingly, the marginal cost curve, depicted in the graph, must intersect the minimum points of the average cost and average variable cost curves. When marginal costs fall, average total and average variable costs are, by definition, falling. Conversely, when marginal costs rise,

587. *Id.* at 440-41.

588. *Id.*

589. Average fixed cost (AFC) at a given quantity of output (Q) is calculated by dividing fixed costs (FC) at that quantity by that quantity, i.e., $AFC = FC/Q$. The numerator is constant at all levels of output. Hence, average fixed cost falls as the denominator rises. *Id.* at 441, Fig. 24-1.

590. The average variable cost (AVC) at a given quantity of output (Q) is calculated by dividing the variable cost (VC) for that quantity of output by that level, i.e., $AVC = VC/Q$.

591. Average total cost (ATC) is calculated by summing AFC and AVC and dividing the result by Q . As Q increases, ATC is "pulled up" by AVC.

592. Variable factors of production are those factors that can be altered in the short run, such as labor. In contrast, in the short run, a firm cannot alter the amount of a fixed factor, such as land used in the production process.

593. SAMUELSON, *supra* note 53, at 428.

average total and average variable costs also must rise; any average curve is pulled down when marginal costs are falling and pushed up when they are rising.⁵⁹⁴

This cost structure reveals a firm's break-even and shut-down points. The break-even point is the point where the price for the firm's output equals its minimum average total cost, which, by definition, is where the marginal and average total cost curves intersect:

$$\text{Price} = \text{Marginal Cost} = \text{Minimum Average Cost.}$$

At the break-even point, the firm earns no excess profits in the long run. Yet, it is economically rational for the firm to continue producing because it covers both its fixed and variable costs. Below this point, the firm cannot cover its total costs—it covers its fixed costs, but not all of its variable costs. Nevertheless, it still may be rational for the firm to continue to produce and sell merchandise at a price below the break-even point, as long as the price remains above the shut-down point.

The shut-down point is the point where the price for the firm's output is at or below its minimum average variable cost. By definition, the shut-down point occurs where the marginal and average variable costs curves intersect:

$$\text{Price} = \text{Marginal Cost} = \text{Minimum Average Variable Cost.}$$

At or below the shut-down point, the firm cannot cover any of its variable costs. When the price for its output is so low that it receives less revenue than the variable cost incurred from producing the output, it is economically rational for the firm to cease production.

C. *System Operation*

1. Red-light Dumping

The traffic-light system eliminates the comparison between prices in the home and importing countries. As one observer noted, granting protection on the basis of price in a foreign market is "irrational."⁵⁹⁵ There is no need to calculate NV; the concept is abolished. Thus, opportunities for protectionist manipulation associated with adjustments—the 5% home-market viability test, third-country sales, below-cost sales, intermediate country sales, and currency conversion—are eliminated. Instead, dumping is defined in terms of the cost structure of the respondent. The DOC compares

594. *Id.* at 441, 443, fig. 24-1(b).

595. PHILIP SLAYTON, *THE ANTI-DUMPING TRIBUNAL* 65 (1979).

the respondent's cost of production, focusing on its break-even and shut-down points for the subject merchandise, and the EP or CEP of the subject merchandise.⁵⁹⁶ The dumping margin formula is:

$$\text{Dumping Margin} = \text{Cost of Production} - \text{EP (or CEP)}.$$

Cost of production consists of the sum of the cost of factor inputs; principally, labor, land and physical capital, and general expenses, with no allowance for profits.⁵⁹⁷ Cost of production should include the cost of transporting the subject merchandise to and selling it in the United States. The issue should be whether it is rational to sell the merchandise in the United States, not whether it is rational to sell in general. Additionally, if cost of production incorporates all items that are also included in the EP or CEP, then the need to make adjustments and the risk of manipulation is reduced.

This cost of production calculation is not unwieldy for three reasons. First, it is similar in manner to the way in which the DOC calculates NV for nonmarket economies, except that the DOC "borrows" the cost factors from comparable market economies. Hence, the DOC already has experience in using this methodology. Second, the DOC examines the actual data from the respondent's audited financial information that most closely corresponds to the period in which red-light dumping is alleged.⁵⁹⁸ This examination is based on information provided by the exporter in response to the DOC's antidumping questionnaire. The DOC may request verification of this information from the exporter if the DOC believes such verification is necessary. Third, the DOC's questionnaire, which is currently being revised, is extensive.⁵⁹⁹ Because section D of the draft revised questionnaire concerns cost of pro-

596. Readers familiar with antitrust law will recognize an analogy between this proposal and the Areeda-Turner test for predatory pricing. Under that test a price lower than reasonably anticipated short-run marginal cost is predatory because a profit-maximizing producer in a competitive market should supply a quantity of output at which price equals marginal cost. However, because of practical difficulties in measuring marginal cost, average variable cost is used as a proxy for marginal cost. Thus, the test states that a price lower than average variable cost—which is referred to here as the shut-down point—is illegal. See HOVENKAMP, *supra* note 61, at 300. The Areeda-Turner test has been widely debated in the antitrust literature. See *supra* note 61.

597. More specifically, cost of production is calculated in accordance with generally accepted accounting principles (GAAP). See PATTISON, *supra* note 72, § 5.05[6].

598. In the absence of actual data, threshold amounts could be ascribed for the cost of factor inputs and general expenses.

599. See Notice, Request for Public Comments on Revised Antidumping Questionnaire, 60 Fed. Reg. 26,026 (1995); U.S. Dep't of Comm. Import Admin. Office of Antidumping Investigations, Request for Information (May 10, 1995) (on file with *The George Washington Journal of International Law and Economics*).

duction, there should be little difficulty in obtaining information relevant to the cost of production calculation. In effect, the burden is on respondents to maintain and provide this information.

The DOC's goal, when comparing items one and two above, is to identify the respondent's break-even and shut-down points. Based on its identification of break-even and shut-down points, the DOC categorizes the respondent's activity as red-light, yellow-light, or green-light dumping. A bright-line legal presumption is associated with each category which, in turn, allows the DOC to filter out those petitions that simply seek protection from a respondent that is more efficient.

Admittedly, values assigned to the break-even and shut-down points are likely to vary with the measurement period. A measurement period that is too short must be avoided because in the short run virtually all costs are fixed. Conversely, it is necessary to avoid using a measurement period that is too long because in the long run a respondent can vary all of its inputs in the production process and adjust all of its contractual commitments. A measurement period that is too long, therefore, provides a respondent with an opportunity to react to market trends, such as changes in tastes and technological developments. Over time, an exporter can substitute fixed for variable costs, and thereby manipulate its shut-down point.⁶⁰⁰ By deliberately increasing fixed costs in relation to variable costs to lower the shut-down point, the respondent reduces the likelihood of a red-light dumping determination. There are two advantages to linking the measurement period to the period of alleged red-light dumping. First, linking the measurement period to the alleged dumping period creates an unambiguous standard and, therefore, forecloses arguments that the period is too short or too long. Second, it is fair.

With respect to red-light dumping, the threshold question is whether an exporter is engaged in predatory dumping if it sells its product in the importing country below its shut-down point—at a price below its minimum average variable cost. Under these circumstances it is reasonable to conclude that predatory dumping is occurring. The exporter is behaving aggressively, perhaps ruthlessly; it is sustaining losses which, if it were a profit-maximizing enterprise, would cause it to shut down. At this point, it is fair to infer that the exporter seeks to drive its competitors in the importing country out of business, establish a monopoly position, and

600. POSNER, *supra* note 56, at 308-09.

reap monopoly rents. Although it can still be argued that the exporter is behaving in an economically rational manner, the exporter is sacrificing short-run for long-run profits in favor of market share,⁶⁰¹ and the net welfare effect of such behavior on the importing country will surely be negative because competition will be lessened. Red-light dumping, therefore, creates an irrebuttable presumption against the respondent that it is engaging in predatory pricing and a rebuttable presumption that such pricing has injurious effects.

These presumptions shift the battleground to the ITC. No final antidumping duty is imposed and no estimated deposit is required until the ITC renders a final affirmative determination that the red-light dumping is the substantial cause of material injury. Its method of injury determination has, consequentially, been reformed in four ways. First, the ITC must focus on cost differentials. The ITC cannot use the magnitude of a dumping margin as a basis for a final affirmative determination; it must obtain direct evidence of material injury. An interesting case arises when a petitioner has shown that a respondent's EP is below the respondent's shut-down point and also proves that either this EP is below the petitioner's shut-down point, or that this EP is below the average shut-down point for the relevant U.S. industry. Arguably, it may be inferred that the petitioner is of "typical" efficiency; at least as efficient as the respondent but cannot compete with the EP. Alternatively, it may be justified to infer that red-light dumping, not the petitioner's inefficiency, is the substantial cause of material injury.

Second, the dumping of the subject merchandise must be the "substantial" cause of injury. "Substantial" causation is defined in the same way as it is for escape clause actions under section 201 of the Trade Act of 1974: Substantial causation is "important and not less than any other cause."⁶⁰² Dumping must be isolated as a causal factor and other possibilities must be excluded. The respondent can rebut the presumption of injurious effects by introducing evidence of additional or more substantial causes of injury, most notably that the petitioner's cost structure indicates it is an inefficient producer.

Third, the inherently speculative bases for an injury determination of threat and material retardation are eliminated. Only actual material injury suffices. Although eliminating these bases means the ITC cannot take preventive action against dumped merchan-

601. See Deardorff, *supra* note 29, at 151-54.

602. 19 U.S.C. § 2252(b)(1)(B) (1994).

dise, waiting until actual injury occurs not only lessens the chance of an inefficient petitioner obtaining undeserved protection, but also compels the inefficient petitioner to adjust and respond to foreign competitive pressures. This represents a legal policy choice that only actual, not prospective, harm should be redressed. Finally, the ITC must ignore any distinction between merchant and captive markets. Accordingly, a petitioner is unable to artificially narrow the defined market under investigation.

The ITC's determination could also be reformed to include an examination of the extent to which injury occurs to competition in the relevant industry and to consumer interests. First, the ITC could question whether there are barriers to entry in the relevant U.S. industry. For example, consider a hypothetical case where a respondent engaged in red-light dumping forces a U.S. company, Firm A, out of business. If there are significant barriers, no U.S. or foreign company can challenge the respondent in the industry. Not only is Firm A injured, but industry competition and consumer interests are also injured. Alternatively, if there are no barriers to entry into the industry, another U.S. company, Firm B, can commence operations and compete with the respondent. The respondent may then again engage in red-light dumping and force Firm B into insolvency. Yet again, another domestic rival, Firm C, may rise to take the place of Firm B and compete with the respondent. This process causes a hemorrhage of the respondent's profits because it has to continue to lower its price to eliminate the challenge of each new domestic competitor. Thus, as one antitrust scholar explains,

[t]he rationale for predatory pricing is the sustaining of losses today that will give a firm monopoly profits in the future. The monopoly profits will never materialize, however, if new entrants appear soon after the successful predator attempts to raise its price. *Predatory pricing will be profitable only if the market contains significant barriers to new entry.* The relevant barriers are Bainian, not Stiglerian: that is, one must ask whether post-predation monopoly profits will be disciplined by new entry.⁶⁰³

Accordingly, in the above example, because of low barriers to entry, the respondent cannot reap the benefits of predation by charging monopoly prices after a competitor has been dispatched.

Second, the ITC should consider the respondent's share of the market for the subject merchandise. Again, consider the example of the respondent engaged in red-light dumping that drives Firm A out of business. Suppose the respondent has 5% of the aggregate

603. HOVENKAMP, *supra* note 61, at 310 (emphasis added).

market share for the subject merchandise. Surely this case should be treated differently from one in which the respondent's market share is 90%. As one antitrust scholar puts it: "A market with two competitors, one of which is very large, is far more conducive to predatory pricing than a market with several relatively small competitors. Predatory pricing is simply implausible in competitive markets."⁶⁰⁴

In sum, to determine whether the respondent has rebutted the presumption that pricing associated with red-light dumping has injurious effects, the ITC should undertake two further examinations. First, the ITC should attempt to determine whether there are significant barriers to entry in the relevant industry. Next, the ITC should determine whether the respondent has a significant share of the market for the subject merchandise. As intimated above, these inquiries overlap with antitrust analysis. More research may be needed to determine whether these inquiries are appropriate in the antidumping context and whether other factors, such as the existence of excess capacity in the respondent's firm or the disposition of productive assets of a petitioner that has gone bankrupt,⁶⁰⁵ are relevant. However, one advantage to the application of antitrust analysis is readily apparent; if the absence of barriers to entry and a large market share rebut the presumption that red-light dumping is injurious, a petitioner's likelihood of success is reduced. In turn, the risk of protectionist abuse may be lessened.

Under the red-light dumping scheme outlined above, if the ITC finds injury, the DOC issues an antidumping order. The duty equals the difference between the EP or CEP and the respondent's shut-down point. The order terminates automatically in two years from the date of issuance, during which time the petitioner is expected to implement changes to respond to foreign competition.⁶⁰⁶ Under the red-light dumping scheme, therefore, sunset reviews are unnecessary because the order cannot be extended⁶⁰⁷ and the petitioner cannot petition for a new order within two years of the date of expiration of the initial order. At any point during the duration of an order, the respondent may request an administrative review for the purpose of proving that it no longer engages

604. *Id.* at 309.

605. *See id.* at 311-13.

606. In contrast, under the escape clause—section 201 of the Trade Act of 1974, as amended—the period of relief, including any provisional relief, is four years. 19 U.S.C. § 2253(e)(1)(A) (1994).

607. In contrast, under the escape clause, extensions are permissible but the aggregate period of relief cannot exceed eight years. 19 U.S.C. § 2253(e)(1)(B)(ii) (1994).

in red-light dumping or to adjust the margin of dumping and amount of duty imposed. Upon such proof, the DOC would be required to lift or amend the order.

To further avoid protectionist abuse, the presumption regarding new shippers is reversed. A new shipper is automatically exempt from an antidumping order. Only a new petition filed against a new shipper could lead to an order against it. Likewise, allegations of circumvention are treated not by expanding an existing order, but rather by initiating a new case. Admittedly, it may be necessary to allow for an exception to the automatic exemption for new shippers. In an industry in which production facilities are easily mobile, a dumper could move to a new country and establish itself as a new shipper. Arguably, this dumper is not a bona fide new shipper and should not receive the automatic exemption.

What if some, but not all, of the exporter's sales in the importing country occur at or below its shut-down point? The issue is whether the exporter's yellow-light and green-light sales⁶⁰⁸ should offset its red-light sales. Under the traffic-light system, the propetitioner bias in favor of finding large dumping margins by barring offsets is eliminated; offsets are permitted.

Economists may object to making red-light dumping actionable because, as an empirical matter, predatory pricing does not occur very often.⁶⁰⁹ For example, "[r]ather than being predatory in motivation, the low price in the importing country may be merely an attempt to meet the competition of local firms in the importing country . . . [or] competition in the local market of some third-country exporter."⁶¹⁰ This objection misunderstands the proposed traffic-light system: The whole point of the system is to narrow the scope of antidumping law. In practice, foreign companies are often accused of predatory pricing. Typically, a foreign company is puz-

608. See discussion *infra* part V.2-3.

609. See, e.g., DAM, *supra* note 29, at 169 (stating that "[a] review of cases in which dumping duties have been imposed will uncover few cases in which domestic firms have in fact been driven out of business" (footnote omitted)); Deardorff, *supra* note 29, at 35-36 (noting that "economists have routinely dismissed predatory dumping as so unlikely that it should not be used to justify anti-dumping duties"); Hoekman & Leidy, *supra* note 28, at 161 (finding that "in practice cases of successful predatory dumping remain undocumented" (footnote omitted)); POSNER, *supra* note 56, at 305 (noting that in the antitrust context "[c]onfirmed instances of predatory price discrimination were rare even before the practice was illegal"); see also Brenda S. Levine, *Predatory Pricing Conspiracies After Matsushita Industrial Co. v. Zenith Radio Corp.: Can an Antitrust Plaintiff Survive the Supreme Court's Skepticism?*, 22 INT'L LAW. 529, 537 (1988) (noting that the U.S. Supreme Court, throughout its discussion of *Matsushita*, "expressed skepticism that a predatory pricing conspiracy could ever arise" (footnote omitted)).

610. DAM, *supra* note 29, at 168.

zled by such an accusation, asking how it can be accused of dumping when its U.S. prices are the same as or higher than the prices of its U.S. competitors. Interestingly, one economist explains that "[t]he truth of the matter is that predatory dumping by foreigners in the U.S. market is much less of a problem than predatory protectionists who use alleged dumping by foreigners as an excuse to obtain protection in the domestic market."⁶¹¹

In addition, the phenomenon of multiple-benefit predation is sometimes observed in the antitrust context. Multiple-benefit predation "occurs when the predator predates in one situation, but stands to benefit in several."⁶¹² This phenomenon could occur in the antidumping context. For example, a foreign company might predatorially dump a product in only one market in which it competes. In the other markets, the foreign company intends to intimidate rivals into maintaining, not cutting, their prices. Thus, multiple-benefit pricing is a signal emanating from the one market in which dumping occurs but is directed at competitors in other markets. The signal is designed to impose price discipline in those other markets. Finally, and more generally, even if undesirable behavior rarely occurs or leads to adverse results, it does not follow that a law against that behavior is unjustified. Infrequent violations may be a testament to the success of the law in deterring the behavior.

A second objection that can be raised against making red-light dumping actionable is that even when predatory dumping does occur, the exporter may have to keep its price fairly low to discourage potential competitors from reentering the market.⁶¹³ The exporter, in this scenario, would not necessarily reap monopoly rents; therefore, imposing an antidumping duty on it may not be justified. The defect in this objection is that it emphasizes price as a barrier to entry, where in fact many nonprice factors are potential barriers to entry. It is difficult to forecast the criteria by which potential competitors will make entry decisions.

611. KRAUSS, *supra* note 29, at 70-71.

612. HOVENKAMP, *supra* note 61, at 306.

613. See Deardorff, *supra* note 29, at 36 (noting that in order for predatory pricing to be successful, the predator must prevent reentry and that this is most easily done "by keeping price fairly low"); Hoekman & Leidy, *supra* note 28, at 161 (noting that "even if all competitors worldwide were driven from the market, to be able successfully to exploit market power over time, barriers to entry in the postpredatory phase must be present" (footnote omitted)); POSNER, *supra* note 56, at 305 (discussing the costs of predation to the predator in the antitrust context).

A third objection posits that even if predatory dumping drives competitors out of the importing country, it may not eliminate other exporters from the market.⁶¹⁴ An exporter engaged in predatory dumping will not necessarily become a monopolist; rather, it may face fierce competition from other exporters (assuming all exporters do not collude). Again, however, this approach lacks predictive power. Whether other exporters will remain standing after a sustained onslaught of dumping by one exporter cannot be known until after the battle. Moreover, this objection implicitly, and reasonably, assumes that what should matter is competition, not the national identities of the competitors. But no country likes to see a domestic industry wiped out and supplanted by foreigner companies.

Fourth, and finally, proving predation is difficult, particularly if the law demands evidence of intent.

[G]iven that the principal theoretical rationale for [antidumping] is the predation argument, one could argue that use of [antidumping] should be limited to such cases. *Of course, it will be quite difficult to establish the intent of the dumping firm.* However, one could require that certain necessary conditions be met that are expected to be positively correlated with the possibility of predation. Market share and concentration ratios are obvious possibilities in this connection. For example, it could be required that firms that are dumping have x% of the global market, and that there exist [sic] at least a concentration ratio for the global industry of y%. . . . [I]n practice market shares of countries facing [antidumping] investigations are often negligible.⁶¹⁵

To be sure, requiring direct evidence of intent is likely to be too difficult a standard for petitioners to meet. Indeed, there has been no prosecution under the Antidumping Act of 1916, which contains an intent test.⁶¹⁶ One possible solution would be to admit circumstantial evidence of the exporter's motivation. Such evidence could pertain to objectively quantifiable factors, such as those suggested in the above-quoted passage. The traffic-light system, however, dispenses with the problem of intent by making red-light

614. See Deardorff, *supra* note 29, at 150.

615. Hoekman & Leidy, *supra* note 28, at 177-78 (emphasis added) (footnote omitted).

616. 15 U.S.C. § 72 (1994); see *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1190, 1243 (E.D. Pa. 1980) (stating that "despite its venerable age (64 years), [the 1916 Act] is virtually a statute of first impression"); Kermit W. Almstedt, *International Price Discrimination and the 1916 Antidumping Act—Are Amendments in Order?*, 13 LAW & POL'Y INT'L BUS. 747, 756-57 (1981); Roy L. Prosterman, *Withholding of Appraisement Under the United States Anti-Dumping Act: Protectionism Or Unfair Competition Law?*, 41 WASH. L. REV. 315, 316 n.4 (1966).

dumping a strict liability offense. This resolution helps minimize uncertainty and narrows the scope of disagreement between a petitioner and respondent.

2. Yellow-light Dumping

Is an exporter dumping if it sells its product in the importing country at a price somewhere in between its break-even and shut-down points—at a price below its minimum average total cost but above its average variable cost? The answer is not clear. As discussed above, there are strong justifications for believing that, at least in the short-run, such yellow-light pricing is rational, not predatory, and has no net adverse welfare effect.⁶¹⁷ However, a counter-argument can be made that if the exporter continues to price its product between the two critical points over a long period, it may be engaging in predation. If competitors are eliminated and the market becomes oligopolistic or monopolistic, the net welfare effect of yellow-light pricing would be negative.

Because there are plausible competing explanations, a presumption of predatory intent against the respondent is unjustified. Thus, in the event of yellow-light dumping, the DOC should issue a cautionary statement to the respondent, informing it that its pricing strategy for the subject merchandise is nearing the point of red-light dumping which, in turn, will trigger certain presumptions against the respondent. However, no ITC injury determination is made, no antidumping duties are imposed, and no deposits required. The investigation is terminated and the caution has no precedential value in a subsequent action.

Suppose a respondent receives more than one caution within a short period of time; for example, within three years. In this case tougher action against the respondent is merited. One option is to require the respondent to submit cost and price information to the DOC so that it can closely monitor the respondent's pricing behavior. A second option is to presume that the respondent is engaged in red-light dumping.

It may be argued that this proposal will encourage petitioners to file yellow-light dumping cases in order to inject price uncertainty into the respondent's calculus. If the proposed yellow-light scheme does lead to bad-faith yellow-light petitions, the system could be tightened, perhaps by presuming that the first microeconomic

617. See *supra* notes 342-350 and accompanying text.

explanation discussed above is correct—that there is no predation. In turn, only red-light petitions would be accepted.

3. Green-light Dumping

Finally, is an exporter dumping when it sells in the importing country at or above its break-even point—at a price equal to or above its minimum average total cost? Clearly, the answer to this question must be negative; hence, this case is one of green-light dumping. Regardless of the relationship between the price of the subject merchandise and the price of the foreign like product, the respondent is acting in an economically rational manner. The respondent not only covers its total costs, but may also earn a profit. The only recourse for a producer in the importing country claiming harm from green-light dumping is to reduce its own cost structure to match that of the respondent.⁶¹⁸ If the DOC renders a green-light dumping determination, the entire investigation is automatically terminated without an ITC injury determination. Thus, as in yellow-light dumping, a green-light dumping case is a one-step matter. As with the yellow-light case, no antidumping duties are imposed and no deposits are required.

D. *System Appraisal*

The central purpose of the traffic-light system is to limit the risk of protectionist abuse. By restricting the scope of actionable dumping behavior, the traffic-light system makes antidumping law a less attractive, more difficult remedy to obtain. By classifying dumping behavior and attaching definite legal consequences to each category, the law is simpler and less ambiguous than under the Agreement or the Act.

Of course, the traffic-light system does not solve every problem identified in Part IV. Important issues about the dumping margin calculation must be considered. For example, problems of cost allocation and start-up operations need to be resolved. Likewise, the adjustment and currency conversion, problems discussed in Part IV.B.8. *supra*, need to be addressed. Nor does the traffic-light system suggest possible improvements to procedural aspects of preliminary and final determinations. Accordingly, the system is only a

618. See POSNER, *supra* note 56, at 309-10 ("It can be argued that if U.S. industry is hurt when the Japanese firm is selling at a price equal to its marginal cost, it is a self-inflicted hurt, a hurt due to the failure of the U.S. firms either to minimize their costs or to compete." (footnote omitted)).

partially complete first draft that attempts to distinguish the protectionist abuser from the meritorious petitioner.

Three issues are of particular significance.⁶¹⁹ First, if red-light dumping is found, should there be an exception to the imposition of an antidumping duty if the dumped product is not made or is in short supply in the United States? A “no or short supply” exception would consider the interests of consumers in the dumped products. If the dumped product does not exist in the United States, or is in insufficiently short supply to meet domestic consumption needs, then

the application of dumping duties to imports of that product only serves to punish U.S. industrial users, without providing any counterbalancing benefit to domestic producers. In this situation, there are only two true beneficiaries of the dumping duties: foreign suppliers, who can raise their prices in the U.S. market and earn windfall profits at the expense of U.S. industrial users; and the downstream foreign competitors of the U.S. industrial users, who gladly find their American counterparts hamstrung by higher costs. The higher costs from antidumping duties have a serious adverse impact on the ability of U.S. industrial users to compete in world markets and may ultimately translate into a loss of U.S. jobs.⁶²⁰

It is noteworthy that Canada and the European Union have a “no or short supply” exception in their antidumping laws. Their exceptions take the form of either a public interest test, whereby antidumping duties are not imposed if such imposition would be against the public interest, or a lesser duty rule, whereby the amount of the duty imposed is less than the dumping margin.⁶²¹

Alternatively, there may be a valid economic reason for not instituting a “no or short supply” exception. The point of imposing a duty is to level the competitive playing field and give the petitioner “breathing room” to reinvigorate its operations.

[C]laims that the injured domestic industry should not be concerned when it is unable to supply all or any of a particular item ignore the commercial reality of why companies stop producing or never start producing a particular item—expected inadequate return on investment. Without the correction of the price discrimination, domestic producers will not be able to make market-driven decisions about expanding production, reentering products where prior dumped pricing signals dictated market exit. There is no realistic way to provide the market signals

619. For a discussion of these issues in the context of post-Uruguay Round antidumping law, see Holmer et al., *supra* note 23, at 503-11.

620. Holmer et al., *supra* note 23, at 503.

621. *Id.*

where products are exempted from payment of duty. Such a system also would have the perverse effect of rewarding the most successful dumpers—those that have eliminated all domestic production of an item or prevented U.S. companies from ever commencing production.⁶²²

Put simply, an antidumping duty does not eliminate supply from the U.S. market, but rather confers upon U.S. companies the opportunity to compete with fairly priced imports. A “no or short supply” exception would eliminate this opportunity.

Second, if red-light antidumping duties are imposed on a respondent, should such duties be treated as a cost of doing business in the United States and deducted from the EP when calculating the dumping margin? Consider a case where a U.S. importer of a dumped product is unrelated to the foreign producer or exporter of that product. If an antidumping duty is imposed on the unrelated importer, the importer has two choices. First, it may attempt to pass on all or a portion of the duty to its U.S. customer. Second, it may absorb all or a portion of the duty, essentially treating the duty as a cost of doing business.

If the importer selects the first option, it loses some of its competitive advantage over U.S. producers of the like product because the price of its product rises by the amount of the duty not absorbed. If the importer selects the second option, again, it loses some of its competitive advantage over U.S. competitors because its costs rise by the amount of the duty absorbed. This situation is to be contrasted with one in which the U.S. importer and its foreign supplier are related. If the importer chooses to absorb all or some of the antidumping duty, then relief for the U.S. producers of the like product is “artificially curtailed.”⁶²³ “This result is due to the twin facts that the prices to the importer’s customers have not been raised, or not raised sufficiently, *and* the importer is not a potential customer for the domestic producers.”⁶²⁴ In effect, the cost of the duty is allocated among two related companies on a nonarms-length basis, and the price of the dumped product charged to U.S. customers does not rise to reflect payment of the duty.

Interestingly, since 1986 the European Union has treated antidumping duties as a cost and deducted them from the EP.⁶²⁵ The result is, of course, a larger dumping margin. The United

622. *Id.* at 505.

623. *Id.* at 506.

624. *Id.* at 506-07.

625. *Id.* at 508.

States has consistently rejected this approach.⁶²⁶ Instead, under the Act, during the second and fourth administrative reviews, the DOC will, upon request, consider whether a foreign producer or exporter sells a product through an affiliated importer in the United States that absorbs antidumping duties instead of eliminating the dumping.⁶²⁷ If the DOC makes an affirmative finding of duty absorption, it must inform the ITC, which may consider the finding in its sunset review to determine whether injury is likely to continue or recur.⁶²⁸ The dumping margin, however, is not affected by an affirmative finding.⁶²⁹

Third, when red-light antidumping duties are collected, should the proceeds be given to the petitioner to enable it to invest in production improvements and worker training so that it can become more competitive? The emotional appeal of distributing the proceeds to those injured by dumping is powerful. Moreover, the economic reasons may be compelling. First, those injured by dumping are in the best position to utilize the proceeds for investment in physical capital, human capital, and other productive inputs. Second, potential respondents may feel additional pressure not to dump when they realize that duties imposed on them are transferred directly to their competitors.

However, one problem with a scheme to channel the proceeds from antidumping duties to petitioners is that it may violate Article 18.1 of the Agreement.⁶³⁰ That article states that antidumping duties are to be the exclusive remedy for dumping.⁶³¹ Would the transfer of proceeds amount to a different remedy or merely a derivative of the imposition of duties? A second concern, and possibly a more serious problem, is that the scheme may give rise to a countervailing domestic subsidy under Article VI of GATT 1947 and the Uruguay Round Agreement on Subsidies and Countervailing Measures.⁶³²

626. See, e.g., MESSAGE, *supra* note 69, at 885 (stating that the Act is not to be interpreted to treat antidumping duties as a cost).

627. See Act, *supra* note 23, § 221, 108 Stat. at 4865 (codified at 19 U.S.C. § 1675(a)(4) (1994)); MESSAGE, *supra* note 69, at 885.

628. See Act, *supra* note 23, § 221, 108 Stat. at 4865-66 (codified at 19 U.S.C. §§ 1675(a)(4), 1675a(a)(1)(D) (1994)); MESSAGE, *supra* note 69, at 886.

629. See MESSAGE, *supra* note 69, at 885.

630. Holmer et al., *supra* note 23, at 511.

631. See Agreement, *supra* note 19, at 22.

632. Holmer et al., *supra* note 23, at 511.

VI. CONCLUSION

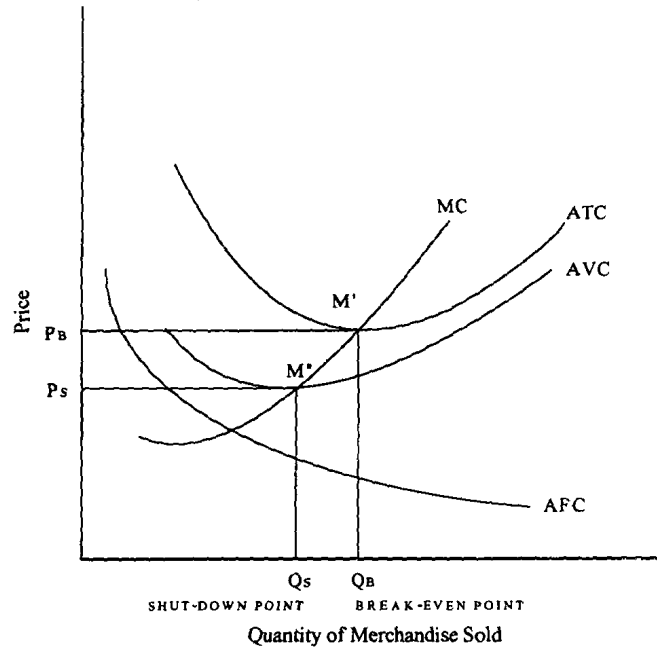
Rethinking antidumping law was a responsibility of the Uruguay Round negotiators. They failed. They perpetuated a law filled with ambiguities surrounding the filing of dumping petitions, dumping margin calculations, injury determinations, anticircumvention, and reviews. They perpetuated a law incongruous with fundamental microeconomic precepts. The post-Uruguay Round regime, therefore, is at least as susceptible to protectionist abuse as its predecessor. Sadly, antidumping law remains a major potential nontariff barrier to trade. The proposed traffic-light system is an effort at pragmatic reform. Its aim is to reduce ambiguity in the law, and infuse it with microeconomic logic.

APPENDIX A. PRE- AND POST-URUGUAY ROUND TERMINOLOGY
AND ABBREVIATIONS

Pre-Uruguay Round Term and Abbreviation	Post-Uruguay Round Term and Abbreviation
Class or kind of merchandise subject to investigation	Subject merchandise
Constructed Value (CV)	Constructed Value (CV)
Exporter's Sales Price (ESP)	Constructed Export Price (CEP)
Department of Commerce (DOC)	Department of Commerce (DOC)
Foreign Market Value (FMV)	Normal Value (NV)
International Trade Commission (ITC)	International Trade Commission (ITC)
Less Than Fair Value (LTFV)	Less Than Fair Value (LTFV)
Like product	Domestic like product
Purchaser's Price (PP)	Export Price (EP)
Such or similar merchandise	Foreign like product
United States Price (USP)	No comparable term
United States Trade Representative (USTR)	United States Trade Representative (USTR)

APPENDIX B. GRAPHS

GRAPH A.
AVERAGE COSTS; BREAK-EVEN & SHUT-DOWN POINTS



GRAPH B.
TOTAL, FIXED, & VARIABLE COSTS

