

# CLOSING THE LOOPHOLES: 1988 TRADE ACT AMENDMENTS TO THE ANTIDUMPING AND COUNTERVAILING DUTY LAWS

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## I. INTRODUCTION

In 1988 the United States Congress passed and President Reagan signed the Omnibus Trade and Competitiveness Act of 1988 ("Trade Act" or "1988 Trade Act"),<sup>1</sup> the first comprehensive trade legislation since the Trade Agreements Act of 1979.<sup>2</sup> The bur-

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1. The Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988). On January 6, 1987, the House introduced a bill, H.R. 3, the "Trade and International Economic Policy Reform Act," 100th Cong., 1st Sess., 133 CONG. REC. H101 (daily ed. Jan. 6, 1987), which closely corresponded to H.R. 4800, which it had passed on May 22, 1986. 132 CONG. REC. H3162 (daily ed. May 22, 1986). It passed H.R. 3, as amended, on April 30, 1987. 133 CONG. REC. H2847 (daily ed. Apr. 30, 1987). On June 24, 1987, S. 1420, "The Omnibus Trade Act of 1987," was introduced, combining provisions of S. 490, 100th Cong., 1st Sess., 132 CONG. REC. S1851 (daily ed. Feb. 5, 1987), as reported by the Senate Finance Committee on June 11, 1987, and provisions of other Senate committees. S. 1420, as amended on the floor, was passed as a substitute for H.R. 3 on July 21, 1987, 134 CONG. REC. S10,249 (daily ed. July 21, 1987). Following a prolonged House-Senate conference, the Omnibus Trade and Competitiveness Act of 1988 was passed by the House on April 21, 1988, by a vote of 312 to 107, 134 CONG. REC. H2284 (daily ed. Apr. 21, 1988), and by the Senate on April 27, 1988, by a vote of 63 to 36. 134 CONG. REC. S4832 (daily ed. Apr. 27, 1988). On May 24, 1988, the President vetoed H.R. 3, 134 CONG. REC. H3531 (daily ed. May 24, 1988). The House responded by introducing one week later H.R. 4848, a bill stripped of two of the provisions that the President had found objectionable (requiring advance notice of plant closings and mass layoffs, and relating to the transportation of oil). The House passed the new bill on July 13, 1988, 134 CONG. REC. H5694 (daily ed. July 13, 1988), and the Senate on August 3, 1988, 134 CONG. REC. S10,731 (daily ed. Aug. 3, 1988). Finally, on August 23, 1988, President Reagan signed Public Law No. 100-418 into law.

2. The Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948, by contrast, was not comprehensive but rather merely tinkered with the trade laws, extended the GSP program and authorized negotiation of a free trade agreement with Israel.

geoning United States trade deficit, which had climbed dramatically from \$40 billion per year in 1981 to \$130 billion in 1987, provided the main impetus for the new legislation.<sup>3</sup> While the United States had become the world's largest importer,<sup>4</sup> its exports had experienced only minimal growth in the 1980s.<sup>5</sup> Congress blamed several factors for the creation of this so-called "one-way trade,"<sup>6</sup> including the claimed failure of United States policy to adapt to a rapidly changing international trading system, inadequate global coordination of currency exchange rates, and unfair trade practices employed by foreign producers and governments, especially import restrictions and export incentives.<sup>7</sup> Congress was especially concerned that the deteriorating United States trade balance would lead to a corresponding decline in United States leadership and influence in the international community.

The new Trade Act tackled several formidable challenges, including authorizing the President to negotiate multilateral trade agreements,<sup>8</sup> trying to increase American competitiveness through amendments to the Foreign Corrupt Practices Act<sup>9</sup> and Export Trading Company Act,<sup>10</sup> enhancing the protection of intellectual property,<sup>11</sup> and stimulating technological development.<sup>12</sup> Perhaps the greatest challenge addressed by the Act was to open up foreign markets to United States exports, the goal of amendments to section 301 of the Trade Act of 1974.<sup>13</sup>

In addition to many other such provisions, the 1988 Act also revised the antidumping ("AD") and countervailing duty ("CVD") laws. Several new provisions reflected the concern that foreign producers had invented new strategies to evade the antidumping and countervailing duty laws.<sup>14</sup> Others attempted to clarify existing

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3. S. REP. NO. 71, 100th Cong., 1st Sess. 2-3 (1987).

4. *Id.* at 4.

5. *Id.* at 3.

6. *Id.*

7. H.R. CONF. REP. NO. 576, 100th Cong., 2d Sess. 515 (1988); S. REP. NO. 71, *supra* note 3, at 2-7; H.R. REP. NO. 40, 100th Cong., 1st Sess., pt. 1, at 2-6 (1987).

8. Omnibus Trade and Competitiveness Act of 1988, § 1102, 19 U.S.C. § 2902 (1988).

9. *Id.* § 5003.

10. *E.g., id.* § 3402.

11. *Id.* § 2206.

12. *Id.* § 5131.

13. Trade Act of 1974 §§ 301-06 (collectively referred to as Section 301), as amended by Omnibus Trade and Competitiveness Act of 1988, § 1301, codified as amended at 19 U.S.C. §§ 2411-16 (1988); see Bello & Holmer, *The Heart of the 1988 Trade Act: A Legislative History of the Amendments to Section 301*, 25 STAN. J. INT'L L. 1 (1988).

14. See *infra* text of part III.

provisions, and to ensure that the International Trade Administration and the United States International Trade Commission apply the laws in accordance with Congressional intent.<sup>15</sup>

This article will address the changes aimed at rendering the AD and CVD laws more effective.<sup>16</sup> The article first outlines briefly the antidumping and countervailing duty laws. It then discusses the amendments designed to prevent evasion of the antidumping and countervailing duty laws. Next, the article discusses the repeal of duty drawback for antidumping and countervailing duties, and amendments to the determination of injury. Finally, the article assesses the significance of the 1988 Act amendments to the AD and CVD laws.

## II. BACKGROUND

### A. *The Antidumping Law*

Dumping is traditionally defined as selling at a lower price in one national market than in another.<sup>17</sup> The economic reason for dumping is to make a profit by discriminating on price between different national markets, either between the producer's home and an export market, or among the producer's export markets.<sup>18</sup> Dumping can either be of a sporadic and minimally harmful nature, such as unloading overstock, or of a persistent and extremely harmful nature, such as pricing goods below cost to stifle or even eliminate competition.<sup>19</sup>

Neither sporadic nor persistent dumping is prohibited by United States law. Instead, United States law provides for the imposition of antidumping duties on injuriously dumped goods. An antidumping order requires the importer of record to deposit in cash estimated duties in an amount equal to the "margin" of dumping. The margin of dumping is determined by deducting the "United States price" of the product from the "foreign market

15. See *infra* text of parts IV and V.

16. See S. REP. NO. 71, *supra* note 3, at 90-91. The AD and CVD laws are generally regarded as reasonably effective. Between 1980 and 1986, 658 petitions for antidumping and countervailing duties were filed with the Department of Commerce on behalf of United States industries. In 185 cases, antidumping or countervailing duty orders were issued or agreements suspending investigations achieved, and many other cases were settled with the consent of the domestic industry. *Id.*

17. See, e.g., Fisher, *The Antidumping Law of the United States: A Legal and Economic Analysis*, 5 L. & POL. INT'L BUS. 85, 86 (1973); see generally J. VINER, *DUMPING: A PROBLEM IN INTERNATIONAL TRADE* (1966 reprint).

18. *Id.*

19. *Id.*

value." "United States price" is defined as either the "purchase price," if the importer is not related to the foreign producer,<sup>20</sup> or the "exporter's sales price," in the case of trade between related companies.<sup>21</sup> "Foreign market value" is defined as either the home market price in the country of origin, the market price in third countries, or in certain cases, the constructed value.<sup>22</sup> If the United States price is less than the foreign market value, then sales are said to be made at "less than fair value."<sup>23</sup>

The International Trade Administration of the United States Department of Commerce determines whether goods are being sold in the United States at less than fair value. In addition, an independent government agency, the United States International Trade Commission ("ITC"), determines whether the domestic industry is materially injured or threatened with material injury by reason of sales at less than fair value or, alternatively, if the establishment of a United States industry is materially retarded by the "dumped" merchandise.<sup>24</sup> If both the Department of Commerce and the ITC make affirmative determinations, then an antidumping duty is assessed against imports of the subject merchandise.

### B. Countervailing Duty Law

A foreign producer enjoys a competitive advantage over domestic producers of the same good if the foreign government subsidizes the production or exportation of his product. The CVD law is intended to offset this advantage by imposing a duty in the amount of the subsidy on subsidized imports, usually only if they injure or threaten to injure a United States industry, or materially retard the establishment of a United States industry.<sup>25</sup>

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20. Tariff Act of 1930, § 772(b) (codified as amended at 19 U.S.C. § 1677a(b) (1988)).

21. *Id.* § 772(c) (codified as amended at 19 U.S.C. § 1677a(c) (1988)).

22. *Id.* § 773 (codified as amended at 19 U.S.C. § 1677b (1988)).

23. *Id.* § 731 (codified as amended at 19 U.S.C. § 1673 (1988)).

24. *Id.* §§ 731-40, amended by Omnibus Trade and Competitiveness Act of 1988, §§ 1316-33, 19 U.S.C. §§ 1673-1673i (1988).

25. Tariff Act of 1930, §§ 705(b), 735(b), amended by Omnibus Trade and Competitiveness Act of 1988, §§ 1324, 1333, 19 U.S.C. §§ 1671d(b), 1673d(b) (1988). The injury test does not apply in CVD cases to dutiable imports from countries that are not parties to the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 513, T.I.A.S. No. 9619 [hereinafter Subsidies Code], or that have not assumed substantially equivalent obligations with the United States. The injury test also does not apply to duty-free imports from such countries if they are not members of the GATT or the test is not otherwise required under United States international obligations. Tariff Act of 1930, §§ 303(a)(2), 701(a)(2), (b), 19 U.S.C. §§ 1303(a)(2), 1671(a)(2), (b) (1988).

“Subsidies,” as defined in the Tariff Act of 1930, include export subsidies conferred only on exports,<sup>26</sup> and domestic subsidies<sup>27</sup> conferred upon the production of goods, whether or not they are later exported. Domestic subsidies are only countervailable if they are “sector-specific,” i.e., have been conferred upon a specific enterprise or industry, or group of enterprises or industries.

The Department of Commerce investigates whether an imported product is subsidized. If the government alleged to have conferred the subsidy is a signatory of the General Agreement on Tariffs and Trade (“GATT”) Subsidies Code,<sup>28</sup> or has concluded a substantially equivalent agreement,<sup>29</sup> then the ITC conducts an injury investigation.<sup>30</sup> If not, the ITC still conducts an investigation if the merchandise is duty-free and the government is a GATT contracting party.<sup>31</sup>

### III. PREVENTION OF CIRCUMVENTION AND DIVERSION OF AD/CVD LAW

Prior to the enactment of the Trade Act of 1988, various loopholes in the antidumping and countervailing duty provisions may have enabled foreign producers to evade compliance with the AD and CVD laws. Foreign producers were believed to have evaded orders covering a final product, a practice known as circumvention, and avoided orders by incorporating the product subject to an order into another product, a practice often referred to as “diversionary or input dumping.”<sup>32</sup> Given the requirements of the GATT,<sup>33</sup>

26. Tariff Act of 1930, § 771(5)(A), amended by Omnibus Trade and Competitiveness Act of 1988, § 1312, 19 U.S.C. § 1677(5)(A) (1988).

27. *Id.* § 771(5)(B), amended by Omnibus Trade and Competitiveness Act of 1988, § 1312, 19 U.S.C. § 1677(5)(B) (1988).

28. Subsidies Code, *supra* note 25.

29. *See supra* note 25.

30. Tariff Act of 1930, § 701, 19 U.S.C. § 1671(b) (1988).

31. *Id.* § 303(a)(2), 19 U.S.C. § 1303(a)(2) (1988).

32. For example, the House Committee expressed concern that parties subject to antidumping or countervailing duty orders were able, under the law prior to the 1988 Trade Act, to circumvent or evade the order by making slight changes in the method of production or shipment of merchandise destined for consumption in the United States. H.R. REP. No. 40, *supra* note 7, at 134-35; *see also* S. REP. No. 71, *supra* note 3, at 96, 99-101; H.R. CONF. REP. No. 576, *supra* note 7, at 599-604.

33. For example, both the GATT Subsidies and Antidumping Codes require a finding that a “like product” is dumped or subsidized and causing or threatening injury to a United States industry. Subsidies Code, *supra* note 25; Agreement on Interpretation of Article VI of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 4919, T.I.A.S. No. 9650 (entered into force Jan. 1, 1980) [hereinafter Antidumping Code].

and the Antidumping<sup>34</sup> and Subsidies<sup>35</sup> Codes, Congress encountered difficulty developing an effective means to limit circumvention and diversion.<sup>36</sup> Consequently, many of the more ambitious proposals for new legislation in this field were dropped, although they had been passed by either the House or the Senate.<sup>37</sup>

### A. Circumvention

#### 1. Practices and Legal Developments Prior to Enactment of the Trade Act of 1988

Several major loopholes in the antidumping and countervailing duty laws enabled foreign producers to circumvent an antidumping or countervailing duty order. First, instead of exporting a final product that had been found to be dumped or subsidized, foreign producers could export components or parts of the product to the United States, where the final product would then be assembled or completed.<sup>38</sup> Second, foreign producers could ship components or parts of the subject merchandise to a third country for such assembly or completion prior to import into the United States. The exporter of the finished product to the United States would thus be outside of the order.<sup>39</sup> The third form of circumven-

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34. Article 3 requires a finding that a "like product" is "dumped" and causing or threatening injury to a domestic industry to warrant imposition of antidumping duties. Antidumping Code, *supra* note 33.

35. Article 2 requires that the domestic authorities find injury caused by the existence of a subsidy before a countervailing duty is imposed. Subsidies Code, *supra* note 25.

36. See, e.g., *Trade and International Economic Policy Reform Act and other Proposals: Hearings on H.R. 3 Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 100th Cong., 1st Sess. 660 (1987) [hereinafter *Hearings on H.R. 3*] (statement of Alan F. Holmer, General Counsel, Office of the U.S. Trade Representative).

37. These proposals included: creating a private right of action for dumping, H.R. 3, *supra* note 1, § 166; expanding the definition of "subsidy" to encompass a broader range of foreign government actions, *id.* § 153; providing relief for diversionary dumping, *id.* § 156; requiring the application of the countervailing duty law to nonmarket economies, *id.* § 157; and creating an effective presumption of dumping where foreign producers and exporters sold in the United States through a related party, S. 1420, *supra* note 1, § 322. See generally Bello & Holmer, *The 1988 Trade Bill: Savior or Scourge of the International Trading System?*, 23 INT'L LAW. 523 (1989); Bello & Holmer, *The Trade and Tariff Act of 1984: The Road to Enactment*, 19 INT'L LAW. 287 (1985).

38. See, e.g., Color Television Receivers from Korea, 49 Fed. Reg. 18,336-37 (Dep't Comm. 1984) (antidumping duty order); Color Television Receivers, Other Than Video Monitors, from Taiwan, 49 Fed. Reg. 18,337-38 (Dep't Comm. 1984) (antidumping duty order).

39. See, e.g., Erasable Programmable Read Only Memory Semiconductors (EPROMS) from Japan, 51 Fed. Reg. 39,680 (Dep't Comm. 1986) (final determination); Dynamic Random Access Memory Semiconductors of 256 Kilobits and Above from Japan, 51 Fed. Reg. 4661 (Dep't Comm. 1986) (prelim. determination). In both cases, wafers produced in Japan

tion involved altering the product to a minor extent and then claiming that the imported product was different from the product covered by the order.<sup>40</sup> Finally, producers sometimes claimed that products developed after the issuance of an order, especially if subject to higher technical standards than the product originally covered by the order, were outside the scope of such order.<sup>41</sup>

Prior to the enactment of the Trade Act, the Commerce Department and the Court of International Trade had occasion to address these creative theories.

In *Gold Star Co. v. United States*, the plaintiff challenged a Commerce Department scope clarification ruling, which had found that an antidumping order for "color television receivers, complete or incomplete" included color picture tubes ("CPT") and printed circuit boards ("PCB") "entered together or on separate entries for subsequent assembly into color television receivers."<sup>42</sup> The court rejected the plaintiff's contention that a separately imported PCB or CPT was outside the scope of the order because it did not constitute a complete or incomplete receiver. The court held that foreign producers could not avoid the imposition of antidumping duties by importing the component parts of subject merchandise, reasoning that

[t]he object of the dumping laws is to protect domestic producers against imported merchandise which "is being, or is likely to be, sold in the United States at less than its fair value . . ." [Tariff Act of 1930, 731(1), 19 U.S.C. 1673(1) (1988) (emphasis added)]. The present merchandise is sold on the United States market not as a PCB nor as a CPT but as a color television receiver. If the Court were to allow separate importations of PCBs and CPTs

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and assembled in a third country were included in the scope of the antidumping investigation. After suspension agreements between the Japanese producers and the Department of Commerce had been conducted, both cases were suspended, still including third country imports within their scope. See 51 Fed. Reg. 28,253 (Dep't Comm. 1986); 51 Fed. Reg. 2839 (Dep't Comm. 1986). An example in the steel industry can be found in efforts by Brazilian steel producers to set up a pipe production facility in Panama that would use Brazilian sheet in order to avoid express undertakings made by the Brazilian government to limit their sheet exports to the United States. See *Hearings on H.R. 3, supra* note 36, at 695 (statement of Matthew B. Coffey, on behalf of the Metalworking Trade Coalition); see also Cameron & Crawford, *An Overview of the Antidumping and Countervailing Duty Amendments: A New Protectionism?*, 20 L. & POL. INT'L BUS. 471, 476 (1989).

40. See, e.g., *Portable Electric Typewriters from Japan*, 45 Fed. Reg. 30,618 (Dep't Comm. 1980) (antidumping duty order); 45 Fed. Reg. 18,416 (Dep't Comm. 1980) (final determination); 48 Fed. Reg. 7768, 7769 (Dep't Comm. 1983) (final admin. review).

41. See, e.g., *Semiconductors from Japan*, 51 Fed. Reg. at 461; *Portable Electric Typewriters*, 45 Fed. Reg. at 30,618.

42. 692 F. Supp. 1382, 1384 (Ct. Int'l Trade 1988) (citations omitted).

(subsequently assembled together) to escape the purview of the CTV [color television] Order, the domestic industry would continue to suffer the injurious consequences of dumped goods.<sup>43</sup>

In *Mitsubishi Elec. Corp. v. United States*, the Court of International Trade considered the Commerce Department's treatment of "discrete subassemblies" in an antidumping investigation concerning Japanese cellular mobile telephones ("CMTs").<sup>44</sup> The court first found that the Department of Commerce acted properly in going beyond the language of the petition to effect its intent, "with the purpose in mind of preventing the intentional evasion or circumvention of the antidumping duty law."<sup>45</sup> Relying on its holding in *Gold Star*, the court subsequently upheld the Commerce Department's determination to include subassemblies "dedicated exclusively for use in CMTs" within the scope of its antidumping order.

In the administrative review of *Portable Electric Typewriters from Japan*, the Department of Commerce faced the issue whether to include within the scope of the order products that had undergone minor alterations or subsequent improvements. The Court of International Trade reversed the Commerce Department's determination<sup>46</sup> that portable electric typewriters containing a calculator mechanism were outside the scope of the antidumping duty order covering portable electric typewriters.<sup>47</sup> Moreover, the court held that portable electric typewriters with a memory function developed after the order was issued were included within the order covering portable electric typewriters, reversing the Department of Commerce determination that memory typewriters were outside

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43. *Id.* at 1385.

44. *Mitsubishi Elec. Corp. v. United States*, 700 F. Supp. 538, 552 (Ct. Int'l Trade 1988).

45. *Id.* at 555.

46. *Portable Electric Typewrites from Japan*, 48 Fed. Reg. 7768 (Dep't Comm. 1983) (final admin. review); see *Smith Corona Corp. v. United States*, 698 F. Supp. 240 (Ct. Int'l Trade 1988) [*Smith Corona I*], *aff'd*, 706 F. Supp. 908 (Ct. Int'l Trade 1989) [*Smith Corona II*].

47. The court reasoned that portable electric typewriters with or without a calculating device "generally exhibit the same external characteristics"; that in the absence of a price premium for the calculator mechanism, "the expectation of the consumer [was] not influenced by that additional feature"; that both products "have nearly identical uses"; and that the channels of trade for both types of typewriters were identical. See *Smith Corona I*, 698 F. Supp. at 245. The factors thus applied resemble the ones later enacted in § 781(d) of the Tariff Act of 1930, as added by section 1321 of the Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 1677(d) (1988); see *infra* text accompanying notes 65-68.

the scope of the order.<sup>48</sup>

## 2. *Anticircumvention Provisions of the Trade Act of 1988*

In the years preceding the enactment of the 1988 Trade Act, the Department of Commerce and the Court of International Trade had increased their efforts to combat circumvention.<sup>49</sup> However, with no statutory basis for preventing circumvention, the Commerce Department's and the court's liberty to read AD or CVD orders broadly was limited.<sup>50</sup> Recurring examples of circumvention, such as those described above, prompted both the Senate and House to advocate the enactment of anticircumvention provisions.<sup>51</sup>

### a. *Assembly in the United States*

The Trade Act of 1988 amended the Tariff Act to address the practice of circumvention through assembly of the final product in the United States.<sup>52</sup> Under the new section, the Department of Commerce may include within the scope of an AD or CVD order certain imported parts or components that were used in the assembly<sup>53</sup> or completion<sup>54</sup> in the United States of merchandise that is subject to an AD or CVD order. Under the new provision,<sup>55</sup> parts or components may be included within the scope if they were produced in the country that is subject to the order, and the difference in value between the final product sold in the United States

48. Despite noting physical differences between the two models, the court held that differences between obsolete and the most advanced models did not reach the degree of "substantially distinct general physical characteristics." *Smith Corona I*, 698 F. Supp. at 246.

49. See H.R. CONF. REP. NO. 576, *supra* note 7, at 599. For examples, see *supra* notes 42-48 and accompanying text.

50. See *Hearings on H.R. 3*, *supra* note 36, at 653 (statement of Gilbert B. Kaplan, Deputy Assistant Secretary for Import Administration, Dep't Comm.); see also Cameron & Crawford, *supra* note 39, at 472-73.

51. See *supra* note 37 and accompanying text.

52. Tariff Act of 1930, § 781(a), as added by Omnibus Trade and Competitiveness Act of 1988, § 1321, 19 U.S.C. § 1677j(a) (1988); see also H.R. REP. NO. 40, *supra* note 7, at 134; S. REP. NO. 71, *supra* note 3, at 96, 99-101.

53. The House Report mentions the facts of *Gold Star Co. v. United States*, see *supra* note 42 and accompanying text, as an example of circumvention of an order through assembly of parts or components in the United States. H.R. REP. NO. 40, *supra* note 7, at 134.

54. An example of completion within the United States by means other than assembly is the import of steel pipe by a related party that threads it in the United States and sells it as threaded pipe. See H.R. REP. NO. 40, *supra* note 7, at 134.

55. Tariff Act of 1930 § 781(a), as added by Omnibus Trade and Competitiveness Act of 1988, § 1321, 19 U.S.C. § 1677j(a)(1) (1988).

and the parts or components is small.<sup>56</sup> The Department of Commerce decides whether to include parts or components in an order based on the pattern of trade, whether the foreign producer or exporter of the parts or components and the entity assembling the final product in the United States are related, and whether the amounts of parts or components imported into the United States have increased after the issuance of the order.<sup>57</sup>

b. *Third Country Diversion*

Section 781 of the Tariff Act is intended to apply to two situations: first, where merchandise is imported into the United States following assembly in a third country out of parts or components which were themselves subject to an AD or CVD order; and second, where a product subject to an order is simply assembled in a third country and then exported to the United States.<sup>58</sup> This case differs from the situation covered by section 1321 only in that the place of assembly is a third country rather than the United States. In both situations, the difference between the value of the imported final product and the aggregate value of the parts or components must be small. The Department of Commerce considers the same factors as those under section 781(a) in determining whether to include the imported merchandise within the scope of the order. In addition, prior to taking action, the Department of Commerce must determine that such action is appropriate to prevent evasion of the order.

c. *Slightly Altered Merchandise*

Section 781(c) of the Tariff Act authorizes the Department of Commerce to include within the scope of an AD or CVD order subject merchandise that has been slightly altered prior to importation.<sup>59</sup> With this provision, Congress intended to prevent situations such as in the case concerning portable electric typewriters from

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56. Congress abstained from defining the term "small" and has given the Commerce Department broad discretion in its interpretation. "Small" is, however, not to be interpreted as insignificant. See S. REP. NO. 71, *supra* note 3, at 100.

57. Added by the Omnibus Trade and Competitiveness Act of 1988, § 1321, 19 U.S.C. § 1677j(a)(2) (1988).

58. Added by *id.* § 1321, 19 U.S.C. § 1677j(b) (1988); see S. REP. NO. 71, *supra* note 3, at 100.

59. Added by the Omnibus Trade and Competitiveness Act of 1988, § 1321, 19 U.S.C. § 1677j(c) (1988).

Japan,<sup>60</sup> where the Department of Commerce found that typewriters that were slightly altered to contain calculator or memory functions were not covered by the scope of an antidumping duty order pertaining to the original model without these devices.<sup>61</sup>

The amendment enjoyed strong support within the Reagan Administration.<sup>62</sup> Thus, articles altered in form or appearance in minor respects are presumptively subject to the order, whether or not they remain in the same tariff classification.<sup>63</sup> This provision also applies to raw agricultural products that have undergone minor processing.<sup>64</sup>

*d. Merchandise Developed After Issuance of an Order*

Section 781(d) of the Tariff Act provides that merchandise developed after the initiation of an AD or CVD investigation can be made subject to the order if the later-developed product is essentially the same as the original subject merchandise with regard to general physical characteristics, the expectations of the ultimate purchasers, ultimate use, channels of trade, and advertisement and display.<sup>65</sup> Later-developed products that are subject to a different tariff classification than the product originally subject to the order may, nonetheless, be included in the AD or CVD order.<sup>66</sup> Furthermore, a later-developed product may not be excluded merely because it is capable of additional functions, as long as those functions do not constitute the primary use of the product and are not responsible for a significant proportion of the total cost of produc-

60. See *supra* note 40 and accompanying text.

61. S. REP. NO. 71, *supra* note 3, at 101. The Court of International Trade reversed the Commerce Department's determination. See *supra* note 47 and accompanying text.

62. See Letter from Office of Management and Budget, United States Trade Representative, and the Secretaries of Treasury, Commerce, Labor and Agriculture to Senate Committee on Finance 13-16 (Oct. 30, 1987).

63. The presumption does not apply if the Department of Commerce determines it unnecessary to consider the altered merchandise within the scope of the investigation or order. See S. REP. NO. 71, *supra* note 3, at 100. Classification of the altered product under a different tariff category than the unaltered product does not dispose of the presumption of coverage, but rather is one of a number of factors the Department of Commerce has to consider when determining whether an alteration results in a change in the class or kind of merchandise preventing the alteration from being considered as minor. See H.R. REP. NO. 40, *supra* note 7, at 135.

64. The amendment, including the provision for agricultural products, originated in the House. See H.R. CONF. REP. NO. 576, *supra* note 7, at 601.

65. Added by the Omnibus Trade and Competitiveness Act of 1988, § 1321, 19 U.S.C. § 1677j(d) (1988).

66. See H.R. CONF. REP. NO. 576, *supra* note 7, at 601.

tion of the merchandise.<sup>67</sup> With the enactment of this section, Congress clarified and codified those practices of the Department of Commerce that had been endorsed by the courts.<sup>68</sup>

### 3. Consistency of Anticircumvention Provisions with GATT

According to the GATT Antidumping Code, a product is considered to be dumped, i.e., introduced into the commerce of another country at less than its normal value, if the export price of the product is less than the domestic sales price of a like product.<sup>69</sup> A like product is defined as identical to, or having characteristics closely resembling, those of the product under consideration.<sup>70</sup>

Congress appears to have left ample discretion to the Department of Commerce to enable it to administer the anticircumvention provisions consistently with the GATT. For example, prior to enactment of the Trade Act, the Court of International Trade in *Gold Star* upheld, as consistent with the GATT Antidumping Code, the Commerce Department's extension of the scope of an antidumping order to cover a product that was assembled in the United States of imported components. The holding in *Gold Star* was based on a finding that the imported components were substantially like the finished product.<sup>71</sup> The 1988 anticircumvention provisions codified the pre-Act practice of the Department of Commerce upheld as GATT-legal in *Gold Star*.

## B. Input Dumping

### 1. Diversionary Dumping

Input or diversionary dumping refers to the practice of including a dumped or subsidized input product within an exported product (the "downstream product") that is subject to an AD or CVD order. For example, in 1982, the European Community ("EC") entered into a voluntary restraint agreement to settle out-

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67. *Id.*

68. See H.R. CONF. REP. No. 576, *supra* note 7, at 601; see, e.g., *Smith Corona II*, 706 F. Supp. at 908; *Portable Electric Typewriters*, 48 Fed. Reg. at 7768.

69. Antidumping Code, *supra* note 33, art. 2, para. 1.

70. *Id.* One author has argued that to be consistent with the GATT, duties may be imposed only if assembly or production is carried out by an importer related to or associated with the foreign manufacturer whose exports of a like product are subject to a definitive anti-dumping duty. See generally Steenbergen, *Circumvention of Antidumping Duties by Importation of Parts and Materials: Recent EEC Antidumping Rules*, 11 FORDHAM INT'L L.J. 332 (1988).

71. *Gold Star Co.* 92 F. Supp. at 1385.

standing countervailing duty cases concerning subsidized hot-rolled bar from Europe. As a consequence, European steel makers diverted their production to cold-finished bar, which is made from hot-rolled bar, because cold-finished bar was not covered by the new agreement. Before these exports could be brought under the control of a new agreement covering cold-finished bar, imports of cold-finished bar from the EC had doubled.<sup>72</sup>

The House has sought to restrict input dumping since 1984, but has had only limited success.<sup>73</sup> During deliberation over the Trade Act, the House proposed that diversionary input dumping be found “[w]henver any foreign material or component which has been found within the past six years to have been dumped in the United States market is purchased by a foreign manufacturer at a price less than its fair value.”<sup>74</sup>

Under the House bill, Commerce would have initiated an investigation into input dumping whenever the following factors were present:

- the ITA had reasonable grounds to suspect the occurrence of diversionary input dumping;
- the input had served as a major material or component for the production of the downstream product;
- imports of the input had declined; and
- imports of the downstream product had increased.<sup>75</sup>

In cases where the Department of Commerce found that input dumping was occurring, the foreign market value of the downstream product would have been calculated by determining the constructed value of the product and increasing that figure by the difference between the dumped input’s purchase price and its fair market value.

The Administration opposed the House proposal because it believed it was inconsistent with the GATT Antidumping Code.<sup>76</sup> Under the GATT Antidumping Code,<sup>77</sup> the relevant price compari-

72. See *Hearings on H.R. 3*, *supra* note 36, at 695 (statement of Matthew B. Coffey on behalf of the Metalworking Trade Coalition).

73. For a history of House proposals regarding the extension of antidumping laws to input dumping, see Barshefsky & Zucker, *Amendments to the Antidumping and Countervailing Duty Laws Under the Omnibus Trade and Competitiveness Act of 1988*, 13 N.C.J. INT’L L. & COM. REG. 251, 296 (1988).

74. H.R. CONF. REP. NO. 576, *supra* note 7, at 593.

75. H.R. 3, *supra* note 1, § 156 at 206-07.

76. See *Hearings on H.R. 3*, *supra* note 36, at 660 (statement of Alan F. Holmer, General Counsel, Office of the United States Trade Representative).

77. See *supra* note 33.

sons must be made between “like products” sold in the United States and in the home country. Because an input product that has been incorporated into a finished product is not “like” the finished product, the Administration reasoned that assessing dumping duties against the final products, based on the pricing disparities of inputs, violated the GATT.<sup>78</sup>

The House proposal to regulate diversionary input dumping was criticized for many other reasons. First, the provisions could lead to absurd results. For example, a foreign producer selling a finished product in his home market and in the United States at the same price, could be found to be dumping. Second, an input dumping provision would be unfair to United States importers, who would normally have neither control over the prices charged by their foreign suppliers, nor knowledge that the finished product contained a dumped input. Third, under the new provisions, the Department of Commerce would have to use stale data, i.e., data collected in dumping investigations of the input product from as long as six years prior to the investigation into the downstream product, resulting in arbitrary dumping findings.<sup>79</sup> Finally, because products subject to AD and CVD orders often do not correspond exactly to tariff nomenclature classifications, the Department of Commerce might be unable to gather data necessary to analyze thoroughly the market conditions within the short period of the investigation. Consequently, the Department of Commerce would have to rely on the best information available, virtually assuring the petitioner’s success.

The conferees agreed to adopt the Senate’s substitute amendment in lieu of the problematic House proposal.<sup>80</sup> Section 1317 enables the United States Trade Representative to pursue the United States’ rights under Article 12 of the GATT Antidumping Code by asking a foreign government to engage in consultations with the United States government to stop a producer within that country

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78. See *Hearings on H.R. 3*, *supra* note 36, at 655 (statement of Gilbert B. Kaplan, Deputy Assistant Secretary for Import Administration, Department of Commerce).

79. See *id.*

80. H.R. CONF. REP. NO. 576, *supra* note 7, at 594. Although Congress agreed on provisions that are consistent with the United States’ obligations under GATT, Congress also hoped eventually to strengthen and expand the GATT provisions. Accordingly, the Trade Act included among the negotiating objectives of the United States an improvement of the provisions of the GATT regarding resource input subsidies, diversionary dumping and dumped or subsidized inputs. Omnibus Trade and Competitiveness Act of 1988, § 1101, 19 U.S.C. § 2901(b)(8)(A) (1988).

from dumping merchandise on the United States market.<sup>81</sup> If the foreign government refuses to cooperate, then the United States Trade Representative shall “promptly consult with the domestic industry on whether action under any other law of the United States is appropriate.”<sup>82</sup> No remedy is available, however, if the government concerned refuses to take action.<sup>83</sup>

Section 1318 addresses the occasional situation where constructed value is being used to determine foreign market value and the foreign manufacturer has purchased a major input from a related party. If the Department of Commerce reasonably believes that the major input was supplied at a price that was less than the cost of production, then it may determine the value of such input according to the best evidence available regarding such costs of production. This method of computation may be used if the costs of the input thus determined are greater than the amount that would result from a determination pursuant to section 773(e)(2) of the Tariff Act, i.e., the arm’s length price.<sup>84</sup>

Despite the objections to the enactment of any material regulation of input dumping other than the provisions contained in sections 1317 and 1318, section 1321 as discussed above effectively addresses input dumping. This section authorizes the Department of Commerce to include, within the scope of an order, imported merchandise comprised of parts or components that are subject to an order and that have been transformed into a final product in a country that is not covered by the order.<sup>85</sup>

## 2. Downstream Product Monitoring

The 1988 Trade Act contains a provision designed to monitor downstream products containing dumped or subsidized inputs that are subject to an AD or CVD order.<sup>86</sup> The monitoring provision is intended to prevent the evasion of an AD or CVD order covering component parts by increasing imports of final products containing dumped or subsidized components.<sup>87</sup>

81. Omnibus Trade and Competitiveness Act of 1988, 19 U.S.C. § 1677k (1988).

82. *Id.*

83. See Cameron & Crawford, *supra* note 39, at 482.

84. Codified as amended at 19 U.S.C. § 1677b(e)(3) (1988).

85. See S. REP. NO. 71, *supra* note 3, at 100. The Senate Committee referred to this situation as being “typical of the kind of diversionary input dumping that the downstream product monitoring provision . . . aims to identify.” *Id.*

86. Tariff Act of 1930, § 780, amended by Omnibus Trade and Competitiveness Act of 1988, § 1320, 19 U.S.C. § 1677i (1988).

87. See H.R. REP. NO. 40, *supra* note 7, at 145.

Section 1320 of the 1988 Trade Act provides that a domestic producer may petition the Department of Commerce to designate a downstream product for monitoring. If the Department of Commerce determines that there is a reasonable likelihood that imports of the downstream product will increase as a result of diversion of a component part<sup>88</sup> that is subject to an AD or CVD order, then the ITC shall commence monitoring trade in the downstream product.<sup>89</sup> The ITC shares information it gathers through the monitoring process with the Commerce Department, which analyzes the information and determines whether to initiate an investigation into the downstream product.<sup>90</sup>

This provision complements the other provisions of the Act and strengthens the broad goals of United States trade law in the following ways. First, monitoring can identify diversionary input dumping that occurs when the foreign producers of the dumped input and the foreign producers of the downstream product are related, a practice addressed by section 1318 of the Trade Act. The monitoring provision can also identify instances where countervailing duties can be applied to offset upstream subsidies.<sup>91</sup> The monitoring provision also aims to identify the situations contemplated by section 1321, as discussed above, where parts or components are shipped to a third country to be made into a final product.<sup>92</sup>

Aside from identifying particular violations of the antidumping and countervailing duty laws, the monitoring provision reinforces the goals of United States trade law. First, the monitoring provision gathers information on the impact of dumping and subsi-

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88. A component part is referred to as any imported article used as a major part in a downstream product subject to an antidumping or countervailing duty order or a suspension agreement with an estimated net dumping or subsidy margin of 15%. See Tariff Act of 1930, § 780(d), amended by Omnibus Trade and Competitiveness Act of 1988, § 1320, 19 U.S.C. § 1677i(d) (1988).

89. Omnibus Trade and Competitiveness Act of 1988, § 1320, 19 U.S.C. § 1677i(d) (1988).

90. *Id.*

91. S. REP. No. 71, *supra* note 3, at 98. In 1984, a provision was added to the CVD law authorizing certain price adjustments if the Department of Commerce determined that "upstream subsidies" were granted by a government to input products, bestowing a competitive benefit on the merchandise and having a significant effect on the cost of manufacturing or producing the merchandise. In this context, "input product" is defined as a product used in the manufacture or production in a foreign country of merchandise which is the subject of a countervailing duty proceeding. See Tariff Act of 1930, § 771A (codified as amended at 19 U.S.C. § 1677-1(a) (1988)). Under current law, such subsidies are countervailable only where the final product is produced in the same country as the input product.

92. S. REP. No. 71, *supra* note 3, at 98.

dies on trade, which would be useful in any subsequent AD or CVD investigation.<sup>93</sup> Second, the monitoring program is intended to deter dumping and subsidization by putting foreign producers and United States importers on notice that the ITC is collecting information that could result in the initiation of an investigation.<sup>94</sup>

Monitoring programs have been criticized because they are expensive to implement and may be of little practical value.<sup>95</sup> The Department of Commerce already administers elaborate monitoring programs for steel, semiconductors, machine tools and Canadian lumber. These four programs alone require a staff of about seventy people, at a cost of \$3.5 million per year.<sup>96</sup> Monitoring provisions therefore drain Department of Commerce and ITC resources and may be of only limited benefit to the domestic industry. Furthermore, monitoring does not provide information on either the home market price of a product or the potential injury to the United States industry, which are essential factors for the initiation of an AD or CVD investigation.<sup>97</sup>

### C. Sham Transactions

When an antidumping duty is imposed on imported merchandise, the Customs Service requires the importer of record to pay the duty.<sup>98</sup> If the foreign producer absorbs the antidumping duty by refunding to the importer any duties he has paid, the Department of Commerce doubles the dumping margin by deducting the refund from the United States price.<sup>99</sup>

The Senate believed that current law addressed the problem of absorption of antidumping duties only in part.<sup>100</sup> The Senate therefore proposed a provision that would have given the Depart-

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93. *Id.*

94. *Id.*

95. See *Hearings on H.R. 3, supra* note 36, at 655 (statement of Gilbert B. Kaplan, Deputy Assistant Secretary for Import Administration, Department of Commerce).

96. *Id.*

97. *Id.*

98. 19 C.F.R. § 141.1(b) (1989). Often, the United States subsidiary of the foreign producer registers as the importer of record rather than the United States consumer of the merchandise because the liquidation of the entry can take a long time and because the United States subsidiary is more likely to be aware of any antidumping duties on the imported merchandise. See Cameron & Crawford, *supra* note 39, at 498.

99. 19 C.F.R. § 353.26 (1989). By deducting antidumping duties paid or refunded by the foreign producer from the United States price, the difference between the foreign market value and the United States price, and consequently any antidumping duty finally assessed, is increased. See S. REP. No. 71, *supra* note 3, at 95.

100. See S. REP. No. 71, *supra* note 3, at 95.

ment of Commerce the authority to declare an importation a sham transaction if it determined that goods were being imported by, or for the account of, a foreign manufacturer, producer, seller or exporter.<sup>101</sup> As the result of a determination that an import was a sham transaction, the Department of Commerce could have treated the United States end purchaser as the importer of record, who would have been held responsible for the payment of antidumping duties.<sup>102</sup>

The Senate believed that exporters were able to "purposefully absorb antidumping duties to achieve sales, increase United States market share, and maintain employment."<sup>103</sup> Furthermore, the Senate maintained that "such objectives may be sufficiently important to the foreign entity that it is willing to bear the costs associated with such absorption."<sup>104</sup> The Senate viewed the sham transaction provision as necessary to force the United States purchaser to bear the full impact of the increased duty.

This provision appeared not only to be logistically unmanageable, because the entry documents do not identify the end purchaser, but also unfair to the end purchaser, who, without information as to whether the product had actually been dumped, would have been required to pay the duty.<sup>105</sup> The Senate dropped the provision in conference due to opposition from the Administration and after conceding that the current prohibition against reimbursement of antidumping duties was sufficient to deter this practice.<sup>106</sup>

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101. S. REP. NO. 490, 100th Cong., 1st Sess. 322; 132 CONG. REC. S1851 (daily ed. Feb. 5, 1987). The concept of the sham transaction can be traced back to an antidumping investigation involving offshore oil drilling rigs from Japan and Korea. Offshore Platform Jackets and Piles from Japan, 50 Fed. Reg. 20,252 (Dep't Comm. 1985) (initiation); Offshore Platform Jackets from the Republic of Korea, 50 Fed. Reg. 20,253, 20,254 (Dep't Comm. 1985) (initiation and prelim. administrative review).

102. To determine whether a transaction would be considered a sham, the Department of Commerce would have had to consider such factors as whether the foreign manufacturer, producer, seller or exporter had actual notice of an antidumping proceeding, whether the transaction was an unusual method of importation by or for the account of the foreign exporter, and whether the size and nature of the exporter's commercial operations with respect to the merchandise in the United States was insignificant. See S. REP. NO. 71, *supra* note 3, at 95.

103. *Id.* at 95-96.

104. *Id.*

105. See Barshefsky & Zucker, *supra* note 73, at 272.

106. See H.R. CONF. REP. NO. 576, *supra* note 7, at 629.

## IV. DUTY DRAWBACK TREATMENT

Section 313 of the Tariff Act of 1930, the duty drawback provision, permits United States importers of inputs used to produce further manufactured goods to obtain a refund for the customs duties paid on the imports upon exportation of the finished goods.<sup>107</sup> Duty drawback is intended to facilitate the international competitiveness of American exports by allowing United States producers to use inputs at world market prices.<sup>108</sup> Prior to the 1988 Trade Act, both antidumping and countervailing duties were eligible for drawback; however, section 1334 of the Act abolished duty drawbacks for antidumping and countervailing duties.<sup>109</sup> The Congress believed that the repeal of duty drawback was necessary to discourage the continued use of unfair trade practices.<sup>110</sup> The House, where this provision originated, reasoned that a refund pursuant to drawback was "counterproductive to efforts to discourage dumping and subsidization."<sup>111</sup>

Criticism of the amendment has focused on its harsh impact on United States exporters. By relinquishing equal treatment of customs and antidumping and countervailing duties, the amendment punishes those who purchase dumped and subsidized products.<sup>112</sup> The lack of duty drawback forces United States exporters to pay antidumping and countervailing duties even though the dumped or subsidized merchandise is not destined to remain on the United States market.<sup>113</sup> As a result, Congress has dealt a blow to United States exporters, who must either increase their export prices, causing sales to drop, or reduce their profit margins.<sup>114</sup>

## V. AMENDMENTS TO THE REQUIREMENT OF MATERIAL INJURY

The provisions related to injury did not dramatically change the existing law, but rather, provided explicit guidance to the ITC

107. Codified as amended at 19 U.S.C. § 1313 (1988); *See also* 19 C.F.R. § 191 (1989).

108. *See* Cameron & Crawford, *supra* note 39, at 488.

109. *See* H.R. REP. NO. 40, *supra* note 7, at 141; H.R. CONF. REP. NO. 576, *supra* note 7, at 625.

110. *See* H.R. REP. NO. 40, *supra* note 7, at 141.

111. The House of Representatives reasoned that if United States parties are allowed to buy dumped and subsidized goods at dumped and subsidized prices (which is essentially what the current drawback provisions allow) then dumping and subsidization would continue. H.R. REP. NO. 40, *supra* note 7, at 141.

112. Cameron & Crawford, *supra* note 39, at 488.

113. *Id.*

114. *Id.* The authors contend that the elimination of duty drawback is an expression of protectionism, reminiscent of the "buy national" policies endorsed by developing countries.

on the proper interpretation of the existing law. The changes reflected the concern expressed by both the House and the Senate that certain ITC Commissioners had not given effect to the intent of Congress in interpreting the injury provisions.<sup>115</sup> The Congress was not alone in this assessment. The Court of International Trade had chastised the Commissioners for failing properly to apply the factors specified by Congress for determining injury.<sup>116</sup> The ITC published a spirited defense to the court's criticism,<sup>117</sup> but the Congress somewhat shortened the ITC's leash just the same.

### A. *Material Injury*

The "material injury" standard provided in section 771(7) of the Tariff Act requires the ITC to determine the occurrence of harm "not inconsequential, immaterial, or unimportant" to a United States industry by reason of imports of products subject to an antidumping or countervailing duty investigation.<sup>118</sup> The established method of assessing injury to a United States industry required the evaluation of the volume of imports, the effect of imports on the prices of like products in the United States, and the impact of these imports on domestic producers of like products.<sup>119</sup>

Although this traditional injury analysis was not itself subject to criticism, Congress expressed concern that certain ITC Commissioners might not apply the law in accordance with Congressional intent.<sup>120</sup> Specifically, Congress observed that some Commissioners frequently did not specify whether they had considered and based their determination on all three factors.<sup>121</sup> Consequently, section

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115. S. REP. NO. 71, *supra* note 3, at 116; H.R. REP. NO. 40, *supra* note 7, at 128.

116. *See* USX Corp. v. United States, 682 F. Supp. 60 (Ct. Int'l Trade 1988); USX Corp. v. United States, 655 F. Supp. 487 (Ct. Int'l Trade 1987).

117. Cold-Rolled Carbon Steel Plates and Sheets from Argentina, USITC Pub. 2089, Inv. No. 731-TA-175 (final) (second remand) (June 1988).

118. Tariff Act of 1930, § 771(7), *amended by* Omnibus Trade and Competitiveness Act of 1988, § 1328, 19 U.S.C. § 1677(7) (1988).

119. Tariff Act of 1930, § 771(7)(B)(i), *amended by* Omnibus Trade and Competitiveness Act of 1988, § 1328, 19 U.S.C. § 1677(7)(B)(i) (1988).

120. *See* S. REP. NO. 71, *supra* note 3, at 116; H.R. REP. NO. 40, *supra* note 7, at 128.

121. *See id.* Failure to consider a factor can lead to unjustified negative determinations, as an example given by the Senate Committee illustrates: capital intensive industries might stop investing in new plant and equipment because the existence of dumped or subsidized imports on the domestic market would render the industry incapable of raising capital or would make new investment unprofitable. Yet, such industries might have operational profits from fully depreciated plant and equipment, appearing not to be materially injured, unless the factor of capital expenditures would be considered which would demonstrate the industry's move towards uncompetitiveness. S. REP. NO. 71, *supra* note 3, at 116.

1328 provides that the ITC must consider all three factors in its injury determination, and may consider any other additional factors.<sup>122</sup> The ITC must further explain its analysis of these three factors and identify and explain the relevance of any other factor considered. Thus, Congress intended that the injury determination be based on a case-specific analysis of the relevant factors, rather than on a mechanical application of factors and formulas that remained constant from case to case.<sup>123</sup>

Although the 1988 Trade Act did not alter the evaluation of volume effects,<sup>124</sup> it did change the terminology related to price<sup>125</sup> in order to ensure interpretation in accordance with Congressional intent.<sup>126</sup> Prior to its enactment, the ITC evaluated the effect of imports on domestic prices by considering the occurrence of "price undercutting" or significant depression of domestic prices. Some Commissioners narrowly interpreted the term "price undercutting" to mean only predatory pricing, i.e., the lowering of prices by a foreign exporter to drive out competition in order to gain market power in the importing country.<sup>127</sup> Following the precedent of the Court of International Trade, Congress changed the term "price undercutting" to "price underselling" to ensure that AD and CVD laws are not limited to preventing predatory pricing, but are aimed at preventing material injury to United States industries resulting

122. Tariff Act of 1930, § 771(7)(C), amended by Omnibus Trade and Competitiveness Act of 1988, § 1328, 19 U.S.C. § 1677(7)(C) (1988).

123. See S. REP. No. 71, *supra* note 3, at 116; H.R. REP. No. 40, *supra* note 7, at 128; H.R. CONF. REP. No. 576, *supra* note 7, at 616. These changes do not affect the holding of the Court of International Trade in *British Steel Corp. v. United States*, 593 F. Supp. 405 (Ct. Int'l Trade 1984), that the ITC's determination can be based on substantial evidence even if the main contentions of the parties are not specifically addressed by the ITC. See S. REP. No. 71, *supra* note 3, at 115.

124. As for the volume of imports, the ITC must consider the significance of the volume of imported products, or of the increase in such volume, compared to the volume of United States production, either in absolute or in relative terms. Tariff Act of 1930, § 771(7)(C)(i), amended by Omnibus Trade and Competitiveness Act of 1988, § 1328, 19 U.S.C. § 1677(7)(C)(i) (1988).

125. Tariff Act of 1930, § 771(7)(2)(B), amended by Omnibus Trade and Competitiveness Act of 1988, § 1328, 19 U.S.C. § 1677(7)(2)(B) (1988); see S. REP. No. 71, *supra* note 3, at 116; H.R. REP. No. 40, *supra* note 7, at 128.

126. See S. REP. No. 71, *supra* note 3, at 116; H.R. REP. No. 40, *supra* note 7, at 128.

127. See, e.g., *Cold-Rolled Carbon Steel Plates and Sheets from Argentina*, Inv. No. 731-TA-175, USITC Pub. 1967 (March 1987) at 13; *Certain Red Raspberries from Canada*, Inv. No. 731-TA-196, USITC Pub. 1707 (June 1985) at 14-15. Such an interpretation is clearly misguided because the Antidumping Act of 1916, which is still on the books, prohibits foreign producers from pricing predatorially their imports to the United States. 15 U.S.C. § 72 (1973); see *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 402 F. Supp. 251 (E.D. Pa. 1975).

from less than fair value imports.<sup>128</sup>

As for the impact of imported products on the domestic industry, the Trade Act added the effect on research and development<sup>129</sup> to the list of relevant factors.<sup>130</sup> Congress thereby addressed the concern that dumped or subsidized foreign goods would drain the affected industry's resources to invest in product innovations and next generation development, especially because of the long lead times "from product design to actual production, business uncertainties, lost marketing opportunities, and erosion of profitability caused by such unfair trade practices."<sup>131</sup>

To assure an accurate injury analysis, section 1328 of the Trade Act does not consider any foreign operations or import operations of domestic producers in the determination of injury.<sup>132</sup> The amendment recognizes that, in spite of profitable foreign subsidiaries, the domestic industry might still be injured because domestic producers might need to import in order to meet competition and stay in business.<sup>133</sup>

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128. Tariff Act of 1930, § 771(7)(c)(ii), amended by Omnibus Trade and Competitiveness Act of 1988, § 1328, 19 U.S.C. § 1677(7)(C)(ii) (1988). The Court of International Trade overruled a negative injury determination by the ITC in which an import penetration by exporters from two countries was considered to be "very small and not consistent with a finding of unfair price discrimination." *USX Corp. v. United States*, 682 F. Supp. 60, 64 (Ct. Int'l Trade 1988) (citation omitted). The court held that the statement of the ITC did not answer the question of how the volume of imports related to injury of the domestic industry, and rejected the ITC's view that the purpose of the antidumping law was to prevent a particular type of "injury to competition" rather than merely material "injury to industry." *Id.* at 64-65.

129. According to new § 771(7)(C)(iii)(IV) of the Tariff Act of 1930, the ITC is required to consider in its injury determination the "actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the like product." 19 U.S.C. § 1677(7)(C)(iii)-(iv) (1988).

130. The factors to be evaluated are the "actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity, . . . factors affecting domestic prices, and . . . actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment." Tariff Act of 1930, § 771(7)(C)(iii)(I)-(III), amended by Omnibus Trade and Competitiveness Act of 1988, § 1328, 19 U.S.C. § 1677(7)(C)(iii)(I)-(III) (1988).

131. See S. REP. No. 71, *supra* note 3, at 117. Industries producing big ticket items, such as aircraft and heavy electrical equipment, are especially exposed to a stifling of research and development programs due to dumped or subsidized imports, because the loss of a single sale can have a serious impact on the industry's financial resources. *Id.*

132. Tariff Act of 1930, § 771(7)(B)(i)(III), amended by Omnibus Trade and Competitiveness Act of 1988, § 1328, 19 U.S.C. § 1677(7)(B)(i)(III) (1988); see S. REP. No. 71, *supra* note 3, at 117; H.R. REP. No. 40, *supra* note 7, at 128-29.

133. See S. REP. No. 71, *supra* note 3, at 117. Examples of the distortion of the injury determination by including goods manufactured abroad and imported into the United States by domestic producers are the cases of Erasable Programmable Read Only Memory

Finally, the evaluation of injury must be made within the context of the "business cycle and conditions of competition that are distinctive to the the affected industry."<sup>134</sup> For example, if an industry is doing better than in previous years, but this improvement can be attributed to a general economic upturn after a recession, then the ITC could still find that the industry has been impaired by imports if the industry is doing worse than it did during economic upturns following previous recessions.<sup>135</sup>

### B. Threat of Material Injury

The provisions of the Tariff Act regarding threat of material injury were amended by the Trade Act of 1988 in three respects. The amendments were aimed at eliminating the threat to research and development, the effect of dumping in third-country markets and the threat to processed agricultural products.

Section 1329 of the Trade Act added effects on research and development to the list of factors to be considered by the ITC in determining whether imports are threatening material injury to a United States industry.<sup>136</sup> The provision is identical to the section 1328 amendment to section 771(2)(C)(iii) of the Tariff Act, which considers the effect of dumping and subsidies on research and development in the determination of material injury.<sup>137</sup>

The second new factor considers whether the party under investigation has dumped the same merchandise in markets of other GATT members.<sup>138</sup> This factor reflects a presumption that the offending party is likely to repeat his past unfair trade practices in

Semiconductors (EPROMS) from Japan, 51 Fed. Reg. 39,680 (Dep't Comm. 1986); Portland Hydraulic Cement, Other Than White Nonstaining, 40 Fed. Reg. 54,883 (1975); 40 Fed. Reg. 59,622 (1975); 41 Fed. Reg. 46,062 (1976). In both instances, the ITC attributed profits from the sale of the finished product to domestic production, although only minimal finishing operations had been carried out in the United States. See S. REP. NO. 71, *supra* note 3, at 117.

134. H.R. CONF. REP. NO. 576, *supra* note 7, at 617.

135. See S. REP. NO. 71, *supra* note 3, at 117; see also Perry, *Aftermath of the Omnibus Trade Act: ITC Material Injury Determinations*, in *THE 1988 TRADE LAW: WHAT IT AFFECTS AND WHAT IT MEANS* 151, 156-57 (1988).

136. Tariff Act of 1930, § 771(7)(F), 19 U.S.C. § 1677(7)(F) (1988). As the Senate Committee put it, the purpose of the provision is: "to clarify that a threat of material injury can exist when imports affect the industry's research and development for a future generation of related products, as well as its current operations." See S. REP. NO. 71, *supra* note 3, at 118.

137. 19 U.S.C. § 1677(7)(C)(iii) (1988); see *supra* note 129 and accompanying text.

138. Tariff Act of 1930, § 771(7)(F)(iii), amended by Omnibus Trade and Competitive-ness Act of 1988, § 1329, 19 U.S.C. § 1677(7)(F)(iii) (1988).

the United States market.<sup>139</sup> This provision was added to protect foreign subsidiaries of United States companies.<sup>140</sup> The provision recognizes that certain foreign companies are better adapted, as a result of diversification, to withstand long-term suppressed prices than are the undiversified American competitors for foreign market shares.<sup>141</sup> The Senate Finance Committee specifically identified certain Japanese outboard motor manufacturers, including Yamaha, Honda and Suzuki, as companies that injured United States subsidiaries by dumping in third country markets, such as Europe and Australia.<sup>142</sup> The provision attacks the problem by enabling United States authorities to prevent dumping before it occurs in the United States. The targets of this provision appear to be producers from Japan, Taiwan and Korea.<sup>143</sup>

A third provision addresses threat of injury determinations in the context of processed agricultural products.<sup>144</sup> A number of recent cases raised the issue of whether domestic producers or growers of raw agricultural products are properly included within the domestic processed agricultural products industry, for purposes of determining injury caused by dumped or subsidized imports of processed agricultural products.<sup>145</sup> Congress settled the controversy by including producers of raw agricultural products within the processed agricultural products industry.<sup>146</sup>

Section 1326 provides that if a final affirmative determination

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139. For example, in its determination of injurious market penetration—one of the exemplary factors listed in 19 U.S.C. § 1677(7)(F) (1988)—the ITC may conclude that the party's past history of injurious dumping in a foreign country provides a strong reason to assume that similar injurious market penetration of the United States market has to be expected. See S. REP. No. 71, *supra* note 3, at 119.

140. See S. REP. No. 71, *supra* note 3, at 119.

141. *Id.*

142. *Id.*

143. *Id.*

144. Omnibus Trade and Competitiveness Act of 1988, § 1326, 19 U.S.C. § 1677(4) (1988) (amending Tariff Act of 1930, § 771(4)).

145. Live Swine and Pork from Canada, Inv. No. 701-TA-224, USITC Pub. 1733 (July 1985), *aff'd sub nom.* National Pork Producers Council v. United States, 661 F. Supp. 633 (Ct. Int'l Trade 1987); Frozen Concentrated Orange Juice from Brazil, Inv. No. 731-TA-326, USITC Pub. 1970 (April 1987); Certain Fresh Atlantic Groundfish from Canada, Inv. No. 701-TA-257, USITC Pub. 1844 (May 1986); Lamb Meat from New Zealand, Inv. No. 701-TA-80, USITC Pub. 1191 (1981).

146. According to section 1326, producers or growers of the raw agricultural products may be considered part of the industry producing the processed product if there is a single continuous line of production from the raw to the processed product and if there is a substantial coincidence of economic interest between producers or processors, on the other. Tariff Act of 1930, § 771(4), *amended by* Omnibus Trade and Competitiveness Act of 1988, § 19 U.S.C. § 1677(4)(E)(i) (1988).

covers either raw or processed agricultural products, but not both, then the ITC must consider whether a threat of material injury to the domestic industry could be expected due to foreign producers shifting production from raw to processed products or vice-versa.<sup>147</sup>

### C. Cumulation

In 1984, Congress added a "cumulation" provision to the AD and CVD laws to protect domestic industries from injury resulting from dumped or subsidized imports from several countries.<sup>148</sup> The Congress felt that this "hammering effect" could not be adequately addressed if the injury analysis were carried out separately for each country of origin, because the separate impact might be minimal while the aggregate impact was great.<sup>149</sup> Under the cumulation provision, when considering the cumulative effects of imports from several countries, the ITC could find material injury to exist even if separate considerations of imports from each country would have led to a negative injury determination.<sup>150</sup>

The 1984 provision did not specify whether cumulation would be appropriate where a producer from one foreign country dumped goods in the United States and, at the same time, a producer in another country exported subsidized like products to the United States ("cross-cumulation").<sup>151</sup> The House bill would have required cross-cumulation in the determination of material injury.<sup>152</sup> In particular, the House proposed cumulation of volume and price effects for like products from two or more countries that are subject to an ongoing antidumping or countervailing duty investigation.<sup>153</sup>

While this particular House proposal was dropped in conference, the 1988 Trade Act authorizes, but does not require, cross-

147. Omnibus Trade and Competitiveness Act of 1988, § 1326, 19 U.S.C. § 1677(7)(F)(IX) (1988) (amending Tariff Act of 1930, § 771(7)(F)(IX)).

148. Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 612, 98 Stat. 2948, 3035 (amending Tariff Act of 1930, § 771(7)(C)(iv), 19 U.S.C. § 1677(7)(C)(iv) (1988)).

149. See H.R. REP. No. 40, *supra* note 7, at 130.

150. Trade and Tariff Act of 1984, § 612(a)(2)(A) (amending Tariff Act of 1930, § 771(7)(C)(iv), 19 U.S.C. § 1677(7)(C)(iv) (1988)) provides

For purposes of [the evaluation of volume and price effects], the Commission shall cumulatively assess the volume and effect of imports from two or more countries of like products subject to investigation if such imports compete with each other and with like products of the domestic industry in the United States market.

151. See *id.*

152. See H.R. 3, *supra* note 1, § 154, at 195; see H.R. REP. No. 40, *supra* note 7, at 129-31.

153. See H.R. REP. No. 40, *supra* note 7, at 129-31.

cumulation in cases involving only the threat of injury.<sup>154</sup> In any event, under the Federal Circuit's holding in *Bingham & Taylor v. United States*, the ITC must continue to cross-cumulate in cases involving actual injury.<sup>155</sup> *Bingham* held that section 771(7)(C)(iv) of the Tariff Act required the ITC to cross-cumulate the impact of imports subject to antidumping and countervailing duty investigations.<sup>156</sup>

Imports of the merchandise subject to the investigation are exempt from cumulation in determinations of either material injury or threat thereof if the ITC determines that these imports are negligible and have no discernible adverse impact on the domestic industry.<sup>157</sup> The ITC is required to apply this exception narrowly and must not use it to subvert the purpose and general application of the requirement.<sup>158</sup>

The Trade and Tariff Act of 1984 neglected to specify the time during which the ITC is authorized to review past imports that might be subject to cumulation. The House attempted to clarify this element of cumulation by proposing that products investigated either currently or within the twelve preceding months should be subject to cumulation.<sup>159</sup> This proposal was rejected in conference.<sup>160</sup> Thus, ambiguities remain regarding the appropriate period for cumulation.

Finally, should the ITC find that the domestic industry is not materially injured by reason of imports from a country that en-

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154. See H.R. CONF. REP. NO. 576, *supra* note 7, at 620-21. The House bill, *supra* note 1, § 771(7), would have required cumulation and cross-cumulation in threat cases. A compromise with the Senate resulted in section 1330 of the Trade Act, which authorizes, but does not require, the ITC to cumulate in determining threat of material injury.

155. 815 F.2d 1482 (Fed. Cir. 1987).

156. *Id.* The court upheld a decision of the Court of International Trade to remand for redetermination a finding by the ITC that the import of subsidized iron products from Brazil did not result in material injury to the domestic industry, whereas the import of dumped like products from a number of other countries indicated material injury. The court reasoned that legislative history and intent as well as the statutory language required the statute to be read as to mandate cross-cumulation. *Id.* at 1487.

157. Omnibus Trade and Competitiveness Act of 1988, § 1330, 19 U.S.C. § 1677(7)(C) (1988) (amending Tariff Act of 1930, § 771(7)(C)). The issues to be considered by the ITC in determining if the imports in question are negligible are whether the

(1) volume and market share of the imports are negligible; (2) sales transactions involving such imports are isolated and sporadic; (3) whether the U.S. market for the like product is price sensitive by reason of the nature of the product, so that . . . a small quantity of imports can result in price suppression or depression. . . .

*Id.*

158. See H.R. CONF. REP. NO. 576, *supra* note 7, at 621.

159. See *id.* at 620.

160. See *id.*

tered into a free-trade agreement with the United States before January 1, 1987, section 1330 empowers the ITC to treat such imports as negligible and as having no discernible adverse impact on the domestic industry.<sup>161</sup> The only country eligible for this treatment is Israel.<sup>162</sup>

## VI. CONCLUSION

The AD and CVD amendments enacted in the Omnibus Trade and Competitiveness Act of 1988 are intended to close loopholes in these laws and thus make them more effective in combatting unfair trade practices. Congress and the Administration worked together to ensure that the amendments were fully consistent with United States obligations under GATT. As a result, the amendments themselves are fairly modest and are unlikely to effect dramatic changes in the application of these laws. They grease, rather than shift, the gears of these two trade remedies.

However, the prospect remains that the gears of the antidumping and countervailing duty laws may yet truly shift. The sweeping Uruguay Round<sup>163</sup> of multilateral trade negotiations is scheduled to conclude this year in Geneva. The ninety-seven member nations of the General Agreement on Tariffs and Trade are participating in these negotiations for the purpose of improving existing GATT rules as well as developing guidelines for the "new" areas of intellectual property protection, services and investment.

Many countries are seeking reform of the United States antidumping and countervailing duty laws and practices.<sup>164</sup> Until recently, the dumping negotiations were considered a "sleeper," unlikely to culminate in a consensus for reform, because of staunch United States opposition.

However, many in the trade community believe that substantial progress may be possible. This dramatic change in outlook re-

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161. The necessary indicia for a determination that the eligible imports are negligible and have no discernible impact on the domestic industry, are: "all relevant economic factors regarding the imports, including the level of the imports from Israel, relative to both domestic production and other imports under investigation, their effect on United States prices for the like product, and their impact on domestic producers." *Id.* at 621.

162. U.S.-Israel Free Trade Agreement, Apr. 22, 1985, 24 I.L.M. 653.

163. So named after the launch of these negotiations at a meeting of trade ministers in September 1986 in Punta del Este, Uruguay.

164. Reforms pursued involve reducing the use of cumulation, eliminating statutory minima for profit and expenses in dumping constructed value cases, and creating different criteria for determining whether an industry is injured by dumped exports. Tariff Act of 1930, § 773(e)(1)(B), 19 U.S.C. § 1677b(e)(1)(B) (1988).

sults from two developments. First, a group of influential United States multinational corporations, under the auspices of the Emergency Committee on American Trade, are advocating changes to United States dumping law and policy along lines similar to changes urged by many developing countries. Some United States importers and major United States exporters, who face the application of mirror dumping laws in third countries, have come to appreciate that they share some foreign capitals' interests in and concerns about the United States antidumping law.

Second, all the negotiators in Geneva, including those for the United States, increasingly appreciate that the many seemingly disparate negotiating groups concerned with such issues as agriculture, balance of payments, the GATT's relationship with other international institutions, textiles, as well as the new areas, are intricately linked. To the extent that the United States hopes to achieve satisfactory agreements in the new frontier areas, for example, it reasonably may be expected to offer concessions of value to trading partners who otherwise would be reluctant to subscribe to United States objectives on services, intellectual property, and investment. Dumping and subsidies reform is certainly one such area of interest, although other subjects are also important to the developing world and some developed countries.

Thus, the amendments to the United States AD and CVD laws in the Omnibus Trade and Competitiveness Act of 1988 may serve as a prelude to a weightier drama later this year in Geneva, and, in 1991 in Washington, when any agreement achieved in Geneva must be implemented in United States domestic law. It remains to be seen whether past is prologue, and whether the Trade Act of 1988 ultimately will grease or shift the gears of United States trade policy.