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The Anti-Dumping Systems of Australia, Canada, the EEC and the United States of America: Have Anti-Dumping Laws Become a Problem in International Trade?

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Van Bael & Bellis, Brussels

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THE ANTI-DUMPING SYSTEMS OF AUSTRALIA, CANADA, THE EEC AND THE UNITED STATES OF AMERICA: HAVE ANTI-DUMPING LAWS BECOME A PROBLEM IN INTERNATIONAL TRADE?

*Edwin A. Vermulst**

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* Van Bael & Bellis, Brussels.

This article is adapted from the author's Chapter 8 in *ANTI-DUMPING LAW AND PRACTICE: A COMPARATIVE STUDY* (J. Jackson & E. Vermulst ed., University of Michigan Press forthcoming 1989). The book is the result of a collaborative project studying Anti-dumping law in Australia, Canada, the European Community, and the United States.

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INTRODUCTION

The Contracting Parties to the General Agreement on Tariffs and Trade ("GATT") are now in the middle of the Uruguay Round of multilateral trade negotiations. A number of the Contracting Parties, including the European Community, Japan, Korea, Hong Kong and the United States, have tabled proposals for change in the anti-dumping regime which may influence the formulation of national anti-dumping laws for the decade to come. The negotiations have not, however, prevented important Code signatories from acting *unilaterally* against what they perceive to be shortcomings in the present system: the EEC and the U.S. have both recently implemented amendments to their anti-dumping laws which arguably address newly arisen issues by broadening the potential application of their domestic anti-dumping laws.¹

In some cases, an important justification for such amendments is that other jurisdictions have adopted similar or even more far reaching interpretations of the elements of the anti-dumping law. Such claims are often made out of context, and are sometimes misleading. This article argues that the best way of stopping such a "race to the bottom" through unilateral interpretation of anti-dumping principles is detailed multilateral regulation through the GATT.

1. Australia has also enacted substantial amendments to its anti-dumping law. For more detail about these amendments, see Steele, *The Australian Anti-dumping System*, in ANTI-DUMPING LAW AND PRACTICE: A COMPARATIVE STUDY ch. 6, postscript (J. Jackson & E. Vermulst ed., University of Michigan Press forthcoming 1989).

The EEC 'parts' or 'screwdriver' amendment has been challenged in GATT by Japan. The EEC has agreed to have the amendment investigated by a GATT dispute settlement panel. See FIN. TIMES, Oct. 20, 1988, at 9, col. 2. For overviews of the EEC 'parts' amendment, see Van Bael, *Japanese Investment in the EEC: Trojan Horse or Hostage?*, INT'L FIN. L. REV., June 1988, at 10; Bierwagen & Hailbronner, *Input, Downstream, Upstream, Secondary, Diversionary and Components or Subassembly Dumping*, J. WORLD TRADE L., June 1988, at 27; Hailbronner, Bierwagen, *'Neue' Formen des Dumping und ihre Regelung im Ausenwirtschaftsrecht der Europaischen Gemeinschaften*, 9 RECHT DER INTERNATIONALEN WIRTSCHAFT 705 (1988); Landsittel, *Anti-dumpingzolle auf in der Gemeinschaft hergestellte Waren*, 1988 WETTBEWERB IN RECHT UND PRAXIS 21; Steenbergen, *Circumvention of Anti-dumping Duties by Importation of Parts and Materials: Recent EEC Anti-dumping rules*, 11 FORDHAM INT'L L. J., 382 (1988).

This article, part of an in-depth comparative study of municipal anti-dumping laws in Australia, Canada, the European Economic Community and the United States,² does not purport to undertake a comprehensive comparative analysis of the anti-dumping laws of the four jurisdictions. Its aim is, rather, to examine the core concepts and some of the core salient features of the laws as developed in actual practice, and to consider the problems that have arisen in these jurisdictions and their solutions. For this purpose, section I will analyze procedural issues, section II substantive issues of dumping, and section III substantive issues of injury. The article concludes in section IV with specific recommendations for change — both to municipal and to multilateral anti-dumping systems.

I. PROCEDURE

A. *The Actors*

1. *Administering Authorities*

In all four jurisdictions, anti-dumping action has in practice been delegated to special units within the Executive Branch³ which make the decision whether or not protective measures against injurious dumping should be taken on essentially technical grounds. The fact that in these jurisdictions anti-dumping complaints enjoy a higher popularity than other trade actions seems at least partly attributable to the relatively streamlined and non-discretionary character of such proceedings.⁴

An important difference between Australia and the EEC on the one hand, and the United States and Canada on the other hand, is the separation of responsibilities for the dumping determination and the injury determination in the latter two countries. While the Australian Customs Service (and now the Anti-Dumping Authority) and the EEC Commission investigate both dumping and injury, the injury determinations in the United States and in Canada are made by independent (but politically appointed) agencies: the U.S. International Trade Commission (ITC) and the Canadian Import Tribunal. The

2. ANTI-DUMPING LAW AND PRACTICE: A COMPARATIVE STUDY, *supra* note 1.

3. The two exceptions to the rule are the International Trade Commission in the U.S. and the Import Tribunal in Canada, both of which are independent (but politically appointed) agencies in charge of the injury investigations in the respective countries.

4. In addition, the fact that anti-dumping measures directly control the price of imports of the dumped goods seems an important reason for the popularity of the anti-dumping instrument; see Horlick, *The United States' Anti-dumping System*, in ANTI-DUMPING LAW AND PRACTICE: A COMPARATIVE STUDY ch. 4, § 1 (J. Jackson & E. Vermulst ed., University of Michigan Press forthcoming 1989).

U.S. Department of Commerce and Revenue Canada are in charge of the dumping determination in the two countries.

Both types of structure have their advantages. The main advantage of the bifurcated systems found in Canada and the U.S. would seem to be that there are more guarantees for an objective — (supposedly) mutually independent — examination of both conditions for imposition of duties. The unified EEC and Australian systems, on the other hand, minimize waste of resources and avoid substantive disagreements *casu quo* overlaps inherent in any bifurcated system.⁵

Perhaps the best system would have one truly independent and objective authority in charge of both the dumping and injury investigation.⁶ This does not, however, seem likely to happen in any jurisdiction in the near future.⁷

The Legislative branches seldom become involved in concrete cases.⁸ This might perhaps reflect the view that anti-dumping investigations are a technical affair best left in the hands of the specialists. It also means that there is relatively little room for political manoeuvring behind the scenes. Of course, Horlick's observation that "it cannot be completely ruled out that individual case handlers have sought to guess what may (or may not) be on the Deputy Assistant Secretary's

5. See especially *id.* § 2.1.3. The recent institutional changes in Australia where an Anti-dumping Authority was set up to recommend imposition of definitive duties to the Minister may create their own overlap problems.

6. In this sense, see Steele, *supra* note 1, § 2.3.

7. It is at present certainly not the case in either Australia or the EEC where the Customs Service and the EEC Commission both advise potential complainants and — at a later stage — then investigate whether the allegations of those same complainants are meritorious. Note, however, that the establishment of Australia's new Anti-Dumping Authority by the Anti-Dumping Authority Act of 1988 (which entered into force on September 1, 1988) can be seen as an attempt to establish an independent and objective authority in charge of making final recommendations on both dumping and injury to the Minister. That having been said, one should bear in mind that:

- The Anti-Dumping Authority is subject to the discretion of the Minister in terms of general matters of policy (although it is not subject to direction in a particular investigation);
- the Minister who oversees the Anti-Dumping Authority also is responsible for the Australian Customs Service; and
- the Anti-Dumping Authority is an administrative fact-finding body only and does not have judicial or quasi-judicial powers (of a court or a tribunal).

8. Although in the EEC the Council must decide to impose definitive anti-dumping duties, the Council practically always rubber stamps the proposals of the Commission. See Bellis, *The EEC Anti-dumping System*, in ANTI-DUMPING LAW AND PRACTICE: A COMPARATIVE STUDY ch. 3, § 2.1.2 (J. Jackson & E. Vermulst ed., University of Michigan Press forthcoming 1989). See also E. VERMULST, ANTI-DUMPING LAW AND PRACTICE IN THE UNITED STATES AND THE EUROPEAN COMMUNITIES: A COMPARATIVE ANALYSIS, 196 (1987). But see Steenbergen, *Some Comments on EEC Anti-dumping Enforcement*, in ANTI-DUMPING LAW AND PRACTICE: A COMPARATIVE STUDY ch. 7, § 14 (J. Jackson & E. Vermulst ed., University of Michigan Press forthcoming 1989).

mind in terms of the politics of the case"⁹ applies equally in jurisdictions other than the U.S. No system is or can be completely insulated from political pressure.

Since 1980, judicial review of administrative anti-dumping determinations has become more widespread in the four jurisdictions.¹⁰ Not only has the number of appeals brought against administrative determinations shown a sharp increase, but the courts themselves would seem to have interpreted both their jurisdiction and the scope of review expansively.¹¹ In both respects, the United States — where special courts were established to deal with trade matters — can be seen as leading the way.

Although the input of the Judiciary is a relatively new phenomenon in the anti-dumping area and one should therefore be careful to draw conclusions, it would seem to this author that the possibility of judicial review in itself is a laudable development in that it puts into place an extra-administrative and de-politicized control on the administrations.¹² The recommendation of the Australian Administrative Review Council that a right of full merit review to the Administrative Appeals Tribunal be established with regard to essentially outcome-decisive administrative determinations indicates that the end of this trend is not yet in sight. Similarly, it seems only a question of time before the EEC Commission and the French Government will give up their resistance to the Court of First Instance's hearing appeals of anti-dumping determinations.¹³

9. Horlick, *supra* note 4, § 2.6.2.

10. In three out of four jurisdictions, the exception being Australia, judicial review seems only available with regard to "final" determinations, *i.e.*, determinations which have an outcome-determinative character. For a description of judicial review in Australia, see also Waincymer, *Anti-dumping Regulations in the Australian Context: A Commentary*, in ANTI-DUMPING LAW AND PRACTICE: A COMPARATIVE STUDY ch. 7, § 17 (J. Jackson & E. Vermulst ed., University of Michigan Press forthcoming 1989).

11. The exception would seem to be the European Court of Justice which has shown a marked reluctance to subject administrative determinations to in-depth review, at least on substantive issues. See Bellis, *supra* note 8, § 2.8; Kuijper, *Judicial Protection and Judicial Review in the EEC*, in ANTI-DUMPING LAW AND PRACTICE: A COMPARATIVE STUDY ch. 7, § 11 (J. Jackson & E. Vermulst ed., University of Michigan Press forthcoming 1989); Van Bael, *Lessons for the EEC: More Transparency, Less Discretion, and at Last, A Debate?*, in ANTI-DUMPING LAW AND PRACTICE: A COMPARATIVE STUDY ch. 7, § 16 (J. Jackson & E. Vermulst ed., University of Michigan Press forthcoming 1989); Vermulst, Waer, *Hof van Justitie der Europese Gemeenschappen, 7 mei 1987, zaken 240/84 NTN Toyo Bearing Company Limited, 255/84 Nachi Fujikoshi Corporation, 216/84 Koyo Seiko, 258/84 Nippon Seiko KK, 260/84 Minebea Company Limited v. Raad*, 36 SOCIAAL ECONOMISCHE WETGEVING 106 (1988).

12. On the legalistic character of trade proceedings in the United States, see Jackson, *Perspectives on the Jurisprudence of International Trade: Costs and Benefits of Legal Procedures in the United States*, 82 MICHIGAN L. REV. 1570 (1984). Cf. Petersmann, *Grey Area Policy and the Rule of Law*, J. WORLD TRADE, April 1988, at 23.

13. On judicial review in the EEC, see Bellis, *supra* note 8, § 2.8 and Kuijper, *supra* note 11.

2. *Private Parties*

Anti-dumping complaints are normally brought by producers in the importing country who feel that they suffer injury as a result of imports dumped into the market of the importing country. The foreign producers at whom the complaint is aimed typically receive questionnaires from the authorities in the importing country (once such authorities have decided that the complaint provides sufficient evidence) and then can decide whether or not to cooperate in the proceeding (the decision is normally affirmative because a decision not to cooperate may lead to use by the administering authorities of the "best information available," and resulting high dumping margins). Importers of the dumped merchandise (related or unrelated to the foreign producer/exporters) likewise receive questionnaires and are offered the opportunity to participate. These three categories can be classified as the parties most directly affected by the outcome of the proceeding. As a result of the increased legalization of anti-dumping proceedings, most of these parties find it in their interest to retain specialized counsel (the complainants sometimes do this in-house) to defend their interests before the authorities. This may lead to significant expenses for the parties concerned.

B. *Investigation Techniques*

A typical dumping proceeding involves five important stages:

- (1) Initiation of the proceeding;
- (2) sending of questionnaires to the parties concerned (typically foreign producers, domestic producers and importers of the merchandise under investigation in the country of importation); receipt and analysis of the questionnaire responses by the officials assigned to the investigation;
- (3) verification of the questionnaire responses through on-site visits; verification reports by the case handlers;
- (4) provisional findings; opportunity to comment by the parties involved; announcement and publication of the provisional findings (not necessarily in that order);
- (5) final findings; opportunity to comment by the parties involved; announcement and publication of the final findings (again not necessarily in that order).

While the four jurisdictions all follow these steps, this should not obscure the important difference between the more quasi-adjudicatory U.S. and Canadian approach and the more investigatory EEC and Australian approach. The single most important cause of this differ-

ence in the opinion of this author is the possibility of disclosure of confidential information under administrative protective order in the North-American continent.¹⁴

In a nutshell, U.S. and Canadian law allow counsel for interested parties (not the parties themselves!) to obtain certain confidential information submitted by other parties in the proceeding. The extent of the disclosure of such information depends on the authority concerned. In the United States the Department of Commerce has been more willing than the ITC to disclose the information it received (this would seem to have most benefitted counsel for the complainant domestic industry who is able to analyze the information on dumping submitted by the foreign respondents), while in Canada the Import Tribunal is more liberal than Revenue Canada (thereby benefitting counsel for the foreign respondents who can examine the injury information submitted by the complaining Canadian industry). It should be noted, however, that the U.S. Omnibus Trade and Competitiveness Act of 1988 requires the ITC to yield all information now. As a result, the current U.S. system would appear to be the most transparent.

The possibility of severe sanctions in case of breach of the protective order would thus far seem to have provided sufficient guarantees¹⁵ against disclosure by counsel to outsiders.¹⁶

In the EEC and in Australia,¹⁷ the investigating authorities are the only ones with access to the confidential portions of the file, and the non-confidential summaries are generally of limited value. This leads to parties "shooting in the dark" at each other and to the undesirable situation that in many cases there are no external checks on the inves-

14. See also Bello, *Access to Business Confidential Information in Anti-dumping Proceedings*, in ANTI-DUMPING LAW AND PRACTICE: A COMPARATIVE STUDY ch. 7, § 7 (J. Jackson & E. Vermulst ed., University of Michigan Press forthcoming 1989); Jacobs, *Observations on the Anti-dumping Law and Practice of The European Community, and Some Possible Reforms*, in ANTI-DUMPING LAW AND PRACTICE: A COMPARATIVE STUDY ch. 7, § 8 (J. Jackson & E. Vermulst ed., University of Michigan Press forthcoming 1989); Taylor & Vermulst, *Disclosure of Confidential Information in Anti-dumping and Countervailing Duty Proceedings Under U.S. Law: A Framework for the European Communities*, 21 INT'L L. 43 (1987).

15. *But see* Bello, *supra* note 14, § 7, noting some incidences of unauthorized disclosure.

16. The GATT Anti-dumping Code provides in article 6:3 that

any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom he acquired the information) or which is provided on a confidential basis by parties to an anti-dumping proceeding shall, upon cause shown, be treated as such by investigating authorities. Such information shall not be disclosed without specific permission of the party submitting it.

In footnote 10, however, the Code acknowledges that "Parties are aware that in the territory of certain Parties disclosure pursuant to a narrowly drawn protective order may be required."

17. For an overview of the Australian system, see Steele, *supra* note 1, § 2.6.

tigators until it is too late, *i.e.*, in court.¹⁸

C. Price Undertakings; Settlements

Price undertakings in the form contemplated by the 1979 Anti-Dumping Code,¹⁹ *i.e.*, agreements between the foreign exporters and the administering authorities in the importing country whereby the former agree to revise their prices (or cease exports), are quite common in the European Communities and in Australia, but have been used only infrequently in the United States and Canada.

The reasons for this practical difference seem two-fold. In the first place, the system of undertakings fits more comfortably in jurisdictions where the authorities have a considerable amount of discretion throughout the proceeding as is the case in Australia and in the EEC. In this respect it is worth noting that, in the more quasi-adjudicatory Canadian and American systems, the procedural requirements for acceptance of an undertaking are rather burdensome. In the Canadian context, the requirement that undertakings must be established prior to a preliminary determination seems particularly unrealistic.²⁰ These problematic requirements are probably the result of a certain legislative distrust of the executive agencies. Arguably, the decision whether to accept an undertaking and, if so, under what conditions, vests more discretion in the executive agencies (both in the negotiations leading up to the undertaking and in the subsequent implementation) than a semi-automatic decision to impose duties.

Secondly, it might well reflect an attitude on the part of the authorities in Australia and the EEC that acceptance of undertakings is a preferable way of solving dumping problems in cases involving less developed countries.

While the suspension agreements, contemplated in the 1979 U.S. Trade Agreements Act, have been used only sporadically, extra-statutory settlements, either in the form of quotas or in the form of special

18. *See id.*, discussing the problems in Australia.

19. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Part I [hereinafter Anti-dumping Code of 1979], art. 7:1 provides that:

[p]roceedings may be suspended or terminated without the imposition of provisional measures or anti-dumping duties upon receipt of satisfactory voluntary undertakings from any exporter to revise its prices or cease exports to the area in question at dumped prices so that the authorities are satisfied that the injurious effect of the dumping is eliminated. Price increases under such undertakings shall not be higher than necessary to eliminate the margin of dumping.

20. *See Magnus, The Canadian Anti-dumping System*, in *ANTI-DUMPING LAW AND PRACTICE: A COMPARATIVE STUDY* ch. 5, § 2 (J. Jackson & E. Vermulst ed., University of Michigan Press forthcoming 1989). *See also* R. Bierwagen, *The Protectionist Bias in National Anti-dumping Laws: An Appraisal of GATT Article VI and its Implementation; and Proposals for Negotiation in the Uruguay Round*, (1988) (unpublished manuscript), ch. IV, § iv.

pricing schemes, have been used in the United States as a *sui generis* remedy for solving anti-dumping disputes with high stakes (such as those in the steel and semiconductor sectors).²¹

D. *Anti-dumping Duties*

1. *Lesser Duty Rule*

An important difference between the United States and Canada²² on the one hand, and the European Communities and Australia on the other hand, is the rule in the latter jurisdictions that anti-dumping duties should be lower than the dumping margins if lesser duties would be sufficient to remove the injury caused by the dumping ("lesser duty" rule).²³

In Australia, the lesser duty rule has given rise to the phenomenon of non-injurious FOB margins (NIFOBs). Thus, the Australian Customs Service will determine the minimum level of the producers' export prices at the FOB level which will ensure that no injury can be caused.²⁴ If the NIFOB is lower than the dumping margin, the anti-dumping duty will be set by reference to the NIFOB.

Similarly, the EEC Commission typically calculates injury margins, *i.e.*, the margins by which prices of the foreign producers should be raised in order to allow Community producers to cover their cost of production and earn a "reasonable" profit. If the resulting margins are lower than the dumping margins found, the duty will be set at the level of the injury margin.

In the opinion of this author, the lesser duty rule seems a logical

21. See Horlick, *supra* note 4, § 2.3. See also, GATT Dispute Settlement Report, Japan — Trade in Semi-Conductors, GATT, L/6309 (1988) (as yet unpublished); R. Kulms, *DAS ANTI-DUMPINGRECHT IM AMERIKANISCHEN UND EUROPÄISCHEN RECHT: EINE UNTERSUCHUNG ANHAND DER STAHLKRISE* (Baden-Baden: Nomos, 1988).

22. Note, however, that in Canada the Import Tribunal may give its advice as to whether the imposition of a duty equal to the full amount/level of the dumping margin would be in the Canadian national interest. In the Grain corn anti-subsidy proceeding, the Import Tribunal advised that a countervailing duty equal to the subsidy rate found by the Canadian authorities would not be in the Canadian national interest. This seems to have been the only instance in which the Import Tribunal advised in favor of application of what is, in essence, a lesser duty rule.

23. This rule is in conformity with the desire of the signatories of the Anti-dumping Code. Article 8:1 of the Code provides that,

the decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin or less, are decisions to be made by the authorities of the importing country or customs territory. It is desirable that the imposition be permissive in all countries or customs territories [of] Parties to this Agreement, and that the duty be less than the margin, if such lesser duty would be adequate to remove the injury to the domestic industry.

24. See Steele, *supra* note 1, § 5.2.

consequence of the GATT provision that anti-dumping duties should only be imposed if the dumping has caused injury. Thus, if the injury caused can be offset by a duty that is less than the margin of dumping, arguably any relief should be limited to this duty.²⁵ However, the GATT Anti-dumping Code itself merely states that under such circumstances a lesser duty is desirable and therefore leaves it up to the Code signatories whether or not to adopt a lesser duty rule. Again, the absence of a lesser duty rule in the United States and in Canada would seem to be a consequence of legislative hesitancy to give discretion to the Executive.

In the European Communities and Australia the lesser duty rule has worked well, especially to temper the high dumping margins often found with respect to exports from non-market economies (and, more recently, Japan). Jacobs provides an additional argument in favor of a lesser duty rule:

[T]he conclusion which appeared to emerge from the Ann Arbor conference [is] that the practice of the Parties to the Code has led increasingly, in all the jurisdictions considered, to an inflation of dumping margins by the cumulative effect of increasingly strict interpretations of the various components of the dumping calculation. Accordingly, the practice of the European Community in treating as mandatory the provision that the duty "should" be less than the dumping margin if such lesser duty would be adequate to remove the injury is in principle to be preferred to the practice of the United States and Canadian authorities.²⁶

In view of the above, the adoption of a lesser duty rule in the U.S.²⁷ and Canada might be recommended. A proper and sufficiently detailed statutory framework for the lesser duty rule might alleviate Congressional fears of providing the Executive with "too much" discretion. Uniform — standardized — language on the exact application of the lesser duty rule could be developed within the GATT Anti-Dumping Committee. At present, the Australian and EEC authorities seem to have too much leeway in determining what constitutes a non-injurious price level, especially in view of the confidential character of complaining industry's and foreign producers' pricing data in the market of the importing country (preventing external checks). This problem is exacerbated in cases where the authorities decide to establish a

25. See also Jacobs, *supra* note 14.

26. *Id.*

27. The retrospective assessment of anti-dumping duties in the United States which requires a calculation on an entry-by-entry basis might pose certain problems for the application of a lesser duty rule. One could, however, envisage a system in which the Commerce Department not only checks each entry with the normal value, but also with a non-injurious minimum price, determined by the ITC. Contrary to the retrospective character of the determination of dumping, the lesser duty rule probably could only be applied on a prospective basis.

target price for domestic producers which covers their costs of production and a reasonable profit.

Within the GATT, clarity could be provided on a number of issues such as whether the calculation of the injury margin should be made on a producer-by-producer basis or on a country-by-country basis, under what circumstances target prices could be used, what constitutes a reasonable profit margin, *etc.* The GATT lesser duty rule would work to ensure that any target price does not provide excessive protection to the domestic industry.

2. *Circumvention Problems*

Anti-dumping duties are typically imposed on a country-wide basis.²⁸ Individual duties are normally applied to investigated exporters who have cooperated fully during the investigation with one residual duty rate set for all other exporters or potential exporters in the country of export. The method for determining the level of the residual duty differs per jurisdiction.

The residual duty works to the disadvantage of new exporters or exporters who did not cooperate with the investigation, who are, until the first administrative review forced to pay a duty that bears no relationship to their costs or prices. From a policy point of view, however, a residual duty makes sense because it prevents — to a certain extent — circumvention. In the opinion of the author, a residual duty is a necessary evil. Its unfairness vis-à-vis new or non-investigated exporters could, however, be mitigated through creation of special, expedited reviews. A new GATT Code could provide special provisions on expedited reviews for non-investigated or new exporters.

The imposition of an anti-dumping duty on product x originating in country X may create an incentive for the producers in that country to move production to other countries (“country hopping”) or to start producing slightly different products that fall outside the scope of the anti-dumping duty (“product-shifting”).²⁹ In this respect, four situations can be distinguished:

- production in the jurisdiction which imposed the anti-dumping duty;
- production in a third country;

28. *But see* Video Cassette Recorders from Japan and Korea, 31 O.J. Eur. Comm. (No. L 240) 5 (1988), where the Commission initiated the proceeding against all Korean producers and against two Japanese producers.

29. This product-shifting or country-hopping is facilitated by the globalization of the world economy. For an interesting perspective on the changed world economy, see Drucker, *The Changed World Economy*, 64 FOREIGN AFF. 768 (1986).

- production of a slightly different product, upstream, downstream or sidestream (a “pinstriped” widget); and
- production of new products.

In some cases, the whole aim of any of the above strategies will be circumvention of the anti-dumping duty. However, in many other cases, the imposition of an anti-dumping duty will become a decisive factor and lead to an investment or product-shifting decision that might already have been reached on other grounds.

The GATT Anti-dumping Code does not address these issues.³⁰ In the absence of multilateral agreement to deal with these strategies, a number of Code signatories have found it necessary — perhaps understandably — to act unilaterally against certain corporate practices that they consider to constitute circumvention.

The EEC, for example, in June, 1987, adopted its ‘parts’ or ‘screw-driver’ amendment to deal with intra-EEC assembly of parts and components that, if imported as a complete item, would have been subject to anti-dumping duties,³¹ provided that:

- the assembly or production is carried out by a related party;
- the assembly or production operation was started or substantially increased after the opening of the anti-dumping investigation; and
- the value of parts or materials originating in the country of exportation of the product subject to the anti-dumping duty is at least 60 percent of the total value of the parts.

In the United States and Canada, the revolution occurred more quietly when the Department of Commerce and the Import Tribunal determined that, under certain circumstances, an anti-dumping duty imposed on imports of the finished product, would also apply to imports of parts or components.

In addition, in 1988, the United States adopted a provision to prevent circumvention of anti-dumping duties through only minor alterations of the dumped merchandise or through limited further assembly in the U.S. or in third countries.³² Furthermore, Horlick has pointed

30. See Koulen, *Some Problems of Interpretation and Implementation of the GATT Anti-dumping Code*, in *ANTI-DUMPING LAW AND PRACTICE: A COMPARATIVE STUDY* ch. 7, § 10 (J. Jackson & E. Vermulst ed., University of Michigan Press forthcoming 1989).

31. The parts amendment is discussed extensively in Griffith, *Anti-Dumping Duties on Parts in the EEC*, in *ANTI-DUMPING LAW AND PRACTICE: A COMPARATIVE STUDY* ch. 7, § 5 (J. Jackson & E. Vermulst ed., University of Michigan Press forthcoming 1989). It should be noted that, prior to adoption of the ‘parts’ amendment, CKD kits normally were already subjected to anti-dumping duties imposed with respect to the finished product because of the customs classification rules.

32. See Holmer & Bello, *The 1988 Trade Bill: Is It Protectionist?*, 5 *INT’L TRADE REP.* 1347, 1350 (1988). The circumvention provisions are regulated in Section 1321 of the Omnibus Trade

out³³ that the Commerce Department in the DRAM investigation included future generation DRAMS, although this was questioned by the ITC on "like product" grounds.

The Australian courts, on the other hand, currently consider the identity of goods in the condition they are in at the point of entry. Accordingly, unless the goods at the point of entry can be said to be unassembled or disassembled with the essential character of the whole (finished) product, e.g., CKD kits, they will be treated simply as parts.³⁴

The increased globalization also affects the complainants who, in certain cases, will source vital parts abroad or have the final product assembled abroad. Obviously, the question then arises whether they can still be considered as domestic producers in the country of importation.³⁵

As of the moment of writing, there is no uniform approach in the four jurisdictions towards these important issues which may have a vital impact on foreign investment and on corporate planning. This creates considerable uncertainty.

Product-shifting and country-hopping are new issues that should have a high priority in the GATT negotiations. Product-shifting could be addressed in part through a revised "like product" definition, duly restrictive to prevent protectionist applications.³⁶ The customs classification rules of the Harmonized Commodity Description and Coding System could also provide a certain guidance. Thus, for example, Rule 2 states that:

- (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the

and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 119 to be codified as section 781 of the Tariff Act of 1930. They deal with four types of circumvention: (1) importation of parts and components into the United States for assembly into a product of the same class or kind of merchandise as that which is subject to an anti-dumping duty order; (2) assembly or completion of parts and components in a third country into a product of the same class or kind of merchandise as the product subject to an anti-dumping duty order in the U.S.; (3) importation of products with minor alterations (compared to the products subject to an anti-dumping duty order); and (4) importation of newly developed products with the same basic characteristics as those subject to an anti-dumping duty order. It is up to the Commerce Department to decide whether to use these provisions in specific proceedings.

33. Horlick, *supra* note 4, § 2.4.1.

34. See Steele, *supra* note 1, § 4.1.

35. For more detail, see *infra* § III.B.

36. See Baker, "Like" Products and Commercial Reality, in ANTI-DUMPING LAW AND PRACTICE: A COMPARATIVE STUDY ch. 7, § 1 (J. Jackson & E. Vermulst ed., University of Michigan Press forthcoming 1989), pointing out the need to address circumvention strategies and suggesting possible solutions.

essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or failing to be classified as complete or finished by virtue of this Rule), presented unassembled or disassembled.

- (b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such materials or substance

Thus, one could envisage an assumption that, if the widget and the pinstriped widget fall under the same subheading of the Harmonized System, they should normally be considered alike. Likewise, imports of parts that fall under the same Harmonized System subheading as the finished product, could be subject to the anti-dumping duty imposed with respect to the finished product. Of course, the Harmonized System classification rules might sometimes be too broad and other times overly restrictive. They could, therefore, never provide perfect guidance.

As far as production of the dumped product in the country of import or in third countries is concerned, it would seem to this author that rules of origin might provide a logical framework for reference. The problem is, of course, that there are no uniform rules of origin and that, in addition, certain jurisdictions have many different sets of origin rules.

It would seem to be in the interest of all GATT Contracting Parties to have uniform rules on circumvention. Such rules should strike a balance between allowing legitimate business practices and obstructing clear attempts to evade the anti-dumping laws.

3. *Sunset Provision*

Australia, Canada, and the EEC all have sunset clauses under which anti-dumping duties expire automatically after a certain time (five years in Canada and the EEC; three years in Australia) unless a request for continuation is received from the domestic industry.³⁷ Sunset provisions seem to be an efficient way of dealing with anti-dumping duties in which the domestic industry has lost interest. Adoption of a sunset clause should be seriously considered by the United States and by the GATT Code signatories. As far as the

37. In Australia, anti-dumping duties automatically sunset after three years. In other words, the complaining industry must lodge a new complaint which will form the basis for a new investigation.

United States is concerned, it would be an easy way for the Office of Compliance to deal with the backlog of annual review cases.

E. *Assessment of Anti-dumping Duties*

The heart of any anti-dumping system is the actual assessment of anti-dumping duties. This study has found widely diverging approaches to duty assessment in the four jurisdictions.

One should note as a starting point that the GATT does not prohibit injurious dumping. GATT article VI merely states that dumping is to be "condemned" if it causes material injury and that an anti-dumping duty may be levied by Contracting Parties "in order to offset or prevent dumping."

It follows that anti-dumping duties should not have the character of a penalty for past dumping practices. They should merely be designed to prevent or offset injurious dumping in the future on the basis of findings of fact. Even where injurious dumping exists, imposition of duties is not mandatory under GATT or the Code, but merely discretionary.

In Canada, Revenue Canada first determines whether dumping took place during the investigation period (which is always in the past). However, the dumping margin established for that period does not really have any practical importance. Once the Import Tribunal has issued a final affirmative injury determination, Revenue Canada must determine within 6 months whether and at what level dumping occurred during the 120 days between the preliminary Revenue Canada determination and the final Import Tribunal determination. In addition, Revenue Canada must set a prospective normal value for the future.

The Canadian system, therefore, offers potential importers the opportunity to ascertain for themselves whether or not to purchase at a certain price will attract liability for anti-dumping duties. In other words, the importer can avoid payment of such duties as long as his purchase price is above or equal to the normal value set by Revenue Canada. The disadvantage of the Canadian system would seem to be that the normal value is set by reference to past prices or costs and therefore may not accurately reflect subsequent developments in domestic prices or costs of the foreign producers.

In the United States the liability for payment of anti-dumping duties is determined on a retrospective basis in the course of an annual review. Thus, the rates set in the anti-dumping duty order that forms the culmination of the original investigation in the United States, are only an estimate of the liability. The United States system has the

advantage that it is based on actual data and therefore supposedly most realistically offsets any dumping that has occurred. Compared to the Canadian system, however, it is less predictable for the importer who does not know, at the moment of importation, whether or not and to what extent he will be liable for payment of the duty. It also puts a heavy burden in terms of time and expenses on foreign exporters.

In Australia, the Australian Customs service — and now the Anti-Dumping Authority — will set a prospective normal value based on the data obtained during the investigation period. Once a dumping notice has been published, an anti-dumping duty will be levied only on those sales transactions with regard to which the export prices shown as the transaction value of the goods on entry are less than the normal value.³⁸ Like the Canadian system, Australia therefore offers Australian importers the opportunity to determine in advance whether purchase at a certain price will attract liability for payment of anti-dumping duties.³⁹

The Australian and the EEC systems share the feature that duties are set prospectively on the basis of the data gathered during the investigation period. As there is a substantial time lag between the investigation period in an anti-dumping proceeding and the provisional and final determinations, this means that in most cases anti-dumping duties will be imposed at levels that may have nothing to do with the prices or costs prevailing at the time that the duties are imposed.

More serious, however, is the practice in the EEC to typically impose anti-dumping duties as a percentage of the CIF export price. This percentage is applied to all future imports. In the mechanics of the EEC system, this implies that the anti-dumping duty must be paid whether or not the sale in question is actually made at a dumped price.⁴⁰ While there are certain potentially mitigating factors (the lesser duty rule; acceptance of undertakings; refund possibilities; review possibilities and occasional imposition of an anti-dumping duty in the form of a floor price), in reality these factors do not alleviate this

38. Note, however, that the Australian Customs Service recently decided to express the duty as a percentage for the purpose of assessment of provisional securities prior to the final decision. See Steele, *supra* note 1, § 3.4.

39. The only exception is where a product is imported which falls within the ambit of the dumping notice but for which the Customs Service does not have a specific normal value, e.g., because it is a new model or because it is an existing model whose specifications changed. In those circumstances, rather than hold the product up, the Customs Service will take a security while determining the normal value. If, having done so, the Customs Service determines that the export price is less than the normal value, it will require the payment of anti-dumping duties to the extent of the difference; the security will be used to guarantee that the payment is made.

40. See Bellis, *supra* note 8, § 2.5 and Van Bael, *supra* note 11.

structural problem in the normal case.⁴¹ This is especially so because there is a growing reluctance within the EEC Commission to accept undertakings.

In the opinion of this author, the United States', Canadian, and Australian systems for assessment of anti-dumping duties could serve as a model for improvement of the EEC system. GATT rules could be developed to the effect that no anti-dumping duties should be imposed on specific sales transactions unless there has been an administrative determination that such transactions have actually been dumped (or have been made at injurious prices).

F. *Administrative Discretion*

As far as discretion of the investigating authorities is concerned, the EEC (most discretion) and the United States (least discretion) are on opposing ends of the spectrum. Thus, in the United States imposition of anti-dumping duties is automatic once injurious dumping is found and the duties must furthermore equal the dumping margin found during the investigation, subject to fine-tuning during the administrative reviews.⁴² The investigation itself has a clearly quasi-judicatory character, is subject to strict time limits, and is relatively transparent for the parties involved in the proceeding.

In the EEC, even if injurious dumping is found, the Community authorities must then decide that imposition of protective measures is in the interests of the Community (the decision is usually affirmative).⁴³ The level of the duty is equal to the dumping margin or the injury margin, whichever is lower. Especially in its analysis of the injury margin, the EEC Commission enjoys considerable discretion because it is normally the only party with detailed information on prices in the EEC market of both the EEC industry and the foreign respondents. The absence of a system of disclosure of confidential information under protective order further supports the role of the Commission as "examining magistrate."⁴⁴

Although Canada also has a "public interest" criterion and anti-dumping action in Australia is permissive even if dumping and resulting injury have been found, in practice both countries impose anti-

41. For the EEC, see Bellis, *supra* note 8, § 2.5 and Van Bael, *supra* note 11.

42. The harsh effects of this rule are, to a certain extent, mitigated by the U.S. system of retroactive assessment of anti-dumping duties.

43. Bellis, *supra* note 8, § 2.6. *But see* Bourgeois, *EC Anti-dumping Enforcement — Selected Second Generation Issues*, in *ANTITRUST AND TRADE POLICY IN THE UNITED STATES AND THE EUROPEAN COMMUNITY*, (Hawk ed. 1986) at 563.

44. On administrative discretion in the EEC, see Van Bael, *supra* note 11.

dumping duties once dumping and resulting injury are determined to exist.⁴⁵ Like the EEC, Australia has a "lesser duty" rule in the form of the non-injurious FOB margins.⁴⁶

It would seem to this author that the Australian system leans more towards the EEC⁴⁷ while the Canadian system shows strong similarities with the United States as far as administrative discretion or, more precisely, lack thereof, is concerned. It should be noted that the quasi-judicatory character of anti-dumping proceedings is most pronounced in the United States in the Department of Commerce (dumping) procedure and in Canada in the (injury) procedure before the Import Tribunal.

Compared to the situation prior to 1980, however, procedures in all four jurisdictions have become increasingly "legalized" with a concomitant decrease of administrative discretion. As Jackson has concluded in a previous study dealing with the U.S. system of regulating imports, this development would seem preferable to the system in the "good old days when margins could be manipulated for the greater good of the country."⁴⁸ In a system with a considerably higher degree of government officials' discretion,

[t]he dangers of corruption are high; the dangers of political manipulation and back room deals are also high; and often the weaker segments of the domestic economy (frequently including consumers) are the ones who must pay for the resulting decisions that are made for the benefit of the more powerful producing interests. The legalistic system permits well-intentioned government officials to fend off certain types of particularistic pressures (but, of course, no system will fend off all such pressures).

Sometimes government officials, past, present or future, express considerable impatience with the U.S. legalistic system and yearn for a simpler structure. Often they are simply expressing a bias that can frequently be perceived in government officials, that whatever system exists should leave to those government officials as much discretion and elbow room as possible to make the necessary decisions because those officials inherently feel that they will make the best decisions possible

...⁴⁹

45. *But see* Magnus, *supra* note 20, who mentions one case — Subsidized Grain from the U.S.A., PI-1-87 — in which the public interest criterion was successfully invoked.

46. *See* Steele, *supra* note 1, § 5.2.

47. *Compare* Waincymer, *supra* note 10.

48. *See* Horlick, *supra* note 4, § 2.6.3.

49. Jackson, *supra* note 12, at 1583. *Compare* Corbet, *quoted in* Van Bael, *supra* note 11, on his perception of the role of government officials in international trade regulation.

II. DUMPING

A. *Introduction*

To determine whether dumping takes place, the authorities in the country of importation must determine whether the export price of the product is lower than the normal value after adjustments to bring both back to the ex-factory level. The difference between the two is called the margin of dumping. The dumping margin can be expressed as a percentage or as an amount.

Different jurisdictions use different terms for elements of the dumping determination. In this article, we follow the terminology of the GATT and the GATT Anti-Dumping Code to the extent possible.

B. *Normal Value*

1. *Normal Value Based on Home Market Sales*

The preferred method for establishing normal value in all four jurisdictions is the use of prices of sales transactions in the domestic market of the foreign producer, provided that such sales are (1) in the ordinary course of trade and (2) permit a proper comparison with the export sales.

The first condition is sometimes used to exclude sales to related companies, distress sales, or special sales (e.g., sales to employees, etc.). More importantly, this condition seems to have been the basis for an informal understanding among the four jurisdictions analyzed here during the Tokyo Round not to take into account sales below cost under certain circumstances.⁵⁰

The second condition has been invoked to justify exclusion of home market sales in negligible or small quantities. In this respect it is noteworthy that the EEC and the United States apply the rule that home market sales do not permit a proper comparison where such sales amount to less than five percent — on a model by model basis — of the sales to the EEC or to third countries respectively.⁵¹ Canada and Australia seem to make this determination on a case-by-case basis.

With the exception of the sales below cost concept, these exclusions are logical because they prevent distortions or manipulation of the sales prices in the domestic market. Of course, one can question the rationale of the five percent rule, but it serves the dual purpose of administrative convenience and predictability, and is no more arbi-

50. See *infra*, § II.B.3.

51. As far as the EEC is concerned, this rule was recently confirmed by the European Court of Justice in (Joined Cases 277 and 300/85) Canon Inc., Canon France, Canon Rechner Deutschland, Canon (U.K.) v. Council (Oct. 5, 1988) (as yet unreported).

trary than any other rule would be.⁵²

2. *No or Inadequate Home Market Sales*

If the authorities in the importing country determine that there are no home market sales in the ordinary course of trade or that such sales do not permit a proper comparison, they can, pursuant to GATT and the Anti-Dumping Code, base normal value on either:

- the comparable price of the like product when exported to any third country (which may be the highest such export price but should be a representative price); or
- the cost of production in the country of origin plus a reasonable amount for administrative, selling and any other costs and for profits.⁵³

Third country exports is the preferred basis only in the United States. Horlick points out⁵⁴ that the reasons for this would seem to be a U.S. preference for "hard" price data (as opposed to "softer" cost of production data) as well as the controversial requirement in the U.S. statute that the Commerce Department should apply at least eight percent profit in constructed value cases.

The other jurisdictions seem to prefer the cost of production criterion, arguably because they assume that, if there is evidence that export sales to their country are dumped, there is a likelihood that sales to other export markets have also been made at dumped prices. In addition, use of cost of production is often administratively convenient.

3. *Sales Below Cost/Constructed Value*

In view of the absence of any wording in GATT or the GATT Code to that effect, it is remarkable that all four jurisdictions consider sales below fully allocated cost of production as not being in the ordinary course of trade if they have been made over an extended period of time in substantial quantities and do not permit recovery of all costs within a reasonable period of time. The basis for this practice seems to

52. More fundamentally, one can question the logic of a comparison between domestic and export prices as a basis for determining whether dumping exists. See Macrory, *Cost of Production as the Sole Measure of Dumping*, in *ANTI-DUMPING LAW AND PRACTICE: A COMPARATIVE STUDY* ch. 7, § 12 (J. Jackson & E. Vermulst ed., University of Michigan Press forthcoming 1989); Herzstein, *Dumping and Trade Liberalization: A Two-Tiered Approach to Reducing Anti-dumping Disciplines Between Open Trading Partners*, in *ANTI-DUMPING LAW AND PRACTICE: A COMPARATIVE STUDY* ch. 7, § 6 (J. Jackson & E. Vermulst ed., University of Michigan Press forthcoming 1989). See also Horlick, *supra* note 4, § 3.1.1.

53. See General Agreement on Tariffs and Trade, art. VI:1(b), and Anti-dumping Code of 1979, *supra* note 19, art. 2:4.

54. See Horlick, *supra* note 4, § 3.1.2.

be a GATT document circulated in November 1978 on behalf of certain Parties to the Kennedy Round Anti-Dumping Code.⁵⁵ The essential thrust of this document can, in turn, be traced back to the U.S. Trade Act of 1974 which for the first time included a provision on sales below cost. The legislative history of the Trade Act clarifies both its intended use and the limitations thereon as follows:

[T]his amendment is necessary to prevent foreign sales of merchandise, which are made at less than the cost of producing such merchandise, from being used as the basis for determining whether sales of such or similar merchandise to the United States are at less than fair value. In the absence of such a provision, sales made to the United States at less than cost of production could escape the purview of the Act if sales in the home market of the country of exportation or, as appropriate, to third countries are also made at prices which fail to meet the cost of production by an equal or greater amount.

.....

These standards are designed to insure that sales made at less than cost of production will not automatically be excluded from consideration, for frequently it is normal business practice, both in foreign countries and the United States to sell obsolete or end-of-model-year merchandise at less than cost. Similarly, certain products, such as commercial airliners, typically require large research and development costs before introduction and initially are sold at prices which do not reflect all overhead costs. If, however, such prices will permit recovery of all costs based upon anticipated sales volume over a reasonable period of time, such sales will not be disregarded.⁵⁶

The twin observations by Horlick⁵⁷ that the cost-based normal value calculation has grown in importance over the past eight years and that simultaneously the requirements for finding sales below cost have gradually been eroded (in the sense of "facilitated") would seem to apply with different accents to all jurisdictions. It is therefore certainly regrettable that the international legal basis for excluding sales at a loss is so shaky. Koulen⁵⁸ puts this as follows:

Obviously, this document, which merely states the view of a limited number of parties which has never been formally endorsed by the then Committee on Anti-Dumping Practices, cannot be invoked as an authoritative source of interpretation of the Code.

A cost-based normal value is not objectionable per se.⁵⁹ Problems

55. See, Koulen, *supra* note 30, § 10. For an extensive overview of the sales below cost concept, see Bierwagen, *supra* note 20, ch. 6.

56. Trade Reform Act of 1973, H. Rep. No. 571, 93rd Cong., 1st Sess. 71 (1973).

57. Horlick, *supra* note 4, § 3.1.3.

58. See Koulen, *supra* note 30, § 10.

59. For good arguments in favor of a cost-based approach, see Macrory, *supra* note 52. For an explanation of the U.S methodology as regards cost of production and especially recent developments therein, see Kaplan & Kuhbach, *Recent U.S. Developments in Cost of Production Analy-*

arise, however, when the cost of production is calculated in an arbitrary manner or in a manner which does not reflect economic reality. In such cases the anti-dumping rules can easily be abused for protectionist purposes and, by inflating the normal value, may lead to establishment of dumping margins where none (should) exist. In the absence of detailed multilateral rules on cost of production and constructed value calculations, these dangers are very real.

The following comments might be made with regard to the cost of production/constructed value methodology currently applied by the four jurisdictions:

- The fully allocated cost standard is economically unsound (economic theory generally considers it a perfectly normal business practice to sell below fully allocated cost in the short term as long as the marginal revenues exceed the marginal costs)⁶⁰ and, in many jurisdictions, leads to application of a different standard of acceptable business conduct for foreign producers compared to that applied to domestic producers under domestic competition laws.⁶¹
- The “over an extended period of time” condition has been watered down from the “business cycle”⁶² to the last year or even the (sometimes six months’) investigation period.⁶³
- The “substantial quantities” test is considered fulfilled in at least one jurisdiction (the United States) where at least ten percent of domestic sales were made below cost (on a quantity model-by-model basis). No justification other than administrative convenience has been offered for the ten percent rule.
- The condition that the sales below cost must not permit recovery of all costs within a reasonable period of time is not taken seriously. The “reasonable period of time” is often equated

sis, in *ANTI-DUMPING LAW AND PRACTICE: A COMPARATIVE STUDY* ch. 7, § 9 (J. Jackson & E. Vermulst ed., University of Michigan Press forthcoming 1989).

60. Compare Deardorff, *Economic Perspectives on Dumping Law*, in *ANTI-DUMPING LAW AND PRACTICE: A COMPARATIVE STUDY* ch. 2 (J. Jackson & E. Vermulst ed., University of Michigan Press forthcoming 1989), discussing the circumstances under which finding sales below cost actionable makes economic sense.

61. See Davey, *Anti-dumping Laws in the GATT and the EC*, in *ANTI-DUMPING LAW AND PRACTICE: A COMPARATIVE STUDY* ch. 7, § 2 (J. Jackson & E. Vermulst ed., University of Michigan Press forthcoming 1989).

62. See Horlick, *supra* note 4, § 3.1.3.

63. Compare Kaplan & Kuhbach, *supra* note 59. The new EEC Regulation, *Council (EEC) 2423/88*, 31 O.J. EUR. COMM. (No. L 209) 1 (1988), now states explicitly that the investigation period is the relevant period for determining whether sales in substantial quantities occurred over an extended period of time at prices which do not permit recovery of all costs within a reasonable period of time.

with the "over an extended period of time" condition.⁶⁴ This is particularly important for products where costs normally decline sharply with time (the "learning curve"); prices below cost at the beginning of production would be found "dumped", even if cost recovery is likely.

- Where more than ten percent of domestic sales were made below cost, at least one jurisdiction (the United States) then usually bases normal value on remaining sales above cost. The U.S. will switch to the constructed value if more than 90% of domestic sales were made below cost. In other words, the U.S. will use remaining sales above cost as long as such sales represent more than 10%, but less than 90% of total domestic sales. The EEC determines on a case-by-case basis what number of sales below cost are still in the ordinary course of trade (20% in *Photocopiers*). The EEC will not use remaining sales above cost (but switches to constructed value) where during the investigation period the average cost of production was higher than the average sales price. The Australian Customs Service seems to use remaining sales above cost provided they are of a substantial volume and in comparable quantities to the like goods exported to Australia. This determination is made on a case-by-case basis.⁶⁵ Use of remaining sales above cost may inflate the normal value.
- The application of a profit margin is unrealistic in situations where industries are apparently selling at a loss.⁶⁶ In addition, the decision on what profit margin to use is very arbitrary in most jurisdictions. In this respect, the statutory eight percent minimum profit in the United States and the (recently codified) EEC rule to base the reasonable profit preferably on the actual profits made on profitable sales of the like product in the domestic market (whether or not those sales are representative) deserve special mention.⁶⁷ On the other hand, the recently announced intention of the Australian government to use a zero

64. For a good example, see EEC Regulation 2423/88, *supra* note 63, art. 2(4)(A)-2(4)(b), which lays down explicitly that the time period for both is the investigation period. See also Vermulst & Waer, *De Nieuwe EEG Anti-dumping Verordening 2423/88: Een Stille Revolutie*, 37 SOCIAAL ECONOMISCHE WETGEVING 151-161 (1989).

65. See Steele, *supra* note 1, § 3.1.1.

66. See Macrory, *supra* note 52.

67. The Anti-dumping Code of 1979 merely provides in article 2:4 that, [a]s a general rule, the addition for profit shall not exceed the profit normally realized on sales of products of the same general category in the domestic market of the country of origin.

profit margin in most cases seems a step in the right direction.⁶⁸ Likewise, Revenue Canada's use of the weighted average profit on all domestic sales (including sales at a loss) as long as there is a net profit seems relatively rational.⁶⁹

The combination of these factors offers strong evidence for the thesis that the cost-component of the anti-dumping law has lost touch with reality. In addition, and perhaps more seriously, it makes cost of production calculations extremely unpredictable for most businesses. There is, in the opinion of this author, therefore, an urgent need for a multilateral reappraisal of cost of production analysis in the anti-dumping context.

Such a reappraisal might focus on the following issues:

- What types of costs should be included in calculating the cost of production? How should inputs obtained from a related party be valued? How should R & D and investment costs be amortized? How should cost allocations in the case of multi-product companies be made? What is the value of audited accounts, established in accordance with generally accepted accounting principles?
- How should the amount for SGA and a reasonable profit be determined? By reference to costs and profit of the producer who has been found selling at a loss? If so, on the basis of costs and profit for the like product (and then as far as profit is concerned on the basis of all domestic sales or only domestic sales above cost), the same general category of products, the company as a whole? Should there not be a general "overriding" rule against the use of costs or profit which are manifestly unreasonable or unrepresentative?
- Within what time frame should a company be expected to cover its cost of production? The business cycle, the product cycle, the last financial year or the investigation period? A related question is how start-up costs should be allocated. Specifically, if start-up costs are incurred during the investigation period, but can reasonably be expected to be recovered during the product or the business cycle, should they not then be allocated over one of the latter two periods instead of being attributed 100 percent to the investigation period?
- When does a company sell "substantial" quantities at a loss? Is the ten percent rule used in the United States reasonable?

68. See Steele, *supra* note 1. According to Steele, the ACS occasionally already used a zero percent profit margin. *Id.*, § 3.1.2.

69. See Magnus, *supra* note 20, § 3.

Should there not be an opportunity for foreign producers to prove that selling higher quantities at a loss is, in fact, normal industry practice?

- More generally, should there be an alignment defense, similar to the one known in many countries in competition law in the area of discriminatory pricing? In other words, if foreign producers could establish for a certain import market that (1) all producers sell below fully allocated cost and that (2) price decreases had been initiated by the complaining producers themselves, should the fact that they followed the pricing trends subject them to anti-dumping duty liability?

Despite its recent origin, it may be unrealistic to expect an economically rational cost of production/constructed value analysis for what has become, in essence, a subtle web of import protection decisions. The second-best option therefore would seem to reach multilateral standardization to prevent diverging and ever expanding unilateral interpretations of sales below cost.

4. *Non-market Economies*

The treatment of allegedly dumped imports from non-market economies under the anti-dumping law is anomalous. Backed up by the second Supplementary Provision to paragraph 1 of article VI GATT,⁷⁰ the four jurisdictions have used the freedom that the GATT regime essentially permits as far as the application of anti-dumping action against non-market economies is concerned, to develop the so-called surrogate producer concept. This means that the authorities ignore the nominal prices or costs in the non-market economies and, instead, base normal value on the prices or costs of a producer of the like product in a market economy. In most jurisdictions, the authorities are often forced to use the prices or costs of a producer located in an economy at a substantially higher level of economic development than the non-market economy under investigation. Needless to say, this can inflate the normal value.

More fundamentally, the surrogate producer concept by its very nature does not take into account that the non-market economy pro-

70. General Agreement on Tariffs and Trade, Annex 1, Ad Article V2(2) acknowledges that, it is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing Contracting Parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

ducer may, in fact, have certain comparative advantages that the surrogate producer does not have.

Further, the choice of the surrogate producer is very unpredictable and often depends on practical considerations (such as finding a producer who is willing to cooperate) that have little to do with economic reality. Finally, the surrogate producer concept offers opportunities for manipulation by the parties to the investigation.

Section 1316 of the United States Omnibus Trade and Competitiveness Act of 1988 has made an effort to alleviate the unfairness inherent in the surrogate producer concept by making the so-called "factors" or "simulated constructed value" test the preferred method of calculating normal value.⁷¹ Under the factors test, the Department of Commerce must use the factors of production (hours of labor, quantities of raw materials, amounts of energy and representative capital costs) used in producing the merchandise in the non-market economy. In other words, the factors test requires a two-step approach:

- identification and quantification of the factors of production used in the non-market economy in producing the merchandise under investigation; and
- valuation of those factors in an appropriate market economy.

While the factors test is not a panacea⁷² and may raise many of the same ideological and practical problems that exist in cases of application of the surrogate producer method, it nevertheless would seem to be a step in the right direction in that it applies a more predictable standard to anti-dumping proceedings involving non-market economies than the surrogate producer procedure. As such, it sets an example that deserves to be studied carefully by the other jurisdictions and in GATT.

C. *Export Price*

All jurisdictions would seem to calculate the export price on the basis of the price paid or payable by the importer.

In cases where the importer is related to the exporter, the jurisdictions construct the export price by taking the resale price to the first independent customer in the country of importation and deducting the costs incurred between importation and resale (as well as the costs

71. See Ehrenhaft, *The Application of Anti-dumping Duties to Imports from "Non-Market Economies"*, in *ANTI-DUMPING LAW AND PRACTICE: A COMPARATIVE STUDY* ch. 7, § 3 (J. Jackson & E. Vermulst ed., University of Michigan Press forthcoming 1989). For a critique of the factors test, see Horlick & Shuman, *Nonmarket Economy Trade and U.S. Anti-dumping/Countervailing Duty Law*, 18 *INT'L L.* 807, 825-827 (1984).

72. Ehrenhaft, *supra* note 71.

incurred by the foreign producer from the moment the product left the factory). Such costs include the selling, administrative and other general ('SGA') expenses of the related importer and, in most jurisdictions, a reasonable profit for the importer (the United States does not include a reasonable profit).⁷³

Different jurisdictions apply different methods for establishing what constitutes a reasonable profit. To the extent that — in a related party situation — it may be a perfectly logical corporate decision to have profits accrue to the mother company in the foreign country, one can criticize the assumption that a subsidiary company in the importing country should make a profit.

D. *Adjustments*

Once normal value and export price have been established pursuant to the methods discussed above, adjustments must be made to both in order to effect a fair comparison. The GATT Code rules on adjustments are extremely sketchy:

In order to effect a fair comparison between the export price and the domestic price in the exporting country . . . or, if applicable, the price established pursuant to the provisions of Article VI:1 (b) of the General Agreement [third country exports or constructed value], the two prices shall be compared at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made, in each case, on its merits, for the differences in terms and conditions of sale, for the differences in taxation, and for the other differences affecting price comparability.⁷⁴

Adjustments are very important in practice and, in the typical case, give rise to most discussions. At the same time, the subject of adjustments is technical and complicated and a thorough analysis could easily fill a book. For purposes of this study, we raised one crucial question: are adjustments, as applied administratively, fair or are they biased in favor of or against dumping findings?

There seems to be consensus among the authors of the four country studies of the project from which this article grows that the legal and/or practical application of adjustments displays a tilt towards finding dumping. Although the accents differ by jurisdiction, this tilt is most clear in situations where foreign producers sell in their home and export markets through related sales organizations. In such cases,

73. For an excellent analysis of U.S. practice with regard to adjustments, see UNITED STATES DEPARTMENT OF COMMERCE, STUDY OF ANTI-DUMPING ADJUSTMENTS METHODOLOGY AND RECOMMENDATIONS FOR STATUTORY CHANGE (Washington D.C.: Department of Commerce, 1985). Compare Koulen, *supra* note 30, § 10.

74. Anti-Dumping Code of 1979, *supra* note 19, art. 2:6.

the authorities essentially establish the export price at an ex-works level while leaving (some) overhead expenses in the normal value, thereby inflating the latter. The tilt seems most pronounced in the EEC.⁷⁵

In addition, the fact that adjustments are not made automatically, but have to be proven by the foreign producers, may put a heavy evidentiary burden on those producers and provides the case handlers assigned to the investigation with a large amount of discretion. This applies, in particular, to the requirement in most jurisdictions that adjustments for differences in terms and conditions of sale will only be granted if the terms and conditions of sale bear a direct relationship to the sales under consideration.⁷⁶

During the past eight years administrative practice towards granting adjustments seems to have become increasingly restrictive. The only justification offered is frequently administrative convenience.⁷⁷ To the extent that restrictive interpretations preclude a "fair" comparison, they do not seem justifiable under article VI.

There is a need for multilateral detailed rules on adjustments. While the GATT approach in itself seems sound, it is much too vague to prevent Contracting Parties from adopting concrete interpretations that seem at odds with the basic GATT aim of a "fair" comparison.

E. *The Dumping Margin*

There is a striking similarity between the four jurisdictions studied here as far as the calculation of the dumping margin is concerned in view of the fact that the Anti-Dumping Code does not give any gui-

75. Bellis, *supra* note 8, § 3.3.

76. In the recent case of *Kanthal Australia Pty Ltd v. Minister for Industry, Technology & Commerce* [N. G 259 (1986) and No. G 564 (1987)], Sydney Registry (Dec. 28, 1987) the Australian Federal Court held that the disallowance of adjustments for SGA on the basis that they were "fixed expenses which would be incurred whether or not sales are made" was wrong. The Court held that the correct test was that "only those costs which in an ordinary arms length transaction one would expect to be reflected in the price of the goods sold to Australia should be taken into account. If there are other costs in the domestic market which one would not expect to be reflected in an arms length price of sales to Australia then they should be considered for allowance." The Court seems to be saying that one must look at the circumstances of selling in the domestic market of the exporting producer and of selling for export to Australia. If there are factors involving costs in selling to one market the recovery of which should be expected in the price to that market, and which are not present or relevant to selling to the other market (and so would not be expected to be included in or recovered by the price to that market), then an adjustment should be granted.

77. For a telling example, see the recent amendments to the EEC anti-dumping Regulation, Council (EEC) 2423/88, *supra* note 62, especially Article 2 (10) (e) providing that individual adjustments having an ad valorem effect of less than 0.5% of the price or value are insignificant and may be disregarded. This rule does not apply to the netting back of the constructed export price.

dance. All four typically calculate the normal value on an average basis and then compare the average with each export sale. None of the jurisdictions compensate for export sales above the average normal value (negative dumping); although the U.S. statute has included express authority to do so since 1984, it has been used only once since then. This method works in favor of finding dumping.⁷⁸

III. INJURY

A. *Like Product*

The GATT Anti-Dumping Code defines a like product as: a product which is identical, *i.e.*, alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

Australia and the European Communities have essentially adopted the Code definition integrally and, in practice, put most emphasis on physical likeness. In exceptional cases, however, both have displayed a certain willingness to look at substitutability in the marketplace. Furthermore, Australia has taken the side of Canada and the United States in a number of GATT disputes involving like product and domestic industry definitions.⁷⁹

Canadian and U.S. law, on the other hand, explicitly mention "uses" as a factor to be considered in order to determine whether products are alike. ITC and Import Tribunal practice would seem to confirm that functional similarity is an important factor in determining which domestic products should be considered like the imported dumped products. Thus, functional similarity seems to have played an important role in the Canadian decision that zippers produced in Canada are like imported finished or partly finished zippers. The Canadian decision that Canadian cattle producers can bring a case against imported beef and the American decisions that Californian grape growers and Florida orange growers can bring cases against respectively French and Italian wine and Brazilian frozen concentrated orange juice also seem at least tangentially a consequence of the functional similarity test.⁸⁰

78. Compare Herzstein, *supra* note 52, n.1. See also Davey, *Anti-dumping Laws: A Time for Restriction* (revised manuscript for publication), in the 1988 proceedings of the FORDHAM CORPORATE LAW INSTITUTE, EUROPEAN/AMERICAN ANTITRUST AND TRADE LAW, § II.A.1 (Hawk ed. 1989).

79. See Baker, *supra* note 36.

80. GATT dispute settlement panels have held that cattle producers and grape growers do not produce beef and wine and therefore do not form part of the domestic industry. See *id.* n.7.

In the opinion of this author, this functional similarity test does not conform to the present GATT definition of like product.⁸¹ Although a like product definition on the basis of functional similarity seems broader than a definition based on physical likeness (physically alike products will always compete in the market, but functionally similar products need not be physically similar), it is not necessarily more protectionist. By broadening the scope of the affected domestic industry, it may dilute the impact of the injury.

It might be worth considering whether the present physical similarity test in the Code could be expanded to include a functional similarity test. If conclusive proof (*e.g.*, on the basis of cross-elasticity of demand tests) could be offered that imported coffee at dumped prices hurts domestic chicory producers, the like product definition should not preclude relief on technical grounds that bear no relation to what goes on in the marketplace. In addition, a like product test, based on functional similarity might deal with some of the more obvious circumvention strategies (the "pinstriped" widget).⁸²

B. Domestic Industry

There must be injury to the domestic industry producing the like product. Magnus⁸³ has pointed out that this requirement has given rise to four issues in Canada:

- (1) Does the activity carried on by the domestic industry constitute production? (Import Tribunal: Cleaning and repackaging operations do not amount to production).
- (2) Is the production activity carried on by the complainant? (Import Tribunal: Complaining cattle growers produce beef).
- (3) Is the production activity carried on in the importing country? (Import Tribunal: Steel plate, produced from Canadian continuous cast slabs of steel, but shipped to the United States for hot rolling, annealing, pickling and cutting, before being shipped back to Canada for sale, is not produced in Canada; imports of U.S. produced cars into Canada by complainants should not be included in the injury analysis).
- (4) Is the production intended (and actually used) for domestic consumption? (Import Tribunal: Out of the total Canadian production of pentaerythritol only the portion consumed in Canada

81. Compare Bierwagen, *supra* note 20, at 38, who agrees with this conclusion.

82. For more detail, see Baker, *supra* note 36.

83. See Magnus, *supra* note 20, § 4.

must be taken into account; exported cars are not relevant for injury analysis).

Horlick⁸⁴ has pointed to a fifth — more procedural — issue:

- (5) Does the complainant actually represent (a major proportion of) the domestic industry? (Commerce: Yes, unless a majority of the industry shows its opposition).

Where these questions have arisen in the other jurisdictions, they have been answered in an ad hoc manner. This is logical because the GATT and the GATT Code rules do not go into sufficient detail to provide a clear answer to most of these questions.

It would seem to this author that in many cases the lacunae have been filled in favor of domestic complainants. Thus, a complainant in the U.S. does not have to prove that he represents the domestic industry. In most jurisdictions there is hardly any substantive check to see whether the activities carried out by the domestic producers constitute production and whether the production is carried on in or outside the country of import. In Australia, it is sufficient for imposition of anti-dumping duties if the Australian produced merchandise contains 25 percent Australian content.⁸⁵ By way of comparison, in the context of its parts investigations, the EEC applies a 60 percent (value of parts originating in the country where the dumped finished products originate) — 40 percent (value of parts originating in other countries) rule without taking into account where the complainants source. In the context of its undertakings policy in parts cases, the EEC would even seem to require 40 percent EEC content, again without considering whether the complaining industry complies with that rule.

Horlick⁸⁶ raises a very pointed question in the context of his discussion of the High Capacity Pagers proceeding:

If X percent value added in a third country is insufficient to change the country of origin of an imported end product, should a U.S. producer of that end product who only adds the same percent in the U.S. have standing to complain?

There is a need for uniform answers to the above questions that can only come from multilateral agreement. Such agreement should, in this author's opinion, be aimed at applying the same rules to domestic complainants and foreign respondents, both procedurally and substantively.

84. See Horlick, *supra* note 4, § 4.2.1.

85. Under the amendments to Australia's anti-dumping laws, which came into effect on September 1, 1988, any person may now bring a complaint as well as or instead of the domestic industry producing the like product.

86. Horlick, *supra* note 4, § 4.2.1.

As far as procedure is concerned, the EEC practice of sending out (injury) questionnaires to domestic producers and verifying their responses might serve as an example to the other jurisdictions, assuming that such a questionnaire would request information on the issues above (this is presently not the case).

As regards substantive rules, the first-best option might be standardization of origin rules and explicit application of the national treatment obligation to those rules. Failing standardization (most countries apply their own set(s) of origin rules), there could at least be a requirement that the same origin rules be applied to domestic and foreign producers within the context of anti-dumping proceedings.

B. *Material Injury*

The domestic industry producing the like product must have suffered material injury as a result of the dumped imports. Material injury in this sense has three components (satisfaction of one of the three is sufficient for an affirmative injury finding):

- The domestic industry is suffering material injury during the investigation period;
- the domestic industry is not suffering material injury during the investigation period, but can reasonably be foreseen to suffer such injury in the very near future (threat of material injury);
- there is not yet a domestic industry producing the like product, but there would have been such an industry in the absence of the dumped imports (material retardation of the establishment of an industry).

Although the GATT Anti-Dumping Code and all four jurisdictions provide lists of indicators that should be considered in determining whether there is material injury and, if so, whether it is caused by the dumped imports, any determination on this point is obviously extremely subjective. The subjective character of injury determinations is probably, to a large extent, unavoidable. However, there is the additional problem that two of the four jurisdictions analyzed in the broader study from which this article draws — the exceptions being Canada and, since adoption of the Omnibus Trade and Competitiveness Act of 1988, presumably the United States — consider injury information as confidential and not susceptible to disclosure to the opposing side to any meaningful extent. This prevents external checks during the investigation on the accurateness of the data and the interpretation thereof by the authorities.

As more precise substantive rules seem hard to envisage, improvements could, for example, focus on transforming the investigatory

character of injury investigations. The Canadian adjudicatory proceeding before the Import Tribunal with *in camera* hearings for the purpose of receiving and cross-examining confidential information submitted by the other side (and with a right of counsel to have access to all confidential information submitted by other parties to the investigation) seems to have worked well and could serve as an example for the other jurisdictions.

D. *Causation*

Although one can technically separate the requirements that there must be material injury and that such injury must have been caused by the dumping, the two are obviously interrelated. Indeed, many trend indicators for assessing whether material injury occurred will simultaneously point to the direction where the injury came from. Nevertheless, for purposes of analysis, the distinction has a certain value.

The 1967 Anti-Dumping Code required that the dumped imports be demonstrably the principal cause of injury. In reaching this determination, the authorities were required to weigh, on one hand, the effect of the dumping and, on the other hand, all other factors taken together which might be adversely affecting the industry.

This rather stringent causal link was replaced by the much weaker phrase in the 1979 Code that it must be demonstrated that the dumped imports are, through the effects of dumping, causing material injury.⁸⁷ The Code further provides that other causes of injury, such as the volume and prices of non-dumped imports, contraction in demand or changes in consumption patterns, trade restrictive practices of and competition between the foreign and domestic producers, and developments in technology and the export performance and productivity of the domestic industry, should not be attributed to the dumped imports.

It is very difficult to detect common causation trends in the four jurisdictions studied here. Indeed, the most interesting common trend that this author has been able to discern is the practice in all four jurisdictions to cumulate imports from several sources under investigation for purposes of determining whether injury is caused by the dumped imports. Assuming that dumped imports from several sources compete with each other and with the domestically produced like product, it makes sense from an administrator's policy point of view to cumulate such imports for purposes of the injury analysis. On the other hand, cumulation tends to ignore differences in market share

87. Anti-Dumping Code of 1979, *supra* note 19, art. 3:4.

and differences in market position of the producers and the countries concerned, such as moment of entry and price setter or price taker.

All jurisdictions cumulate imports from the producers found selling below normal value from one country (producer cumulation). To what extent the recent EEC determination in the *Video Cassette Recorders* proceeding to initiate and take protective action against two Japanese producers is an exceptional case or the beginning of a new trend to de-cumulate at the producer level remains to be seen.

The four jurisdictions generally also cumulate imports from several countries if the proceeding has been initiated against those countries (country cumulation). At least one jurisdiction (Canada), however, would seem to provide an opportunity for de-cumulation under certain circumstances (for example if the dumping margins found with respect to producers in one country are significantly lower than those found with regard to other producers in other countries). The EEC has occasionally de-cumulated in cases where producers in a certain country had a minimal market share or did not undercut the prices of EEC producers. To the extent that such de-cumulation represents an effort to make allowance for the position of the smaller — usually new — suppliers/price takers, it is a useful concept that might be multilateralized in GATT.

How de-cumulation should operate is another matter. General rules in absolute terms are hard to envisage in view of the different characteristics of industries and markets concerned. One could, however, imagine a rule providing that a country with a significantly lower export volume or a significantly lower dumping margin (or a combination of both) than other countries involved in the proceeding, would be assumed not to cause material injury. Such a rule would be particularly appropriate if the country in question was a new entrant developing country.

An issue that has raised considerable controversy in the United States, but has been largely ignored in the other jurisdictions concerns the question whether the causal link should relate to the dumping (margins analysis) or to the dumped imports (imports analysis). Proponents of the margins analysis argue that the size of the dumping margin should play a certain role in the causation analysis. Thus, for example, if the dumping margin is five percent, but the margin of price undercutting is 45 percent, this might be an indication that any injury caused by the dumped imports is not caused by the dumping. In addition, imposition of an anti-dumping duty of five percent would not alleviate the injury suffered by the domestic producers in such a factual constellation. The U.S. Court of International Trade has held

that the International Trade Commission is not obliged to, but may, take into account the size of the dumping margins. The wording of the GATT Anti-Dumping Code would seem to contemplate a margins analysis in that it requires in article 3:4 that it must be demonstrated that the dumped imports are, through the effects of the dumping, causing injury. In the opinion of this author, the size of the dumping margin should logically be a factor in the analysis of causation. This could be made explicit in the Code.

An important factor in EEC injury investigations has been the presence on the Community market of other low-priced imports not under investigation. In such cases, the EEC Commission usually gives the complaining industry the option of bringing an additional complaint against those other imports (unless there is no evidence at all of dumping and resulting injury) or having the proceeding against the original respondents terminated on the basis of no injury. As practically all anti-dumping proceedings are initiated following industry complaints and therefore inherently harbor the danger of manipulation by the complaining industry (e.g., domestic industry x competes with industry y in country Y, but imports from or has price agreements with industry z in country Z, therefore bringing an anti-dumping complaint against producers in country Y, but not against producers in country Z), the EEC policy to a certain extent minimizes this danger. In this respect, it could serve as an example for other jurisdictions.⁸⁸

Finally, an issue that seems to have given rise to argument in the United States⁸⁹ is whether for purposes of the injury analysis, the International Trade Commission should look only at the impact of the dumped transactions or at the "class or kind of merchandise" which has been determined to have been dumped by Commerce. The problem arises because Commerce does not give credit for negative dumping and then calculates one weighted average dumping margin for the whole "class or kind of merchandise." The authorities in the other jurisdictions would seem to proceed in the same manner and, consequently, likewise consider the injurious impact of the dumped and non-dumped imports as a whole, ignoring the distinction between dumped and non-dumped sales transactions.

88. Compare Ehrenhaft, *supra* note 71, § 3, who proposes amending the anti-dumping law so as to permit exporters to demonstrate that they are not "dumping" (or not causing injury EAV) if reasonable quantities of similar products are available on the market of the importing country at even lower prices from sources not engaged in sales at dumped prices.

89. See Stein, *Treatment for Injury Purposes of Transactions not at LTFV*, in ANTI-DUMPING LAW AND PRACTICE: A COMPARATIVE STUDY ch. 7, § 15 (J. Jackson & E. Vermulst ed., University of Michigan Press forthcoming 1989).

While it would seem to make sense to consider only the impact of the dumped sales transactions (before calculating a weighted average margin on all transactions), such an examination could be difficult to administer, especially in the bifurcated U.S. and Canadian systems.⁹⁰

IV. SHORTCOMINGS IN THE GATT ANTI-DUMPING CODE AND IN THE NATIONAL ANTI-DUMPING LAWS; PROPOSALS FOR CHANGE

Many economists would argue that the economic justification for anti-dumping action is weak.⁹¹ In this, however, the anti-dumping system does not stand out from other trade protection instruments.

There have also been many commentators who have pointed out that anti-dumping laws, which in a way can be seen as the international component of national competition laws, in fact pursue different objectives and reach different — sometimes opposite — results.⁹²

While both types of criticism have their value, they do not, in the opinion of this author, provide compelling arguments to abolish anti-dumping laws altogether. Anti-dumping laws serve an important function as “interface” mechanism:

As world economic interdependence has increased, it has become more difficult to manage relationships between various economies. This problem can be analogized to the difficulties involved in trying to get two computers of different makes to work. To do so, one needs an “interface” mechanism to mediate between the two computers. Likewise, in international economic relations, and particularly trade, some interface mechanism may be necessary to allow different economic systems to

90. *Id.*

91. For a lucid overview of such arguments, see Davey, *supra* note 78.

92. See Bierwagen, *supra* note 19, ch. V. See also Vermulst, *EEG Anti-dumping en Mededingingsrecht: Twee Handen op Een Buik?*, 36 SOCIAAL ECONOMISCHE WETGEVING 430 (1988); *The Interface of Trade/Competition Law and Policy*, 56 ANTITRUST L. J. 397-460 (1987); Victor, *Task Force Report on the Interface Between International Trade Law and Policy and Competition Law and Policy*, 56 ANTITRUST L. J., 463 (1987); Applebaum & Grace, *U.S. Antitrust Law and Anti-dumping Actions Under Title VII of the Trade Agreements Act of 1979*, 56 ANTITRUST L. J. 497; GREY, *TRADE POLICY AND THE SYSTEM OF CONTINGENCY PROTECTION IN THE PERSPECTIVE OF COMPETITION POLICY* (1986); ORGANIZATION OF ECONOMIC COOPERATION & DEVELOPMENT, *COMPETITION AND TRADE POLICIES/THEIR INTERACTION* (1984); Victor, *Anti-Dumping and Anti-Trust: Can the Inconsistencies Be Resolved?*, 15 N.Y.U. J. INT'L L. & POL. 339 (1983); Ordovery, Sykes & Willig, *Unfair International Trade Practices*, 15 N.Y.U. J. INT'L L. & POL. 323 (1983); Horlick, *American Trade Law and the Steel Pact Between Washington and Brussels*, 6 WORLD ECON. 357 (1983); R. DALE, *ANTI-DUMPING LAW IN A LIBERAL TRADE ORDER* (1980); Nolan-Haley, *The Trigger Price Mechanism: Protecting Competition or Competitors?*, 13 N.Y.U. J. INT'L L. & POL. 1 (1980); Ehrenhaft, *What the Anti-Dumping and Countervailing Duty Provisions of the Trade Agreements Act/Can/Will/Should/Mean for U.S. Trade Policy*, 11 L. & POL'Y INT'L BUS., 1361 (1979); Barcelo, *The Anti-dumping Law: Repeat It or Revise It*, 1 MICH. Y.B. INT'L LEGAL STUD. 53 (1979); Barcelo, *Anti-dumping Laws as Barriers to Trade — the United States and the International Anti-dumping Code*, 57 CORNELL L. REV. 491 (1975).

trade together harmoniously.⁹³

Over the past eight years, the anti-dumping system has become one of the most important (if not most precise) interfaces in international trading relations.⁹⁴ The apparent need felt for anti-dumping action is also clear from the fact that even in the proposed U.S.-Canada free trade agreement⁹⁵ and in the free trade agreements between the EEC and EFTA countries, anti-dumping action remains possible (while, as far as the former is concerned, anti-dumping action is supposed to be abolished after five years, it remains to be seen whether this plan will materialize). From a pragmatic point of view, abolition of anti-dumping laws is therefore not really an option.

While one could argue with some justification that the anti-dumping actions as presently applied are little more than thinly disguised safeguard actions, it should nevertheless be borne in mind that the technicalities involved, especially in the calculation of the dumping margin, offer at least some guarantees for limiting the harmful effects on international trade of the anti-dumping instrument.

Rather, the objective for international reform should therefore be to make the anti-dumping system a better functioning interface by improving its quality. Economic rationalization and injection of competition law considerations might be useful reference points. Before suggesting possible improvements, however, we need to analyze the defects in the international and national frameworks for anti-dumping action.

It is clear that the GATT Anti-Dumping Code is too vague. This vagueness has allowed the jurisdictions analyzed in this study to implement unilateral interpretations, either in law or in practice, and claim GATT-consistency where it may not exist. In the absence of Code-clarity, such claims are hard to refute.

It would seem that many of the interpretations adopted by the four jurisdictions analyzed here either clarify unclear and opaque elements of the Anti-Dumping Code or deal with issues that were simply not addressed in the Code.

The difficulty with these unilateral interpretations is that they typically go in the direction of facilitating anti-dumping findings and/or expanding the scope of anti-dumping measures. This problem is exac-

93. J. Jackson & W. Davey, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* (2d ed. 1986) at 650-51.

94. See also the summary of the discussion during the conference in Ann Arbor by Denton, reproduced in *COMPARATIVE ANTI-DUMPING LAW*, *supra* note 1, app. 1.

95. For a description of the FTA between and U.S. and Canada, see Hart, *Dumping and Free-Trade Areas*, in *ANTI-DUMPING LAW AND PRACTICE: A COMPARATIVE STUDY* ch. 7, § 5 (J. Jackson & E. Vermulst ed., University of Michigan Press forthcoming 1989).

erated by the fact that interpretations proposed in one jurisdiction are sometimes justified on the ground that other jurisdictions have adopted similar or even broader interpretations. Steele⁹⁶ provides the following illuminating example in the Australian context:

The Minister stated that although Professor Gruen had recommended the repeal of Section 5(9) [rejection of sales at a loss as not being in the ordinary course of trade], the Government did not consider this appropriate. Other countries such as the U.S., Canada and the EC which rely on anti-dumping as a means to control unfair trade practices had and used similar proceedings. The Australian Government was not prepared to provide Australian industry with a lesser safeguard against unfair competition than that provided by these other countries.

Likewise, the original proposal in the U.S. House of Representatives to abolish the ESP offset was justified by its proponents on the ground that the EEC did not recognize an offset for indirect selling expenses incurred in the home market in cases where the exporter sold through related sales companies in the export market.⁹⁷

It should be clear from the above that unilateral interpretations adopted in one jurisdiction may lead to the adoption of similar interpretations in the other jurisdictions without any discussion whatsoever in the multilateral forum, provided by the GATT and the GATT Anti-Dumping Code. This amounts to the four jurisdictions effectively short-circuiting the procedures envisaged by GATT.

It is submitted that the only way to call a halt to this development is the establishment of a much more detailed international framework. In other words, the GATT Anti-Dumping Code must be both clarified and expanded, preferably on the basis of the most restrictive interpretation adopted by any jurisdiction.⁹⁸ Clarification and expansion seem desirable especially in the following areas:

Procedure

- The lesser duty rule could be mandatory. While the EEC and the Australian system could serve as a guide, they leave too much discretion to the administering authorities. The lesser duty rule should compare prices of domestic producers with the prices charged by each foreign producer in the export market concerned. Use of target prices (instead of actual prices) should be minimized and used only as a last resort, *i.e.*, when the domestic producers concerned have been forced to sell below their cost of production. If target prices are used, the

96. Steele, *supra* note 1, § 1.3.

97. The 1988 Omnibus Trade and Competitiveness Act, *supra* note 32, did not adopt this provision.

98. Compare Davey, *supra* note 61.

profit margin should be realistic and not provide domestic producers with windfall profits.

- Expedited review requirements could be adopted to deal with new or non-investigated exporters subjected to the residual duty in the original investigation. Agreement should be reached on how to set the level of the residual duty (*e.g.*, the weighted average of the duties imposed on fully cooperating producers).
- A specific provision dealing with circumvention could be adopted. This provision should be aimed at striking a balance between legitimate corporate investment and planning strategies and illegitimate circumvention stratagems. It should apply the same standards to domestic and foreign producers (national treatment requirement). One aspect could be a revised “like product” definition (see below) which would take care of circumvention through production of slightly differing products which nevertheless directly compete with the products on which anti-dumping duties have been imposed. The rules could also cover third-country assembly or assembly in the country of importation, provided that such assembly does not constitute a genuine change of origin of the merchandise concerned. The first best option in this regard would seem establishment of one uniform rule of origin (*e.g.*, x percent value-added in the third country or in the country of importation confers such country’s origin on the product concerned and precludes imposition of anti-dumping or anti-circumvention duties).
- Anti-dumping duties should be assessed only on transactions which are actually dumped. The U.S. system of anti-dumping duty assessment would seem to apply this principle most and could therefore serve as an example for detailed rules on duty assessment within the Code. Administering authorities should make this determination on a transaction-by-transaction basis on the basis of the facts (and not prospectively on the basis of historical data).
- The sunset clause (as already adopted by Australia, Canada and the EEC) could be multilateralized in the form of a GATT obligation. The length of the sunset clause could be subject to debate (three years or five years). Transparency of administrative determinations should be increased to the extent possible, at least for the parties affected by the results of the proceeding.

Disclosure of confidential information under protective order could be recommended in the Code.

Dumping

- A five percent rule for determining whether home market sales have been made in sufficient quantities to be compared to export sales promotes predictability. The EEC variant providing that the five percent rule should be applied in relation to EEC sales seems slightly preferable to the U.S. variant (five percent of sales to third countries) in that it compares the size of the relevant markets. The EEC rule could be adopted in the Code.
- Sales below cost and constructed value should be regulated in the Code in detail. It is submitted that, while it may be very difficult to turn back the clock and rationalize the concept, any multilateral regulation is preferable to the “wild west” situation that prevails at the moment in the four jurisdictions. International regulation could focus in the first place on definition of the four key terms for determining whether sales below cost were made:
 - (1) sales in substantial quantities;
 - (2) over an extended period of time;
 - (3) at prices which do not permit recovery of all costs;
 - (4) within a reasonable period of time.

Secondly, it could address the computation of the constructed value, especially the use of a “reasonable profit margin.” The intention announced by the Australian Government to apply a zero profit margin in most cases represents an element of rationality that could be multilateralized in the Code.

- Calculation of the normal value in cases involving non-market economies could be clarified. Adoption of the factors test in the U.S. Omnibus Trade and Competitiveness Act of 1988 as the preferred method for calculating the normal value for non-market economies represents an effort towards standardized treatment of non-market economies that might set an example for the other jurisdictions and adoption in the Code.
- The rules on adjustments in most jurisdictions display a tilt towards finding dumping. This is especially so in cases where the foreign exporters sell in their home and export markets through related sales organizations. A fair comparison would seem to require deduction of similar expenses on both sides. The Code should require an “apples-to-apples” approach. The requirement in many jurisdictions that adjustments can only be made for expenses which bear a direct relationship to the sales

under consideration impinges upon commercial reality and is of questionable value, but can be understood from the administrator's point of view that it prevents manipulation. As this requirement assumes special importance in the case of sales through related parties, the ESP offset in the U.S. seems a reasonable compromise between these conflicting interests and could be an example for regulation in the GATT and in other jurisdictions.

In addition, one could envisage a rule that adjustments be made for all factors affecting price comparability.⁹⁹ The GATT Anti-Dumping Code Committee or a specially created 'Technical Committee' could consider and rule on contested adjustment and calculation issues.¹⁰⁰

Injury

- The "like product" definition could be expanded to include inclusion of products on the basis of a "functional similarity" test where satisfactory evidence can be supplied by the party requesting inclusion that the physically different, but functionally similar, products compete in the market place.
- Rules on cumulation could be developed with an appropriate exception (dependent on the market share, the dumping margin or other factors which clearly distinguish one party from the other parties involved). In addition, this could be one area where special consideration be given (*e.g.*, in the form of a more lenient rule) to the position of new entrant developing countries. The rules on cumulation could apply to country cumulation and to producer cumulation.
- The mandatory character of the margins analysis could be made explicit in the Code.
- A meeting competition defense could be incorporated in the Code. This defense could at least apply where low-priced (supposedly non-dumped) imports in substantial quantities are present in the market of the complaining industry. (This rule would seem to be applied already by the EEC as a matter of administrative practice.) Such a requirement would serve the dual purpose of preventing manipulation of the territorial

99. Although one could argue that article 2:6 of the GATT Anti-Dumping Code makes it quite clear that adjustments must be made for all differences affecting price comparability, this article has not prevented at least one Code Signatory from amending its anti-dumping law so as to allow adjustments only for a limited list of adjustments. See EEC Regulation 2423/88, *supra* note 63, art. 2(9)-(10).

100. Suggestion of Bill Davey, letter to the author (Nov. 28, 1988).

scope of the investigation by the complaining industry and of not imposing anti-dumping duties where such duties would not alleviate the injury of the domestic industry.

Over the past nine years, administrators of the anti-dumping laws have often hidden behind the technical character of the anti-dumping law to implement unilateral changes that may have far-reaching consequences for application of the law in concrete cases. It is seldom realized by the public at large that technical changes typically have the effect of increasing the likelihood of finding dumping and/or injury. Technical changes often go unchallenged in GATT because the GATT Code Committee is dominated by the four anti-dumping law enforcers examined in this article.

This situation is particularly unsatisfactory because anti-dumping measures have probably become the most important interface mechanism in international trade over the past decade. Trade will only deteriorate in view of the fact that more and more countries are starting to adopt (and use) anti-dumping laws, and typically base these laws and their application on a combination of the anti-dumping laws of the four jurisdictions examined here.

The comparative examination of the four jurisdictions undertaken in this article has shown an acute awareness on the part of anti-dumping administrators of what goes on in other jurisdictions. Thus, proposed changes in one country are often inspired and sometimes justified by reference to other jurisdictions' law or practice. Too often GATT-compatibility is assumed.

Detailed multilateral regulation is the first and most important step to stop or roll back these undesirable developments. In addition to the issues mentioned above, such regulation could (and probably should) include a notification and consultation requirement with regard to any proposed future changes, either in law or in practice.

This article suggests that in a globalized interdependent world economy, today's incremental changes in the anti-dumping law of one country at the behest of domestic producing interests have a tendency to spread to other jurisdictions and will have boomerang effects on those same interests tomorrow. It is, therefore, to the advantage of all parties to ensure a rational application of anti-dumping laws.