80

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THE WORLD TRADE ORGANIZATION ANTIDUMPING AGREEMENT

BY
GARY N. HORLICK AND ELEANOR C. SHEA

Publisher and Editor
JACQUES WERNER

Editorial Assistant
RUTH BENJAMIN

Correspondence and Subscriptions

All correspondence, including subscriptions, should be addressed to:

The Publisher, Journal of World Trade
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The World Trade Organization Antidumping Agreement

Gary N. HORLICK* and Eleanor C. SHEA**

I. INTRODUCTION

The Antidumping Agreement (Agreement) in the World Trade Organization (WTO) Agreements,[1] coupled with the WTO binding dispute resolution mechanism (DSM),[2] could be a revolution in world antidumping law. The Agreement's absolute requirement of a fair comparison, the improvement in language on causation of injury and the requirement of a sunset mechanism, along with numerous other improvements, marks the first world-wide agreement[3] on antidumping rules, and, more important, a reversal of a tendency to make the imposition of antidumping duties easier, even in the absence of a finding of predatory dumping causing injury.[4]

That said, one must emphasize the word "could". As with any set of rules, the effectiveness of the Antidumping Agreement will depend on the willingness of the governments that sign the Agreement to live up to the rules, and the willingness of WTO Members to challenge under the DSM other Members who do not live up to the rules.

This article provides a discussion of the negotiating history of the Antidumping Agreement and a review of the major provisions of that Agreement. It also discusses the relevant provisions of the DSM.

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* O'Melveny & Myers, Washington, D.C., U.S.A. Formerly served as Deputy Assistant Secretary of Commerce for Import Administration and International Trade Counsel, U.S. Senate Committee on Finance.

**O'Melveny & Myers, Washington, D.C., U.S.A. Formerly served in the offices of Policy and Investigations, Import Administration, U.S. Department of Commerce.

[1] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement), Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, at 145, GATT Doc. MTN/FA, 15 April 1994, (Final Act), reprinted in Message from the President of the United States Transmitting the Uruguay Round Trade Agreements, Texts of Agreements Implementing Bill, Statement of Administrative Action and Required Supporting Statements, H.R. Doc. No.316, 103d Cong., 2d Sess. 1453 (1994) (U.S. WTO Implementing Legislation).

[2] Understanding on Rules and Procedures Governing the Settlement of Disputes, Final Act at 353, U.S. WTO Implementing Legislation, at 1654.

[3] By 1993, forty-two countries were Members of the 1979 GATT Antidumping Code. By contrast, all WTO Members (currently numbering one hundred and twenty-five, and increasing rapidly) will be bound by the WTO Antidumping Agreement.

[4] For example, findings of "no dumping" by the U.S. Department of Commerce (Commerce) peaked at 16 percent in 1984, then dropped to zero in 1989 and 1990, two percent in 1991, and one percent in 1992. See I.M. Destler, *American Trade Politics*, 3d edition, forthcoming 1995, at Table 10.1.

II. Negotiating History

A. *Background*

The Ministerial Declaration that launched the GATT Uruguay Round in September 1986 did not mention antidumping law, or even dumping, as a topic for negotiation. The main reason for the omission is that the United States was the *demandeur*, both for having a new negotiating Round and for most of its agenda. At that time, the United States was at a high point of using its antidumping law, both as a tool of "back-door" industrial policy,[5] as well as an escape-valve for protectionist pressures arising from the sharp run-up of the U.S. dollar in the early 1980s and the consequent problems for U.S. import-competing and exporting industries. In effect, the U.S. Administration argued that higher duties against "unfair" imports were necessary in order to preserve free trade. There was also the possibility that some officials in the Administration actually believed the rather misinformed statements made on their behalf in connection with antidumping laws.[6]

More curious was the failure of other governments in 1986 to push for greater discipline on antidumping measures. As a factual matter, the use of antidumping law in the United States increased significantly in the 1980s, with U.S. cases totalling three hundred and forty-six from 1980 to 1986, compared with one hundred and thirty-five from 1970 to 1976.[7] More to the point, the governments of virtually every major U.S. trading partner had complained to the U.S. government, either bilaterally or in the GATT Anti-dumping Code Committee, in connection with one or more U.S. antidumping cases during the 1980s. Therefore, there clearly was some level of foreign government concern.

Yet, despite all the complaints by foreign governments to the United States, not one request for dispute resolution was filed in the GATT in connection with the U.S. administration of its antidumping laws. Indeed, as of 1986, there had been only two such complaints in the whole history of the GATT, one in 1955 by Italy against Sweden[8] and one in 1985 by Finland against New Zealand.[9] (It is noteworthy that both complaints were successful.) Simply put, senior officials in many foreign governments could not be bothered with antidumping cases, regardless of the trade volume involved, to the same degree as countervailing duty (i.e. anti-subsidy) cases, about which disputes could arise concerning the most minuscule of subsidy amounts or trade volume. In part, this was because government officials were trapped in an

[5] For example, the 1986 U.S.–Japan Semiconductor Agreements not only imposed high minimum prices on Japanese semiconductors involved in two antidumping cases, but also established a mechanism for a similar system for Japanese semiconductors for which no dumping or injury had ever been shown (or even investigated): *Arrangement Concerning Trade in Semiconductor Products*, 2 September 1986, U.S.–Japan, 25 I.L.M. 1409.

[6] See e.g. *Trade Is Everything But Unfair*, The Wall Street Journal, 22 June 1987, at 27: "the purpose of these laws is to defend American companies against loss of home market-share to predatory pricing . . . " There is no requirement in U.S. law that predation be shown before antidumping duties may be imposed, nor any requirement to show that predation is likely to succeed and losses be recouped, as U.S. courts would require: Organization for Economic Co-operation and Development, *Predatory Pricing*, 1989, 43–47.

[7] Based on calculations by the authors.

[8] *Swedish Antidumping Duties*, GATT BISD 3S/81, 26 February 1955.

[9] *New Zealand: Imports of Electrical Transformers from Finland*, GATT BISD 32S/55, 18 July 1985.

ingrained (and increasingly incorrect) belief that antidumping cases are private matters for private companies, while countervailing duty cases are between governments. This view ignores the fact that a government intervenes in a private firm's business by applying its antidumping laws. In addition, antidumping is an extremely arcane field, and cases could not readily be simplified so as to be explained to high levels of governments and companies. It was easier to take refuge in the idea that one should not want to appear to be a *demandeur* for antidumping reform in the Uruguay Round. Finally, the very term "dumping" had a pejorative ring to it,[10] and there was considerable ignorance about the exact content of the rules.[11]

By 1990, this attitude had changed substantially, as governments of most major trading entities[12] were formally on record as seeking antidumping rules based more on free market principles—a pressure resisted strongly by the trade negotiators for the United States and the European Community. Some of the reasons for this change in attitude by many governments, and for the opposition by the United States and the EC, can be inferred from the timing of the change.

The first country to press for inclusion of antidumping rules within the Uruguay Round was Korea, which filed a proposal on 21 May 1987. A Korean government official was the chairman of the negotiating group responsible for review of the Tokyo Round Codes (including antidumping), and Korean products had been increasingly subjected to antidumping cases brought by the EC, the United States, Canada, and Australia. In particular, a case had been filed in Canada against Hyundai motor cars, Korea's fastest growing export.[13] Other developing countries raised antidumping as an issue at the Montreal Mid-Term Review Meeting in late 1988.

Other proposals were filed in 1987 by the United States, India, Japan, and the Nordic countries. The U.S. proposal was based on the principle that dumping, as defined in U.S. law, was a practice to be deterred and remedied to a greater extent than under the existing GATT rules.[14] It is interesting to note that the GATT does not suggest any discipline on the practice of "dumping" and instead focuses solely on discipline on

[10] Kenneth W. Dam, *The GATT: Law and the International Economic Organization*, University of Chicago Press, Chicago, 1970, 168: "One coming to the dumping problem with a fresh eye, free of the traditional domestic industry perspective and alert to the pejorative radiations of the expressive term 'dumping' (which is so captivating that it has been absorbed without translation into the world's major commercial languages), may find antidumping duties a peculiar means for protecting domestic industry."

[11] As late as 1990, the Chief Executive Officer (CEO) of one of the companies seeking more trade-restrictive U.S. antidumping laws called up the CEO of a U.S. company seeking less trade-restrictive antidumping laws to ask why the CEO of the second company was seeking to protect the practice of sales below *marginal* cost. The CEO of the first company was apparently unaware that antidumping laws do not require sales below marginal cost, and in fact have no connection at all to the concept of marginal cost.

[12] Including three governments which were frequent users of antidumping laws in the 1980s: Australia, the largest user according to GATT statistics; Canada, the fourth largest user; and Mexico, the fifth largest user; see John H. Jackson, *Dumping in International Trade: Its Meaning and Context*, in *Antidumping Law and Practice: A Comparative Study*, John H. Jackson and Edwin A. Vermulst (eds.), University of Michigan Press, Ann Arbor, Michigan, 1989, 1, 15.

[13] The case was eventually rejected in the final injury determination, after a 35 percent dumping margin was found, primarily on the grounds that the petitioners did not produce competing small cars in significant volumes in Canada. The Canada Gazette, Part I, Vol. 122, No. 9, 27 February 1988, at 763; The Canada Gazette, Part I, Vol. 122, No. 14, 2 April 1988, at 1226.

[14] *Communication from the United States*, GATT Doc. MTN.GNG/NG8/W/22, 14 December 1987.

the use of antidumping rules. Although Article VI states that dumping is to be "condemned" if it causes injury (language not found in the initial U.S. draft for the GATT, but added later by Cuba and Lebanon[15]), a proposal by New Zealand[16] in 1955 that countries be made responsible for disciplining dumping by their exporters did not find acceptance.[17]

No serious examination has ever been undertaken in the GATT to determine exactly what a proper definition of dumping should be—in effect, what is a fair price in international trade? In 1966, at the beginning of the negotiations leading to the first GATT Antidumping Code in 1967, the United States posed all the right questions,[18] but the proposal was effectively blocked by the EC.[19]

The harshness of the 1987 U.S. position in part reflected a desire to pander to Congress during passage of what became the Omnibus Trade and Competitiveness Act of 1988 (1988 Act), and in part reflected heartfelt beliefs (whether well-founded or not) by some within the Administration that dumping was an unfair practice by foreigners intending to destroy fair-trading U.S. industries.

Attention in the United States to antidumping law in 1987–1988 was focused on proposed amendments to the 1988 Act. After major lobbying battles, the amendments to U.S. antidumping law in 1988 were fairly minor.[20] One Administration technique for fending off amendments was to promise that they would be taken up during the Uruguay Round.[21] At the same time, the 1987–1988

[15] W.A. Seavey, *Dumping Since the War: The GATT and National Laws*, Office Services Corp., Oakland, California, 1970, 20.

[16] In a report on a meeting of the Contracting Parties in 1955, it was reported that the New Zealand delegate had commented that: "[the New Zealand] delegation had come to the present Session [of the CONTRACTING PARTIES] convinced that the Agreement was heavily weighted against such countries as his own which were exporters of agricultural products, and in the hope of redressing the imbalance. They had found hostility to their efforts to protect themselves against dumping, and to the proposals which they had put forward with this in mind. Moreover, they had found that the country which was asking for an unfettered right to protect its own agriculture [the United States] had been against any strengthening of the provisions regarding dumping in the Agreement.": *Summary Record of the Forty-First Meeting of the Contracting Parties*, GATT Doc. SR.9/41, 15 March 1955, at 2.

[17] John H. Jackson, *World Trade and the Law of GATT*, Bobbs Merrill, Indianapolis, Indiana, 1969, 412. The United States was the leading target of the 1955 proposal and is currently the leading target of antidumping cases world-wide (based on GATT statistics from 1988–1993 for Members of the GATT Antidumping Code Committee).

[18] "Should antidumping measures be limited to prevention of market monopolization by foreign exporters?... Should antidumping measures permit alignment of exporters' prices to meet competitive prices in the export market? Should such provision be limited to meeting the prices of foreign but not domestic competitors in the export market?... Where a seller lowers his price to gain entry, i.e. consumer familiarity and acceptance, into an export market, should antidumping measures permit such price discrimination?... Where consumers' or competitors' information regarding changes in supply or demand varies in different markets, and the price moves up or down in response to those variances, should antidumping measures permit such geographic price discrimination?": *Note by the United States Delegation*, GATT Doc. TN.64/NTB/W/36, 10 January 1966.

[19] *Comments by the European Economic Community*, GATT Doc. TN.64/NTB/W/10/Add.1, 21 April 1966, at 2. Interestingly, by contrast, both the United States and the EC sought a fundamental re-examination of underlying principles in the WTO Subsidies Agreement negotiations.

[20] For a fuller description, see Gary N. Horlick and Geoffrey D. Oliver, *Antidumping and Countervailing Duty Law Provisions of the Omnibus Trade and Competitiveness Act of 1988*, 23 J.W.T. 3, June 1989, 5.

[21] The statute provided, in hortatory language: "The principal negotiating objectives of the United States with respect to unfair trade practices are: (a) to improve the provisions of the GATT and non-tariff measure agreements in order to define, deter, discourage the persistent use of, and otherwise discipline unfair trade practices having adverse trade effects, including forms of... dumping and other practices not adequately covered such as... diversionary dumping, [and] dumped... inputs; (b) to obtain the application of similar rules to the treatment of primary and non-primary products in the Agreement on the Interpretation and Application of Articles VI, XVI, and XXIII of the GATT.": Omnibus Trade and Competitiveness Act of 1988, § 1101(b)(8), 19 U.S.C. § 2901(b)(8) (1988).

legislative process saw the first ever involvement by major U.S. businesses—through a joint lobbying effort by the Emergency Committee for American Trade (ECAT) and the Business Round Table—to oppose trade-restrictive amendments to the antidumping rules at a technical level. In many respects, this was a useful experience for the companies involved, which gained further insights into the workings of antidumping law at a time when its potential impact on their business operations was dramatized by cases both in the United States[22] and overseas.[23] It also had an impact on perceptions of the antidumping issue within the United States, as the first time in memory that significant private sector interests in the United States had forcefully raised the exporters' point of view against the trade-restrictive use of U.S. antidumping laws.[24]

The U.S. Administration found itself caught between two forces. Many key Administration officials were well aware of the flaws in the world's antidumping rules, and the potential negative impact on U.S. competitiveness. At the same time, the Administration faced determined pressure from groups of import-competing industries which found some of those flaws useful as a way of restricting competition from imports within the United States. The Administration therefore seized on the areas where there was an agreement within all major groups in the United States—namely that antidumping rules should include provisions on due process and transparency, rules to prevent circumvention, and some measures to deter "multiple offenders".

The detailed U.S. proposal of 20 November 1989 comprised three tracks, which were directed primarily at addressing problems of circumvention and repeat offenders.[25] The first track of the proposal was a fairly straightforward anti-circumvention proposal, modelled on the best features of U.S. and EC anti-circumvention rules (Track I). The United States intended that Track I would address circumstances where changes in production of the product are so minor that, if circumvention were found, a new investigation of dumping and injury would not be necessary.[26]

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[22] The imposition of antidumping duties on ball-bearing imports into the United States were opposed by several U.S. companies including Caterpillar, Rockwell, Xerox and 3M. See *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, France, Italy, Japan, Romania, Singapore, Sweden, Thailand, and the United Kingdom*, USITC Publication 2185, Inv. Nos. 303–TA–19– 20 and 731–TA–391–399, Final, May 1989.

[23] For example, Mexico started an antidumping investigation of imports of personal computers made in the United States.

[24] Following the enactment of the 1988 Act, representatives of some of the U.S. exporters involved in the legislative effort (including IBM, Cargill, Caterpillar, and Hewlett-Packard) met to review the possible impact of the Uruguay Round on their businesses. Most of the companies were already involved in Uruguay Round efforts in connection with intellectual property, services and investments. The companies decided that, of the remaining issues, the one most likely to have an impact on their businesses world-wide over the next decade was antidumping, in view of the clear trend toward the increased use of the law within countries that already had antidumping laws, and a sharp increase in the number of developing countries enacting such laws and using them. In that regard, the Mexican example of the rapid use of a new antidumping law was viewed as a harbinger for future developments in other countries. In effect, antidumping laws had become opportunities for governments to impose price floors on these U.S. companies' products, and the Uruguay Round offered an opportunity to negotiate better rules for the imposition of such price controls.

[25] *Communication from the United States, Proposal for Improvements to the Antidumping Code*, GATT Doc. MTN.GNG/NG8/W/59, 20 December 1989.

[26] Id., at 4–5.

Track II of the U.S. proposal outlined a grab-bag of circumstances in which suspension of liquidation could also be imposed upon initiation of an investigation, reflecting the unsuccessful attempt in 1987–1988 of some congressmen and senators for amendments against "input dumping" and multinational corporations. The proposal was intended to counter "recurrent injurious dumping", which could occur through circumvention of an antidumping order where the changes in production of the product were more significant than under Track I, through "country hopping", or through the incorporation of a major input covered by a dumping order in an exported product (i.e. "input dumping").[27]

Track III was a "multiple offender" provision permitting immediate suspension of liquidation upon initiation of a case against a foreign producer that repeatedly dumps products within the same general category of merchandise as the products covered by the original antidumping order (also referred to as "recidivist dumping").[28]

In addition, the U.S. proposed amendments to set minimum standards of transparency and to permit labour unions and growers of agriculture products to have standing in antidumping proceedings. Most significantly, the United States took no position on most of the issues raised by the other delegations, thus leaving its negotiators with considerable bargaining flexibility to try to obtain their stated goals.

Needless to say, the U.S. proposal pleased neither side in the United States. Import-competing industries sought a punitive antidumping law, since the same rules would not be applied to their own sales within the United States, while exporters worried that such rules would be applied to their sales overseas.

Proposals were filed later that year by numerous countries. The Canadian proposal was fairly typical in advocating a wide range of reforms in antidumping rules.[29] The Canadian government had undertaken a detailed review in 1979 of GATT antidumping rules, spurred on in part by fears that the Mexican example would be imitated globally, and in part by complaints of Canadian exporters concerning U.S. antidumping rules. The Canadian proposal comprised two general parts. The first included proposals to achieve greater procedural uniformity and consistency in the application of antidumping measures, such as:

- the need to verify "standing of" before the initiation of an investigation and the need for an explicit definition of the term "major proportion" of the domestic industry;
- specific guidelines on the minimum information requirements for the initiation of an investigation;
- a minimum period after initiation of an investigation before provisional measures may be imposed; and

[27] Id., at 5–7.
[28] Id., at 7.
[29] *Amendments to the Antidumping Code, Submission by Canada*, GATT Doc. MTN.GNG/NG8/W/65, 22 December 1989.

— transparency of antidumping proceedings, particularly with respect to access to relevant information and the publication of a statement of reasons for each phase of the investigation.

The second part of the Canadian proposal contained recommendations to improve the standards for application of antidumping measures, including:

— more detailed guidance for determining when sales below cost may be disregarded and excluded from the calculation of normal value;
— an explicit *de minimis* margin standard;
— a more stringent test for demonstrating that dumped imports are causing injury;
— an automatic five-year sunset provision, unless a review establishes the need to maintain the measure for an additional three years; and
— a public interest test.

In addition, the Canadian proposal included a discussion of the need to develop rules on anti-circumvention to specify the conditions under which an order may be extended "*consistent with the Code*, to goods assembled domestically or in a third country from parts and components originating in a country subject to a finding." (emphasis added).[30]

Similar proposals were filed by Norway, Sweden, and Finland (the Nordic countries),[31] Singapore,[32] Hong Kong,[33] Japan[34] and, in shorter form, Australia.[35]

The EC filed a proposal[36] adopting some of the reforms proposed by Canada and the other delegations (e.g. the Nordic countries, Hong Kong and Singapore), but also proposing some changes of its own to make it easier to impose antidumping duties, especially against Japanese products, and particularly in situations in which low-priced imports were affecting one region of a customs union. The purpose of this aspect of the EC proposal was to take into account the side variations in pricing within the twelve different markets of the EC.

As a result, by January 1990, there were proposals from numerous countries,[37] which essentially overlapped, in addition to the very different U.S. proposal and an EC proposal that shared elements with several of the other proposals. In addition, on the "right wing" (i.e. free market) side, several participants (namely, Hong Kong, Singapore and the Nordic countries) had proposed a re-examination of the concept and definition of dumping, to see if the current GATT definition made sense from an

[30] Id., at 6.

[31] *Amendments to the Antidumping Code, Submission by the Nordic Countries*, GATT Doc. MTN.GNG/NG8/W/64, 22 December 1989.

[32] Proposed Elements for a Framework for Negotiations—Principles and Objectives for Antidumping Rules, Communication from the Delegation of Singapore, October 1989.

[33] *Amendments to the Antidumping Code, Communication from the Delegation of Hong Kong*, GATT Doc. MTN.GNG/NG8/W/51/Add.1, 22 December 1989.

[34] *Submission of Japan on the Amendments to the Antidumping Code*, GATT Doc. MTN.GNG/NG8/W/48, 3 August 1989.

[35] *Amendments to the Antidumping Code, Submission by Australia*, GATT Doc. MTN.GNG/NG8/W/66, 22 December 1989.

[36] *Communication from the European Communities to GATT Uruguay Round—Antidumping Code*, GATT Doc. MTN.GNG/NG8/W/63, 20 December 1989.

[37] Including the Nordic countries, Hong Kong, Singapore, Australia, Canada, Japan, Korea and India.

economic perspective.[38] On the "left wing" (i.e. pro-government regulation) side, some of the U.S. and EC negotiators' proposals were aimed at increasing the use of antidumping measures, either by relaxing the standards (in the EC proposal on regional industry, for example), or by giving litigation advantages to petitioners by allowing suspension of liquidation upon initiation (as proposed by the United States). Much of 1989 was spent in a series of philosophical discussions concerning the right-wing and left-wing proposals, with relatively little detailed work being done on the main body of overlapping proposals. To some extent, this was probably a matter of negotiating strategy; both sides knew that the deadline for concluding an agreement was not until late 1990, and therefore felt no need to get to work on the more practical issues. By the end of 1989, the discussion of basic principles had essentially been ended by U.S. and EC opposition to any reconsideration of the fundamental issues (the EC maintaining its position taken in 1966, and the United States switching positions to agree with the EC).

B. *Negotiations and Draft Agreements*

In November 1989, the United States and the EC had formed a "non-aggression pact" to resist all changes in antidumping rules that would make the system less trade-restrictive. On its face, this alliance seems a bit odd. U.S. exporters were the second leading victim of EC antidumping law in the years prior to the Uruguay Round, while EC exporters as a whole were far and away the leading target of U.S. antidumping cases in the same period.[39] Further, the United States had frequently used antidumping law to force the EC into grey area measures on steel, as the price for the withdrawal of antidumping petitions.[40]

Moreover, the main complaints about the two systems' practices were different. The EC faced more criticism for alleged manipulation of the price comparison, in particular by asymmetrical adjustments prejudicial to exporters, and for lack of transparency. The United States was criticized more for the use of an arbitrary eight percent profit margin; its application of the injury standard, in particular the inclusion of non-dumped imports as a cause of injury; and for the complexity and expense of some of its procedures (notably, the assessment of duties).

[38] In addition, there were similar proposals in 1989 within the EC, supported by several Member States, reportedly Germany, the United Kingdom, Denmark, the Netherlands, and Eire. However, the EC Commission was able to brush off all those Member States.

[39] United States General Accounting Office, *Use of the GATT Antidumping Code*, GAO/NSIAD-90-238FS, July 1990, at 19.

[40] See *Cold Rolled and Galvanized Carbon Steel Sheets from Belgium, France, the Federal Republic of Germany, Italy, the Netherlands, and the United Kingdom*, 43 Fed.Reg. 37,052, Treas. Dep't, 1978: termination of antidumping investigations; *Carbon Steel Cold Rolled Sheet, Hot Rolled Sheet, Galvanized Sheet, Plate and Structural Shapes from Belgium, the Federal Republic of Germany, France, Italy, Luxembourg, the Netherlands, and the United Kingdom*, 45 Fed.Reg. 66,833, Dep't Comm., 1980: termination of antidumping investigations.

The explanation for this alliance was that both the U.S. government and the EC Commission fundamentally still perceived themselves as users of antidumping laws, rather than as exporting countries. (This may seem odd, as the EC, as a whole, was by far the world's largest exporter, with the United States second.) In part, it is a reflection of trade politics in large countries, whose internal markets are so large that some politicians can still focus inward long after economic reality has forced middle-sized countries such as Canada and Australia to emphasize market access for its exporters over protection of the home market. It is also no accident that the United States and the EC are so vulnerable to special-interest lobbying, because neither has a government with a guaranteed parliamentary majority. The White House is always looking over its shoulder to count votes in Congress, which makes the Office of the United States Trade Representative (USTR) extremely sensitive to individual senators and representatives. The EC Commission is an executive body which is not controlled by any elected body, and thus interest-group politics play out within the complex internal politics of the Commission and the Council of Ministers. This opposition to reform by the United States and the EC was reinforced by, and perhaps reflected in, the choice of negotiators. The United States and EC maintained, as lead negotiators on antidumping matters, people whose primary job was enforcement of antidumping measures, while most other countries chose people whose main outlook was general trade policy.[41]

In view of the relatively slow progress on antidumping within GATT Negotiation Group 8 (which also included complex discussions on, *inter alia*, pre-shipment inspection and rules of origin), a special Informal Group on antidumping was set up under Charles Carlisle, the Deputy Director-General of the GATT. This group undertook detailed discussions in March, April, May and June of 1990. While little direct agreement was reached on issues in this Informal Group (in part because each party viewed every individual item as a bargaining chip), the process was quite useful in fleshing out most of the details under various options, and served as the basis for the subsequent discussion of the different issues.

In response to pressure for concrete progress in all areas by the end of July, on 6 July 1990, Carlisle released a discussion draft for a possible Antidumping Code (Carlisle I). Carlisle had rejected the claims of those who wanted no significant changes in the 1979 Code and instead attempted to make useful changes across a wide range of Code issues, without making radical changes in any one area. As a result, Carlisle I picked up perhaps three-quarters or more of the proposals made by the Nordic countries, Singapore, Hong Kong, and Canada, as well as certain private sector suggestions, while rejecting the requests by the Nordic countries, Hong Kong, and Singapore for a re-examination of the fundamental bases of antidumping rules.

[41] As the overall Uruguay Round negotiations became more and more intense in late 1990, the ability of general trade policy people to keep an eye on the antidumping negotiations diminished, and the influence of enforcers rose in a number of delegations.

In the last few days before releasing the draft, however, Chairman Carlisle, apparently, had become convinced that it was essential to accept almost all of the U.S. proposals to make the final package acceptable to the U.S. Congress.[42] As a result, a group of developing countries rejected the Carlisle I text as a basis for further negotiation, perhaps out of irritation that Carlisle had taken more of the U.S. proposals than of their proposals. The developing countries also rejected the text because of a deep-seated fear that the mere possibility of anticircumvention measures against "third-country assembly" would deter needed investment in manufacturing in their countries, which often must import components from other countries for viable, world-scale operations.

The discussions became quite bitter and personal, and stayed that way throughout the remainder of the negotiations. Chairman Carlisle reacted to the demands for revisions by pointing out that, if forced to revise his draft, he would be forced to include suggestions from all sides. In any event, the unhappy developing countries pressed ahead with their demands, and in a "Green Room" meeting in July 1990, Carlisle was asked to produce a second draft text on antidumping.

Carlisle II was released on 14 August 1990. As foreshadowed, Carlisle II was essentially Carlisle I on which was superimposed a wide range of proposals. Some of the proposals were rather extreme, such as a proposal that products subject to an Article XIX safeguard or textiles and wearing apparel products subject to a phase-out of the Multi-Fibre Arrangement be exempt from antidumping actions during the entire phase-out period, or the repeated attempts by the EC and United States to legitimize in a new Code practices that would likely be found by panels to violate the 1979 Code, such as "tilting" the "fair comparison" through misuse of adjustments and averaging.[43]

Virtually all of September and October 1990 was spent in a seemingly constant round of meetings in Chairman Carlisle's office among the representatives of the delegations with the most interest in the negotiations (i.e. Australia, Brazil, Canada, the EC, the Nordic countries, Hong Kong, Singapore, Mexico, Japan, Yugoslavia, Korea, New Zealand and the United States). Many of the delegations grew frustrated

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[42] The authors thought at the time that inclusion of a large chunk of the U.S. proposal was necessary, but that Carlisle I included too much. This is a question on which reasonable people differed quite strongly during the last half of 1990. In the authors' view, the fear of protectionist elements in the U.S. Congress opposing the Code was well-founded, but those elements would have opposed Carlisle I in any event (and they did), whether or not it included the U.S. "anti-circumvention" proposals. They would oppose anything that made U.S. antidumping law a less useful tool against imports into the United States, without any particular concern for the effect of other countries' antidumping laws on U.S. exports.

[43] Carlisle II was followed very shortly by the release in August of the long-awaited Panel Report on Sweden's complaint against imposition by the United States of antidumping duties on stainless steel pipe. *Imposition of Antidumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden*, GATT Doc. ADP/47, 20 August 1990 (Swedish Steel Panel Report). The Report condemned U.S. practices for checking standing (which were worse than those of the EC, Canada or Australia). The Panel used the insufficiency of U.S. practices for checking standing as a reason for not ruling on the more substantive aspects of the case, but it was rumoured that the Panel would have ruled against the United States on a number of aspects of the dumping calculation, which were similar to those followed by other major users of antidumping law (such as the misuse of averaging techniques).

with the apparent lack of progress, and an attempt was made to form an informal drafting group of eight delegations: Australia, Mexico, Canada, the Nordic countries, Hong Kong, the United States, the EC and Japan. The group would begin, on an informal, *ad referendum* basis, to move from the pre-existing negotiating positions from which the negotiation had started a year earlier.

Some of the members of the "group of eight" took the process seriously—e.g. the Nordic countries offered some flexibility on third-country circumvention—while other delegations evidently used the process as one more opportunity to show how "tough" they could be. To some extent, this reflected differing estimates of when the "end game" would begin for the entire Round, with some delegations—notably, the United States and Japan—feeling forced politically to appear "tough" until the last possible moment. The informal group was working against the deadline of mid-October 1990, when responsibility for all unfinished negotiations would move to senior negotiators.

GATT Director-General Arthur Dunkel had planned to have the entire Uruguay Round package wrapped up by mid-October 1990. While certain other negotiating groups (notably Agriculture and Services) were even further behind than Antidumping, antidumping had now become a major element in any Uruguay Round package for a number of developing countries and middle-sized exporting countries (such as the Nordic countries and Canada). The intransigence of U.S. and EC negotiators on antidumping was widely viewed as an attempt to retain their protectionist antidumping systems, while formally requesting market opening in the Round from others.

Two overlapping approaches were then attempted in rapid succession. A group of "neutral" countries (the Troika) was asked to prepare consensus drafts of the procedural aspects on antidumping, which had already been agreed to some extent. This process was completed by October 1990, but even by then, it had become clear that the group could not prepare a complete consensus text (although much of their work was ultimately incorporated into the final Agreement). In effect, the U.S. demands for limited transparency and judicial or administrative review would be conceded by developing countries, which would have to pay higher administrative costs, yet they would receive no commitments from the United States and the EC to the application of fair substantive standards.

Consequently, Director-General Dunkel requested that Hugh McPhail of the New Zealand Delegation serve as an "honest broker" and prepare a draft Code reflecting the best points from all of the proposals (and from a Canadian draft of October 1990). New Zealand I, as the first McPhail text came to be known, was made available to the negotiators on 6 November 1990, and was promptly rejected by the United States and the EC. After consultations with the United States and the EC, McPhail released New Zealand II on 15 November 1990. The U.S. and EC negotiators again rejected the draft, this time taking the unusual step of submitting a long list of objections formally signed on behalf of the European Communities and

the United States[44] (although, at least in the case of the United States, the rest of the U.S. government had not been consulted).

The most remarkable aspect of this lengthy document was the degree to which it reflected the abandonment, by the United States, of long-held objections to protectionist aspects of the EC's antidumping law,[45] while the EC returned the favour by stifling such long-held objections as the twenty-plus years of attack on the U.S. use of a minimum 8 percent profit and minimum 10 percent general selling and administrative expenses in the calculation of constructed value. Both countries were also becoming quite emphatic about the need for provisions to overturn the GATT Panel Report which had found the application of the EC's anti-circumvention rules to be inconsistent with its obligations under Article VI.[46] The U.S. EC proposals included specific anti-circumvention rules or the authority (implicit or explicit) to use rules of origin to extend antidumping measures to products assembled in third countries in whole or in part from components and parts produced in the exporting country, as the EC had done in imposing an antidumping duty on copiers from Japan to those machines assembled in California.

McPhail subsequently prepared a third draft (New Zealand III), released on 23 November 1990, trying yet again to accommodate the U.S. and EC positions. This text served to alienate some of the exporting countries, because of the apparent willingness to adopt U.S. and EC proposals on third-country assembly and direct circumvention (including an explicit "local content" test). The U.S. and EC made one last attempt to salvage their position going into the Brussels Ministerial Meeting in December 1991, by trying to force an agreement through a Quad meeting of the United States, the EC, Canada and Japan (the Quadrilateral group), on the theory that it would be a more malleable forum. This limited group was no longer capable of writing an acceptable Antidumping Code single-handedly, as the United States and EC had done in 1978–1979. In the end, antidumping was one of only a few groups that went into the Brussels Ministerial with no agreed text, but rather with only a complex list of questions supposedly to be put to Ministers (some of whom would not have been amused that such technical and detailed issues had not been resolved by lower level negotiators).

In an attempt to streamline the negotiations in Brussels, the Contracting Parties included individual negotiating topics in larger groups. Antidumping was included within the "Rules Group", along with Subsidies and Safeguards. After some negotiation, Canadian trade minister John Crosbie was named Chairman of the Rules Group.

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[44] Correspondence from the European Communities and the United States to Mr Arthur Dunkel, Director-General of the General Agreement on Tariffs and Trade, 19 November 1990.

[45] For example, the United States reversed the USTR's 1989 attack against the position taken by the EC in the case of the Ricoh copiers from California, and reversed a formal objection made by the USTR in 1986 to the EC practice of counting antidumping duties as a cost, thus "double-counting", in determining whether dumping had ceased. See *European Economic Community—Regulation on Imports of Parts and Components*, GATT BISD 37S/132, 16 May 1990.

[46] Id.

In the absence of an agreed-upon antidumping text,[47] on Tuesday, 10 December, Crosbie obtained general agreement to split antidumping into three slices (or *tranches*), with a first *tranche* to consist of relatively easy issues, the second *tranche* more difficult issues, and the third the most difficult. The Secretariat then hurriedly prepared lists of issues for the first two *tranches* (and, by implication, the third *tranche*) after consultations with several delegations and other individuals, and work began on the first *tranche*[48] on Wednesday afternoon, 11 December.[49]

Work on the first *tranche* went reasonably smoothly, since these issues had been pretty much agreed through the discussions in Carlisle's office in September and October 1990, the Troika draft, and New Zealand III. Within a few hours, the group produced an agreed text (subject to overall agreement on the Antidumping Code specifically and the Uruguay Round as a package) for parts of Articles 2, 5, 6, 7, 8, 9, 13, and 14. A text was produced and distributed to all the delegations. The group reconvened at ten o'clock that evening to begin work on the second *tranche* issues.[50]

Little agreement was reached on these issues, even though some of them were not that difficult or controversial. By this time, of course, it was well known to all the delegations that the U.S./Cairns Group–EC fight in the agricultural negotiations was reaching a breaking point, and it was quite clear that a number of delegations would reach no agreement on an overall package until the agricultural deadlock was broken. As a result, the meeting dragged on until four a.m., with no further progress achieved. At that point, the entire negotiation broke up, with delegations willing to begin work to reach agreement, only once the agricultural deadlock was broken.

The late spring of 1991 seemed the obvious time to complete the Uruguay Round, with politicians in the major developed countries enjoying good economic performances and without major electoral pressures. The opportunity was lost, however, but the U.S. Administration was able to obtain a two-year renewal of its "fast-track" negotiating authority. Antidumping negotiations resumed in a desultory fashion in the second half of 1991. There was no increase in concessions on any of the outstanding issues, and in late October 1991, the United States introduced new demands for anti-circumvention remedies covering parts from countries not previously the subject of an investigation (third-country parts). The United States also reiterated its insistence on special treatment of antidumping in the dispute settlement mechanism. It began to look as if the Secretariat would have to produce the

[47] The United States in particular could not agree to an antidumping text before Brussels (even if it might accept one at Brussels), so as to be in a position to say that it was forced to accept reforms as part of an overall package favourable to U.S. economic interests. Conversely, a number of the exporting countries were determined to hold out on "anti-circumvention" until the last possible moment. The EC would have welcomed any reason for the media to report that any issue other than agriculture was a roadblock.

[48] The first *tranche* issues included: standards for initiation, "all other rates", undertakings, transparency, judicial review, "best information", symmetry, exchange rates, and duty assessment procedures.

[49] The group included representatives of Switzerland, the United States, the EC, New Zealand, Canada, Japan, Singapore and Hong Kong, as well as the Secretariat.

[50] The second *tranche* issues included: conversion of currencies in related party transactions, averaging, standing, pre-initiation evidence, *de minimis* margins, negligible market share, maximum period of investigation, deadline for refunds, duty as a cost, sampling, new shippers rates, and circumvention by assembly in the importing country.

draft agreement. The United States and the EC tried again, unsuccessfully, to push a draft through the Quad. In November 1991, after consultations with a number of delegations, the Secretariat produced significant improvements in "non-papers" on cost of production issues and price averaging. At the request of the parties, a final attempt at consensus was made by Rudi Ramsauer, the Swiss negotiator, but it ended by 10 December, forcing the Secretariat to produce a final draft text by 20 December 1991.

C. *The Dunkel Text*[51]

In mid-December 1991, the United States and the EC stepped up their pressure on Director-General Dunkel for more trade-restrictive antidumping rules. The United States apparently orchestrated telephone calls from Senate Finance Committee Chairman Lloyd Bentsen and House Ways and Means Committee Chairman Dan Rostenkowski, telling Dunkel that Congress would not accept a less protectionist Antidumping Code. There was some element of bluff in these calls, as no one could predict what Congress would do until the shape of the agricultural and market access packages was clear.

Dunkel was in no position to ignore the two largest GATT members; thus, a number of U.S. and EC concerns had to be taken care of, and nothing could be done that would be portrayed as helping Japan. The U.S. and EC negotiators eventually presented a long list of demands. The result, with everyone tired and edgy, was an awkwardly constructed document (far less coherent than Carlisle I, for example) with at least one section dropped by accident and only restored at the end. The United States, which applied most of the political pressure, got very few of the changes it wanted. Most notably, the United States had placed its greatest emphasis on applying anti-circumvention measures to "third-country parts" (i.e. parts from countries not subject to the original antidumping order), but the draft did not include a concept so obviously violative of the GATT (since there would have been no dumping or injury investigation at all of parts and components from the third country).

The United States was also unsuccessful in obtaining special rules on dispute resolution for antidumping disputes, which would seek to ensure deference by GATT panels to U.S. antidumping authorities (as well as those of other countries, although that was not an overriding concern of the U.S. negotiators).

The main beneficiary of the political pressure was the EC, which obtained the inclusion of two very strangely worded provisions which had not appeared in that form in any previous draft. First, the Dunkel Text defined profit by accepting the rather bizarre EC rule of using actual profits, but only from sales "in the ordinary course of trade". In practice, this rule tends to exaggerate the profit level to be included in constructed value, as the EC simply excludes all individual sales below

[51] Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, GATT Doc. MTN.TNC/W/FA, 20 December 1991 (Dunkel Text).

average cost, even though no business would be allowed to report its profits on such a selective basis to national securities regulators. At the same time, if a business made every single sale at a profit of 0.1 percent, the authorities would be required to accept that profit level, even if it were not "reasonable". As a result, protectionist industries in the United States could be forced to live with a 0.1 percent addition to cost in constructed value, rather than the minimum 8 percent provided in the existing U.S. statute. The problem with this rule can be seen in the following examples:

(1a) *Profits exaggerated by agreement*

Total revenue = \$8.00 for 4 units
Total cost = \$6.80 (average cost = \$1.70)
Total profit = \$1.20
Average profit as a percentage of cost
= 17.6% (\$1.20 ÷ \$6.80)

1 Sale at \$3.00	Profit = 76% (\$1.30 ÷ \$1.70)
1 Sale at \$2.00	Profit = 17.6% (\$0.30 ÷ \$1.70)
1 Sale at \$2.00	Profit = 17.6% (\$0.30 ÷ \$1.70)
1 Sale of a sample at \$1.00	Disregarded as "not in ordinary course of trade"
Total \$8.00	Average "profit" under new Antidumping Agreement = 37.3%
	(\$1.90 profit on sales "in the ordinary course of trade" ÷ \$5.10 cost of those goods sold)
	"Fair" export price = \$2.33 (\$1.70 + \$0.63)

(1b) *Same total profits accurately measured by agreement*

Total revenue = \$8.00 for 4 units
Total cost = \$6.80 (average cost = \$1.70)
Total profit = \$1.20
Average profit as a percentage of cost
= 17.6% (\$1.20 ÷ \$6.80)

4 Sales at \$2.00	Profit = 17.6% (\$0.30 ÷ \$1.70)
Total \$8.00	Average "profit" under new Antidumping Agreement = 17.6%
	"Fair" export price = \$2.00 (\$1.70 + \$0.30)

(2a) *Low profits accurately measured by agreement*

Total revenue = \$7.00 for 4 units
Total cost = \$6.80 (average cost = \$1.70)
Total profit = \$0.20

Average profit as a percentage of cost	
=	2.9% ($0.20 ÷ $6.80)
4 Sales at $1.75	Profit = 2.9% ($0.05 ÷ $1.70)
Total $7.00	Average "profit" under new Antidumping Agreement = 2.9%
	"Fair" export price = $1.75 ($1.70 + $0.05)

(2b) *Same low profits exaggerated by agreement*

Total revenue =	$7.00 for 4 units
Total cost =	$6.80 (average cost = $1.70)
Total profit =	$0.20
Average profit as a percentage of cost	
=	2.9% ($0.20 ÷ $6.80)
1 Sale at $2.50	Profit = 47% ($0.80 ÷ $1.70)
1 Sale at $2.30	Profit = 35% ($0.60 ÷ $1.70)
1 Sale at $1.40	Disregarded as "not in ordinary course of trade"
1 Sale at $0.80	Disregarded as "not in ordinary course of trade"
Total $7.00	Average "profit" under new Antidumping Agreement = 41%
	"Fair" export price = $2.40 ($1.70 + $0.70)

Second, Article 9.3.3 of the Dunkel Text permits the EC to continue its practice of treating antidumping duties as a cost to be deducted from the export price, unless the exporter can "conclusively" prove that it has passed along any increase in price[52] in all "subsequent sales" (which, read literally, would include all sales by unrelated purchasers to subsequent unrelated purchasers).[53]

Probably just as unfortunate, from an exporter's point of view, is the watering down in the Dunkel Text, under U.S. and EC pressure, of many of the positive provisions of earlier drafts. For example, the negligible import share, instead of being 1 percent of market-share, was now defined as "normally" one percent of market-share,[54] thus eliminating the anti-harassment value of the "negligibility" concept.[55]

At the same time, the draft made certain that any post-1991 renegotiation of the Dunkel Text would involve some bargaining by the United States and the EC. In particular, the concept of "cumulation" for measuring injury was not included in the

[52] This is a much higher standard of proof than is applied to anyone else anywhere else in the Code, including for such fundamental findings as the determination of injury.

[53] In the extreme (and absurd) example, this could include sales by retailers to individual consumers. Even if it were possible for an exporter to check each such sale, it could require a degree of resale price maintenance, which could well be illegal under U.S. and EC antitrust law.

[54] Compare New Zealand III, Article 5.7, n. 11, with Dunkel Text, Article 5.8.

[55] The point of an absolute floor at some level of market-share was to protect small shippers from being forced out of the importing country market by the cost of defending a case (a not infrequent occurrence in the United States). The addition of "normally" could require mounting a defense in all cases.

Dunkel Text, undoubtedly as a "bargaining chip" for which the United States and the EC would have to pay in any renegotiation. In addition, the third-country anti-circumvention provisions (i.e. governing assembly in a third country of a product that had been subject to an antidumping order) were replaced by a much less intrusive third-country retroactivity provision (in Article 10.5), which required a new investigation for the imposition of duties on the assembled product from the third country, albeit with provisions for duties retroactive to initiation, rather than the usual duty retroactive only to the preliminary affirmative determination. Finally, the Dunkel Text's treatment of "start-up" costs—a footnote requiring the use of the cost at the end of the start-up period or later, rather than the average cost—while a bit unusual, reflected a position considerably more favourable to exporters than existing U.S. or EC practice.

D. *After the Dunkel Text*

The U.S. fast-track system for trade agreements legislation encourages interest groups that are not 100 percent satisfied to continue complaining until that legislation is finally passed. The release of the Dunkel Text without the package of tariff cuts meant that there was no constituency in the United States expressing full support for the Dunkel Text. Even the intellectual property groups in the United States, which had achieved incredible victories in the Round, were unhappy with the Dunkel Text. Far more important, of course, the EC would not accept the Dunkel Text on agriculture, although in the end that text did provide the basis for the negotiated solution.

A summer and autumn of sparring over the U.S./EC *Oilseeds* case,[56] and adoption in May 1992 by the EC of a reform of its Common Agricultural Policy, finally led to the Blair House agreement in November 1992. President Bush had already lost his re-election bid, and USTR Carla Hills, with Bush's backing, was determined to make one last push to obtain an agreement before the inauguration of Governor Clinton. That led to the submission by USTR of demands in three areas connected with antidumping: anti-circumvention, sunset, and panel reviews,[57] all of which were framed in such extreme form[58] that they were ridiculed when presented to the informal negotiating group of twenty senior representatives in Geneva on 14 December 1992.

USTR Hills took advantage of the arrival in January 1993 of a new EC chief negotiator, Sir Leon Brittan, to negotiate significant market access measures (essentially, promises of reciprocal sharp cuts in textiles and electronics tariffs).

[56] *European Economic Community: Follow-Up on the Panel Report, Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, GATT BISD 39S/91, 31 March 1992.
[57] *U.S. Requests Reopening of GATT Antidumping Text, Seeks Major Changes*, Inside U.S. Trade, 18 December 1992, at S-1.
[58] The U.S. proposal on sunset, for example, would have required Canada, Australia and the EC to postpone the sunset reviews of existing antidumping orders against U.S. exporters for five years: id.

However, Brittan was not yet in a position to deliver on them, and time ran out when Bill Clinton was inaugurated on 20 January.

The new Administration began with a clear and comprehensive statement in favour of freer trade, in a speech by the President on 26 February 1993, but also with some significant political debts. (For example, the steel workers union had been one of the largest contributors to the Clinton campaign.) It soon became clear from personnel moves at the working levels and from some decisions on specific cases, that the U.S. position on antidumping in the Uruguay Round would remain dominated by those at USTR, Commerce and in the Congress favouring a trade-restrictive approach.

Since no other country wanted to reopen the antidumping text (the EC was concerned that it might lose some of its gains in the areas of profit and duty-as-a-cost, but agreed to support the United States on antidumping as part of the deal on agriculture), the bruising fight in the United States over the North American Free Trade Agreement effectively postponed any discussion of antidumping until November 1993. Commerce had a long list of changes it wanted in the Dunkel Text on antidumping, primarily a result of pressure from some of the less successful U.S. steel companies. USTR was equally sensitive to the pressure from the domestic steel industry, but recognized the impossibility of getting all the desired changes.

Thus, the Administration had to balance the desire for antidumping changes against the need to get changes in other areas of the text, such as the trade-related aspects of intellectual property rights (TRIPS). In the end, a compromise was reached within the Administration, with USTR seeking four major changes on antidumping (deliberately worded to be within the bounds of acceptability) and Commerce seeking some highly unacceptable changes (such as changes in the measurement of profit and of start-up costs), worded in a way which would not be acceptable. Some technical changes to which no one would object were included, so that the United States could claim that it had achieved most of its changes. U.S. Ambassadors Mickey Kantor and Rufus Yerxa made antidumping the focus of their selling efforts, successfully convincing the EC, Japan and the Association of South East Asian Nations (ASEAN) negotiators that getting the antidumping changes was their number one priority.[59]

[59] In an interview on 17 December 1993, Director-General Peter Sutherland stated that "it had been made abundantly clear politically by Mickey Kantor from the very beginning that this was a crunch issue as far as the United States was concerned.": *Ending the Uruguay Round: An Interview with GATT Chief Sutherland*, Inside U.S. Trade, 24 December 1993, at 4. Japan's chief trade negotiator, Ambassador Nobutoshi Akao, also commented in an interview that "everyone knew that antidumping was critically important for the United States, and if all the U.S. proposals were rejected without any favourable consideration, then perhaps the Uruguay Round package would be dead-on-arrival in the U.S. Congress.": *Japan's Chief Negotiator, in Interview, Discusses GATT Round Endgame*, id., at 7. The Journal of Commerce reported on 22 December 1993: "Under pressure from Mr Gephardt and other Congressional leaders, the Clinton Administration made preserving the U.S. antidumping law its top priority in the last days of the negotiations and were able to line up support for that position by Canada and the European Union by backing off in all other areas.": John Maggs, *Gephardt Lends His Support to Uruguay Round Accord*, The Journal of Commerce, 22 December 1993, at 2A. EC and Canadian support on antidumping had been bought by the United States, with concessions on agriculture and subsidies, respectively. Indeed, the real "price" paid by the United States for its antidumping changes was in permitting those countries to infer that they could successfully ignore U.S. demands on audio-visual and financial services, since the United States (by its emphasis on antidumping) had made clear that success on its antidumping changes would be crucial to get U.S. agreement to the overall package.

It is significant that the changes from the Dunkel Text on antidumping to the Final Act on antidumping involved precisely the changes identified weeks in advance as being relatively saleable, with none of the radical changes accepted. Equally significant, no country made an effort to improve the antidumping rules in return for the U.S. changes. Consequently, all of the flaws in the Dunkel Text were carried through to the Final Act. In addition, exporters (including, of course, U.S. exporters) must now take into account a few new problems introduced by the U.S. proposals that were ultimately adopted.

III. Analysis of the Antidumping Agreement

A. *Procedures for Investigations*

The Antidumping Agreement includes new provisions concerning the initiation of an antidumping investigation which are intended to make the process more transparent and fair, and to protect against frivolous claims. Specifically, Article 5.2 of the Antidumping Agreement repeats the requirement from the prior Code that an application to initiate an investigation must include "sufficient evidence" of dumping, injury and the causal link between the two. It adds that "simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements". In addition, Article 5.2 lists in detail the information that must be included in the application before an investigation may be initiated.

Article 5.3 of the Antidumping Agreement provides that "the authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation." While this seems only logical, the 1979 Antidumping Code did not contain any such explicit requirement, and the degree of examination required has been an issue in three antidumping panels.[60]

Article 6 of the Antidumping Agreement requires that foreign producers or exporters receiving questionnaires in an antidumping investigation shall be granted at least thirty days for reply. Most antidumping authorities currently allow foreign producers and exporters at least thirty days to respond to questionnaires, although the 1979 Code does not specifically require it.[61] The explicit requirement in the new

[60] Swedish Steel Panel Report, *supra* footnote 43, at ¶¶ 3.13–3.36, 5.4–5.22: Article 5.1 requires administering authorities to take affirmative steps to assure themselves that the petition is supported by a major portion of the domestic industry; *United States: Antidumping Duties on Gray Portland Cement and Cement Clinker from Mexico*, at ¶¶ 3.3–3.3.31, 5.14–5.34, GATT Doc. ADP/82, 7 September 1992 (Mexican Cement Report): Article 5.1 requirement not met by relying on certification that petition is supported by major portion of domestic industry where standard is "all or almost all" of the domestic industry; *United States: Imposition of Antidumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, GATT Doc. ADP/87, 30 November 1992 (Salmon Report): Article 5.1 requirement met by relying on certification that petition is supported by major portion of the domestic industry even in light of notice of withdrawal of support for petition and stated opposition by a member of the domestic industry .

[61] Although the 1979 Code does not specify thirty days, this time period was recommended as the minimum response time by the Antidumping Committee, in a recommendation adopted by the Contracting Parties in 1983: *Recommendation concerning the Time-Limits given to Respondents to Antidumping Questionnaires*, GATT BISD 30S/30, 15 November 1983.

Agreement should protect against unfairness and abuse by administering authorities. In addition, Article 7.3 of the Antidumping Agreement stipulates that provisional measures may not be applied less than sixty days after the initiation of the investigation.

B. *Standing*

The Antidumping Agreement incorporates a new provision on standing which requires a more active involvement of the administering authorities prior to the initiation of an investigation. Article 5.1 of the 1979 Code provides that an investigation "shall normally be initiated upon written request by or on behalf of the industry affected". However, the 1979 Code did not include an explicit standard for determining whether an application is filed "by or on behalf of the domestic industry".

Article 5.4 of the Antidumping Agreement provides that an antidumping investigation shall not be initiated:

> " . . . unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry."

Article 5.4 requires that an application be supported by producers accounting for at least 50 percent of the collective output of all producers expressing an opinion concerning the application. However, in no event may authorities initiate an investigation if the domestic producers supporting the petition account for less than 25 percent of total production of the domestic like product.[62]

C. *Calculation Methodology*

Article 2.6 of the 1979 Code refers to the need to effect a "fair comparison" in calculating dumping margins. Article 2.4 of the Antidumping Agreement requires that:

> "A fair comparison shall be made between the export price and the normal value. This comparison shall be made 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."

In contrast, the second sentence of Article 2.4 of the Dunkel Text read:

> "The two *prices* shall be compared at the same level of trade . . . " (emphasis added).

The amendment to the language between the Dunkel Text and the final text shifted the focus from prices to a fair comparison. The change was made in the legal drafting group in 1992 to ensure a fair comparison regardless of whether the comparison is made between normal value and export price or constructed value and export price.

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[62] The 25 percent level is used by Mexico and is the lowest level applied by any "major user" of antidumping measures. This percentage figure was drawn from a U.S. proposal tabled on 26 November 1993, just a few weeks before the conclusion of the Uruguay Round negotiations. The United States was concerned that a panel might establish a higher threshold for determining industry support for a petition.

Moreover, in recognition of the potential for abuse by administering authorities, the Antidumping Agreement sets forth in more detail an equitable methodology for calculating dumping margins (i.e. a comparison of individual prices to individual prices, or weighted average prices to weighted-average prices). At the same time, the Antidumping Agreement gives the administering authorities the express ability to address situations of "hidden dumping". That is, the Antidumping Agreement explicitly permits a comparison of individual prices in one market to weighted-average prices in the other if there is "a pattern of export prices which differ significantly among different purchasers, regions or time periods", and if the authorities provide an explanation as to why such differences would not be accounted for in a weighted-average to weighted-average or individual price to individual price analysis.[63] This strictly limits the current practice of several countries, which use a comparison of average normal values to individual export prices, to those situations where high-priced export sales are arranged to "mask" low-priced export sales to the same market and comparable low-priced sales are not made in the "normal value" market.

The Antidumping Agreement also addresses the issue of currency conversions and exchange rates in the calculation of dumping margins, which are areas for potential abuse by administering authorities. The Antidumping Agreement explicitly requires that, in converting currencies, the exchange rate in effect on the date of sale must be used. If a sale of foreign currency on forward markets is shown to be directly linked to the export sale being examined, the Antidumping Agreement requires that the exchange rate in the forward sale shall be used. In addition, the Antidumping Agreement protects against the situation in which exchange rate fluctuations yield or increase dumping margins. Article 2.4.1 of the Antidumping Agreement provides that exchange rate fluctuations are to be ignored and exporters are to be given sixty days in which to adjust their export prices in response to sustained currency movements.

D. *Sampling*

Whereas the 1979 Code is silent on the use of sampling to calculate dumping margins, Article 6.10 of the Antidumping Agreement provides that:

> " . . . where the number of exporters, producers, importers or types of products involved is so large as to make [a producer/exporter-specific or product-specific margin] determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection . . . "[64]

Of particular significance in this provision is the requirement that the sampling

[63] See footnote 1, *supra*, Antidumping Agreement, Article 2.4.2; Final Act, at 147–48; U.S. WTO Implementing Legislation, at 1455–56.
[64] See footnote 1, *supra*: Antidumping Agreement, Article 6.10; Final Act, at 154–55; U.S. WTO Implementing Legislation, at 1462–63.

techniques must be "statistically valid".[65] The national laws or regulations of some of the major user-countries of antidumping remedies, such as the United States, currently permit the use of sampling in antidumping investigations. All too often, however, the sampling methodologies employed are not statistically valid and thus yield distorted results.[66]

E. *Sales Below Cost of Production*

The 1979 Code provides little guidance on the calculation of cost of production or when sales below cost should be ignored. The Antidumping Agreement provides considerable detail on the issue of sales below cost. Article 2.2.1 provides that sales below cost of production may be excluded from the calculation of dumping margins if 20 percent or more of total sales in the home market are below the fully allocated cost. Some U.S. steel industry lobbyists claim that the 20 percent threshold will reduce the likelihood of a finding of dumping and permit exporters to engage in significant sales below the cost at home. This concern is misplaced, however, because the Antidumping Agreement expressly provides that, if the weighted-average sales price is below the weighted-average cost, the administering authorities may disregard the below cost sales even if they account for less than 20 percent of total home market sales.[67]

Article 2.2.1.1 of the Antidumping Agreement also requires the administering authorities to adjust costs if a company subject to an antidumping investigation is in a start-up situation. This is a significant improvement over the existing Code to the extent that it protects exporters in a start-up situation from arbitrary findings of below cost sales before they have achieved adequate sales volumes to yield anticipated per unit costs. However, the Agreement fails to define explicitly the start-up period.

A significant flaw in the Antidumping Agreement concerns the definition of profit in the calculation of the cost of production. Article 2.2.2 of the Antidumping Agreement legitimizes the EC's much-criticized practice of using overstated profit figures to obtain highly inflated dumping margins. Specifically, under the Antidumping Agreement, administering authorities can calculate the profit margins based on selected sales, rather than following generally accepted accounting principles.

Another significant flaw in the Antidumping Agreement concerns the provision for treating dumping duties as a cost to be deducted from the export price. Article 9.3.3 made its way into the Antidumping Agreement as a result of aggressive negotiating by the EC. Under current EC practice, an exporter found to be dumping in the EC must raise its prices in the EC by double the amount of the dumping margin

[65] Id.

[66] For example, the Salmon Panel found that the United States, in selecting a sample of farms to determine the cost of producing salmon, had not ensured that the sample would be representative, in violation of the 1979 Code: *Salmon Report*, *supra*, footnote 60, at ¶ 426.

[67] See footnote 1, *supra*: Antidumping Agreement, Article 2.2.1, n. 5; Final Act, at 145–46; U.S. WTO Implementing Legislation, at 1453–54.

in order for the EC authorities to find no dumping. The EC essentially "double-counts" the duty in order to reduce competition. The Antidumping Agreement also requires that the second party in the sales chain (presumably excluding unrelated parties, so as to avoid infractions of competition rules against resale price maintenance) demonstrate that it, too, has raised its prices by the full amount of the dumping margin.

F. De Minimis *Dumping Margins*

The Antidumping Agreement includes a new *de minimis* dumping margin standard of 2 percent, below which antidumping duties shall not be imposed. This provision will require a change in U.S. law to raise the existing 0.5 percent *de minimis* standard to 2 percent. It is frequent practice in the EC and Canada to consider dumping margins of less than 1.5 percent to be *de minimis*. While Australia also does not have a formal *de minimis* rule, margins of 5 percent and 6.25 percent have been considered *de minimis*.

G. *Negligible Import Share*

The Antidumping Agreement includes a negligible import share provision whereby no injury would normally be found if imports from a single country accounted for less than 3 percent of imports of the like country, unless all *de minimis* exporters together equal more than 7 percent of imports.[68]

The inclusion of a negligibility provision recognizes the current practice of the major user countries, i.e. the United States, the EC, Canada and Australia. It has been the practice of these countries to consider imports to be "negligible" when they represent a limited share of the domestic market. For example, the United States and the EC generally dismiss cases on the basis of negligible market-share when imports account for less than 0.5 to 1 percent of the domestic market. Australia has dismissed cases when imports accounted for as much as 10 percent of the Australian market. It is more difficult to discern a clear rule used by Canada, though cases have been dismissed when imports accounted for as much as 4.6 percent of the Canadian market. The United States, with help from other administering authorities, was able to shift the basis for negligibility decisions in the final Agreement from market-share to share of total imports. The use of an import-share standard has quite odd results—the more effectively protected an industry is (as measured by low market-share), the easier it is to find that imports are not negligible. This was a gift from USTR and Commerce to the integrated steel mills[69] without any particular concern for, or even knowledge of, its effect on U.S. exports. For example, U.S. exporters had 0.5 percent of the EC wheat market, which would be negligible under the Dunkel Text's negligibility

[68] See footnote 1, *supra*: Antidumping Agreement, Article 5.8; Final Act, at 152; U.S. WTO Implementing Legislation, at 1460.

[69] Three percent of total finished steel imports is approximately 0.6 percent of the total U.S. market.

standard of 1 percent of market-share. However, U.S. wheat exports account for approximately 35 percent of total imports into the EC—well above the 3 percent negligibility standard in the final Antidumping Agreement. Even more puzzling was the EC willingness to sacrifice its small Member States (Belgium, Denmark, the Netherlands, Luxemburg, Eire, Portugal and Greece), which would have been better off with the Dunkel Text's market-share standard.[70]

H. *Anti-Circumvention Measures*

Although the Dunkel Text included substantial provisions concerning anti-circumvention measures, no final agreement could be reached among the delegations. Therefore, these provisions were dropped from the final text. Instead, the parties agreed to a Ministerial Declaration recognizing the problem of circumvention and referring the matter to the Committee for Antidumping Practices for resolution.[71] Although some U.S. officials have claimed that this permits the United States to continue to apply anti-circumvention measures, neither the Agreement nor the Declaration says this. Article 18.1 permits the imposition of antidumping duties only in accordance with the provisions of the Agreement, and there is no provision permitting anti-circumvention measures or the imposition of antidumping duties on products which have not been fully investigated and found to be dumped and causing injury.

I. *Best Information Available*

Article 6.8 of the Antidumping Agreement mirrors Article 6.8 of the 1979 Code and addresses the use of "best information available". Article 6.8 provides that:

> ". . . in cases in which an interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available."

Unlike the 1979 Code, the Antidumping Agreement includes an Annex dedicated exclusively to the application of best information available. The circumstances under which the use of best information available is permitted are significantly

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[70] For example, in the 1992–1993 U.S. antidumping investigations of flat-rolled steel products, the United States found that Belgian imports of cold-rolled steel products were negligible and thus not a cause of injury to the U.S. industry: *Certain Flat-Rolled Carbon Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden and the United Kingdom*, USITC Publication 2664, at 41, 111, Inv. Nos. 701–TA–319–332, 334, 336–342, 344, and 347–353 and 731–TA–573–579, 581–592, 594–597, 599–609, and 612–619 (Final) August 1993. Belgian imports of cold-rolled steel products accounted for 0.4 percent of the U.S. market in 1990 and 0.5 percent in 1991: id., at 111. In those same years, Belgian imports accounted for 5.2 percent and 6.9 percent of total imports: id., at I–137. Under the Dunkel Text's 1 percent market-share standard, Belgian imports of cold-rolled steel would be considered negligible. Under the final Agreement's 3 percent import-share standard, however, Belgian imports would not have been considered negligible and could have been found to cause injury.

[71] See Decision on Anti-Circumvention, Final Act, at 401; U.S. WTO Implementing Legislation, at 1694; *supra*, footnote 1.

circumscribed, and the information that administering authorities may rely on in making preliminary and final determinations is more tightly controlled than under the 1979 Code.

Specifically, Annex II of the Antidumping Agreement provides that:

— all information that is verifiable, appropriately submitted and supplied in a timely fashion should be taken into account by the authorities when making determinations;[72]
— the authorities may not disregard information submitted by interested parties, even though that information may not be ideal in all respects, provided that the interested party has acted to the best of its ability;[73]
— the authorities must notify a party if its information is not going to be accepted and must allow that party a reasonable opportunity to provide further explanation;[74] and
— if the authorities rely on information from a source other than the submitting party, they "should, where practicable, check the information from other independent sources at their disposal".[75]

J. *Sunset Provision*

The 1979 Code does not contain any specific limit on the duration of an antidumping duty order. Rather, it states that "an antidumping duty shall remain in force only as long as, and to the extent necessary to counteract dumping which is causing injury."[76] The historic major user-countries (Australia, Canada, the EC), with the exception of the United States, have a sunset provision in their domestic laws or regulations.

The Antidumping Agreement provides for the termination of antidumping orders after five years unless, in a review initiated prior to the five-year deadline, the administering authorities determine that the termination of the order would be likely to lead to the continuation or recurrence of dumping and injury.[77] The burden lies with the administering authorites—not the exporters—to determine whether it is necessary for the duty to remain in place beyond five years in order to prevent the continuation or recurrence of dumping and injury.

K. *Dispute Settlement*

The WTO Agreement contains an integrated dispute settlement mechanism

[72] See footnote 1, *supra*: Antidumping Agreement, Annex II, ¶ 3; Final Act, at 168; U.S. WTO Implementing Legislation, at 1476.

[73] See footnote 1, *supra*: id. at Annex II, ¶ 5; Final Act, at 168; U.S. WTO Implementing Legislation, at 1476.

[74] See footnote 1, *supra*: id., at Annex II, ¶ 6; Final Act, at 168; U.S. WTO Implementing legislation, at 1476.

[75] See footnote 1, *supra*: id., at Annex II, ¶ 7; Final Act, at 168–69; U.S. WTO Implementing Legislation, at 1476–77.

[76] 1979 Antidumping Code, Article 9, ¶ 1.

[77] See footnote 1, *supra*: Antidumping Agreement, Article 11.3; Final Act at 160–61; U.S. WTO Implementing Legislation at 1468–69.

which applies to all aspects of the WTO, including the Antidumping Agreement. It provides a timetable for various submissions so that panel reviews would be completed within nine months. It also sets out a procedure so that a losing party to a dispute would not be able to block a panel decision, as can be done under the 1979 Code. Finally, it provides a procedure to appeal a panel decision to an appellate tribunal on issues of law.

One of the changes to the final antidumping text insisted on by the United States concerned the standard of review to be applied in antidumping disputes. Article 17.6 of the Antidumping Agreement provides:

> "(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
>
> (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations."

The Antidumping Agreement's standard of review for questions of law (as opposed to questions of fact) requires an interpretation in accordance with the Vienna Convention on the Law of Treaties.[78] Commerce and USTR officials claim that the language of the Agreement recognizes that there may be multiple "permissible" interpretations of the language. This claim would be assessed in light of the rules of the Convention. Article 31 of the Vienna Convention provides that a treaty is to be interpreted in accordance with the ordinary meaning of the terms of the treaty, in context and in terms of the treaty's object and purpose.

Subsequent rules in the Convention address situations where the language is ambiguous or where the official texts in different languages give rise to different meanings. Article 31, paragraph 3 states that:

> "... there shall be taken into account together with the context... (b) any subsequent practice in the application of the treaty which *establishes the agreement of the parties regarding its interpretation*" (emphasis added).

Article 32 provides for recourse to the drafting history if the meaning of the terms is ambiguous or obscure, rather than permitting individual signatories to adopt their own interpretations of such ambiguous or obscure language. Article 33 provides that if the different official languages of the text disclose different meanings:

> "... *the meaning* which best reconciles the texts, having regard to the object and purpose of the treaty, *shall be adopted*" (emphasis added).

Thus, a position that envisions multiple "permissible" interpretations[79] may conflict with the normal standards of treaty interpretation.

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[78] Vienna Convention on the Law of Treaties, 23 May 1969, 8 I.L.M. 679 (Vienna Convention).

[79] It should be noted that, although the United States is not a signatory to the Vienna Convention, it acknowledges the Convention as authoritative. See S. Exec. Doc. L., 92d Cong., 1st Sess. (1971): "although not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty law and practice".

At one point in 1993, USTR proposed that a single (deferential) standard of review be applied by WTO panels reviewing all administrative decisions (apparently after being told in Geneva that a special standard just for antidumping would not be acceptable).[80] This proposal was greeted with fury by U.S. intellectual property interests, which did not wish to give to other countries' patent and copyright authorities the deference which USTR sought for Commerce and International Trade Commission antidumping decisions. The proposal was abandoned, and USTR was able to convince Director-General Sutherland and the negotiating parties that an explicit standard should be added for antidumping.[81]

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[80] See *U.S. Moves to Limit Dispute Settlement Panels' Scope of Review*, Inside U.S. Trade, 5 November 1993, at 1.

[81] And possibly, to a vaguely defined degree, countervailing duties. See Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 194 or Part V of the Agreement on Subsidies and Countervailing Measures, Final Act, at 403, U.S. WTO Implementing Legislation, at 1696, *supra*, footnote 1.