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NOTES

WHY A PRIVATE RIGHT OF ACTION AGAINST DUMPING WOULD VIOLATE GATT

ROGER P. ALFORD

INTRODUCTION

The General Agreement on Tariffs and Trade1 (GATT or General Agreement) is recognized as "the most important agreement regulating trade among nations."2 It is intended to facilitate the development of world resources; raise standards of living; increase real income; and expand the production and exchange of goods.3 To achieve these objectives, GATT is directed at "the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce."4 GATT has been surprisingly successful. Despite a tumultuous beginning5 and endemic structural frailties,6 GATT "has arguably done more over the past 40 years to promote the cause of peace and prosperity than any other international body."7


3 See GATT, supra note 1, preamble.


5 See text accompanying notes 25-34 infra.


7 Address by Clayton Yeutter before the U.S. Chamber of Commerce 2 (Sept. 10, 1986)
One of the barriers to free trade that GATT seeks to eliminate is the "dumping" of merchandise by one country into another country's market. Stated generally, dumping is the sale of products in a foreign market at a price less than "the normal value of the products" in the home market. This prohibition is predicated on the assumption that dumping is not based on superior efficiency but is an attempt to injure or destroy competition. GATT permits a country to respond to dumping that causes or threatens material injury to domestic industries by levying a duty on the product "not greater in amount than the margin of dumping in respect of such product." To illustrate, if a foreign company sells its product for $1000 in the United States and for $1200 in its home market, and if an American industry is injured materially by this practice, the United States may respond by assessing a $200 duty, representing the margin of dumping, on all future imports of the dumped product. Such an "antidumping duty" is the internationally accepted response to counteract "injurious dumping."

Despite its other successes, GATT has been criticized as being anything but successful in the antidumping arena. In particular, industries in the United States argue that GATT has failed to control dumping effectively and that alternative forms of relief are needed to counteract this unfair trade practice. The root of their concerns is the prospective

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[hereinafter Yeutter], reprinted in Law and Practice under the GATT, III.C.1. at 2 (K. Simmonds & B. Hill eds. 1976 & Supp. 1988); see also The Times (London), Feb. 8, 1991, at 21 (International Chamber of Commerce stating that GATT "has powered 'the greatest expansion of global living standards in the history of [hu]mankind'").

8 GATT, supra note 1, art. VI, para. 1(a); J. Jackson, World Trading System, supra note 2, at 221. Where no comparable home market price exists, GATT allows the use of production costs in the country of origin or market prices in comparable countries to determine whether dumping has occurred. See GATT, supra note 1, art. VI, para. 1(b). For a more detailed discussion of the proper definition of dumping, see J. Viner, Dumping: A Problem in International Trade 1-22 (1966).

9 For a detailed discussion of why a foreign company would want to dump, see text accompanying notes 70-74 infra.

10 GATT, supra note 1, art. VI, para. 2.

11 However, allowance for differences in conditions and terms of sale, taxation, and other factors affecting comparability also must be made. See id. paras. 1-7.

12 See Remedies Against Dumping of Imports: Hearing on S. 1655 Before the Subcomm. on Int'l Trade of the Senate Comm. on Finance, 99th Cong., 2d Sess. 189 (1986) [hereinafter 1986 Hearing] (testimony of Noel Hemmendinger, Counsel, Willkie Farr & Gallagher). "Injurious dumping" refers to dumping that results in material injury to a domestic industry. Only when dumping results in such an injury is the imposition of a duty permissible. See text accompanying notes 92-95, 100-08 infra.

13 Specifically, GATT has been instrumental in lowering tariffs, reducing trade barriers, and expanding trade such that global living standards have increased markedly. See Yeutter, supra note 7, at 2; The Times (London), supra note 7, at 21.

14 See notes 127-29 and accompanying text infra.

nature of the existing remedy. Since antidumping duties are assessed only after a violation has been detected, dumping is essentially a risk-free, no-lose proposition, giving foreign exporters a free “first bite at the apple.” The absence of monetary damages for injuries sustained as a result of dumping compounds manufacturers’ difficulties.

In response to the growing sentiment that American trade laws do not reflect the realities of international commerce, Congress has introduced several initiatives seeking to strengthen these laws to combat unfair trade practices more effectively. One specific proposal, which has received a flood of congressional interest but little scholarly attention, but little scholarly attention.


16 See text accompanying notes 130-38 infra.
17 See text accompanying notes 131-36 infra.
18 See 1986 Hearing, supra note 12, at 65 (testimony of William H. Knoell, President and Chief Executive Officer, Cyclops Corp.); id. at 58 (testimony of Barton C. Green, General Counsel and Secretary, American Iron and Steel Inst.); 133 Cong. Rec. S5615 (daily ed. Apr. 28, 1987) (statement of Sen. Specter).
20 See text accompanying notes 139-43 infra.

is the establishment of a private right of action to counteract illegal dumping. In contrast to the current procedure that requires an administrative proceeding to determine the propriety of imposing an antidumping duty, such a proposal would give United States industries direct access to federal courts to recover monetary damages for any injury caused by dumping and, in some cases, to receive injunctive relief halting the entry of dumped imports.

Despite its favorable implications, a private right of action raises grave concerns over its compatibility with the United States's international obligations under GATT. Indeed, this Note argues that the establishment of a private right of action granting domestic firms direct access to federal courts to seek monetary and injunctive relief against foreign dumping is a violation of the General Agreement. Part I provides a brief overview of GATT and the international and domestic antidumping laws. Part II discusses the problems with the current American antidumping laws and summarizes the proposals for a private right of action against dumping as a means to remedy these problems. Part III analyzes the relation of the proposed bills to five provisions of the General Agreement and concludes that a private right of action is not compatible with GATT.

I
OVERVIEW OF GATT AND THE ANTIDUMPING LAWS
A. A Brief Introduction to GATT
I. A History of GATT

The General Agreement on Tariffs and Trade was completed and signed as an international trade agreement on October 30, 1947. Origin-
nally, GATT was intended to be subordinate to the yet unfinished International Trade Organization (ITO) and was not to come into effect until the ITO was established formally. For numerous reasons, however, many negotiators argued that GATT should be brought into force as soon as possible. To placate their concerns, GATT was to be applied provisionally until a definitive application could be achieved. As a provisional measure, GATT was to have limited force and would not affect a contracting party’s prior legislation that was inconsistent with the General Agreement. It was assumed that when the ITO charter finally was


26 See Norway—Restrictions on Imports of Apples and Pears, GATT Doc. L/6474 (1989), reprinted in BISD, supra note 1, at 306, 319 para. 5.5 (36th Supp. 1990); J. Jackson, World Trading System, supra note 2, at 32-34. The ITO charter was to be completed in 1948. See id. at 34. In addition to imposing a “code of conduct” on government restraints on international trade, the ITO was intended to collect statistics, produce uniform definitions and classifications, issue guidelines for customs valuations, and resolve trade disputes. See A. Lowenfeld, supra note 2, at 16.

27 See J. Jackson, World Trading System, supra note 2, at 32-34; J. Jackson & W. Davey, supra note 4, at 295. In addition, many negotiators needed parliamentary approval before agreeing to those portions of GATT dealing with nontariff barriers and other matters. See, e.g., Second Session of the Preparatory Comm. of the United Nations Conference on Trade and Employment (1st mtg.) at 11, 19, U.N. Doc. E/PC/T/TAC/PV/1 (1947) (delegates of Norway and France reporting need to place General Agreement before respective Parliaments for approval); Second Session of the Preparatory Comm. of the United Nations Conference on Trade and Employment (2d mtg.) at 13, U.N. Doc. E/PC/T/TAC/PV/2 (1947) (Czechoslovakia reporting requirement of Assembly approval); see also J. Jackson, World Trade, supra note 2, at 62 (governments have authority to agree to lower tariffs but cannot, without parliamentary approval, agree to nontariff barriers of GATT); J. Jackson & W. Davey, supra note 4, at 295 (discussing requirement of parliamentary approval).


30 See Rogoff & Gauditz, The Provisional Application of International Agreements, 39 Me. L. Rev. 29, 67 (1987); see also Norway—Restrictions on Imports of Apples and Pears, supra note 26 (Protocol enabled governments to accept GATT without adjusting domestic legislation).

This procedure was praised immediately for its creativity. One delegate described the Protocol as an “ingenious way of solving quite a difficult problem.” Second Session of the Preparatory Comm. of the United Nations Conference on Trade and Employment (1st mtg.) at 3-4, U.N. Doc. E/PC/T/TAC/PV/1 (1947) (statement of Dr. H. Coombs, Delegate, Australia). The mechanism, however, is not without its critics. See K. Dam, supra note 25, at 342 (The Protocol is “one of the principal weaknesses of the General Agreement as a codification
submitted, GATT would be submitted for "definitive" application as well.\textsuperscript{31}

However, this plan did not materialize as envisioned. The ITO charter never was approved, largely because of opposition in the United States Congress,\textsuperscript{32} thrusting the dual roles of multinational trade agreement and international organization upon GATT.\textsuperscript{33} GATT has lumbered along in this dual capacity without adequate legal structures or a basic constitution for over forty years.\textsuperscript{34}

\section{The Principles of GATT}

Trade liberalization is the starting point for a discussion of modern international economic relations.\textsuperscript{35} "Liberal trade" is committed to minimizing the amount of government interference in trade crossing national borders.\textsuperscript{36} GATT explicitly endorses this principle in its preamble, stating that the General Agreement is directed toward the "substantial reduction of tariffs and other barriers to trade."\textsuperscript{37} As such, GATT generally is opposed to both tariff\textsuperscript{38} and nontariff barriers.\textsuperscript{39} Although the preferred approach is simply to prohibit nontariff barriers,\textsuperscript{40} regulation of the barrier is a viable alternative where prohibition is not feasible due to the complicated or controversial nature of the barrier (as is true of a rule of law in economic affairs.).\textsuperscript{41}

\begin{thebibliography}{100}
\bibitem{} See J. Jackson, World Trading System, supra note 2, at 36; J. Jackson & W. Davey, supra note 4, at 295.
\bibitem{} See A. Lowenfeld, supra note 2, at 20-21; Alford, supra note 2, at 83 n.23. The death-knell for the ITO came in December 1950, when President Truman refused to resubmit the ITO Charter to Congress for approval. See J. Jackson, World Trade, supra note 2, at 50.
\bibitem{} See J. Jackson, World Trading System, supra note 2, at 33, 38 (although intended as multilateral treaty, GATT is international organization); Finlayson & Zacher, supra note 25, at 259 (when ITO failed, GATT transformed from temporary agreement into normative-institutional framework). See generally J. Jackson, World Trade, supra note 2, at 119-22 (discussing whether GATT is international organization).
\bibitem{} See J. Jackson, World Trade, supra note 2, at 51 (upon failure of ITO, GATT found itself without adequate legal and constitutional base); J. Jackson, World Trading System, supra note 2, at 38 (GATT lacks basic "constitution" designed to regulate its organizational activities and procedures); Gadbaw, The Outlook for GATT as an Institution, in Managing Trade Relations in the 1980s: Issues Involved in the GATT Ministerial Meeting of 1982, 33, 37 (S. Rubin & T. Graham eds. 1984) (GATT lacks resources, secretariat, decisionmaking framework, and procedures for taking on complex new issues).
\bibitem{} See J. Jackson, World Trading System, supra note 2, at 8.
\bibitem{} Id.
\bibitem{} GATT, supra note 1, preamble; see also A. Lowenfeld, supra note 2, at 23 (GATT committed to keeping government restraints of trade to minimum).
\bibitem{} See K. Dam, supra note 25, at 17.
\bibitem{} See id. at 19. Nontariff barriers are impediments to the free flow of goods or services in international trade other than tariffs, such as dumping, government subsidies, and quotas. See L. Glick, Multilateral Trade Negotiations: World Trade After the Tokyo Round 7 n.6 (1984).
\bibitem{} See K. Dam, supra note 25, at 19.
\end{thebibliography}
with antidumping laws). Furthermore, the only changes in trade permissible under GATT are those reducing the obstacles to free trade.\textsuperscript{42}

Another fundamental principle of GATT is nondiscriminatory trading.\textsuperscript{43} Specifically, all contracting parties are obligated to treat all other contracting parties equally\textsuperscript{44} and to accord products of foreign origin no less favorable treatment than products of domestic origin.\textsuperscript{45} A primary motivation behind this principle is to prevent domestic taxes and regulatory policies from being used as protectionist measures.\textsuperscript{46}

Finally, GATT is founded on the principle that conditions of trade should be discussed and agreed on within a multilateral framework.\textsuperscript{47} GATT provides for multilateral tariff and trade negotiations, or “rounds,” that are “reciprocal and mutually advantageous” to all contracting parties and are aimed at the substantial reduction of trade barriers.\textsuperscript{48}

These principles are subject to various qualifications and corollaries.\textsuperscript{49} Nevertheless, one cannot assess the validity of action by a contracting party that may affect international trade adversely or impinge upon the rights and obligations of another contracting party except by reference to the fundamental principles of liberalization, nondiscrimination, and multilateral negotiation. Having briefly examined GATT’s history and principles, the specific nontariff barrier that is the focus of the remainder of this Note, antidumping laws, will now be examined.

\begin{footnotesize}
\begin{enumerate}
  \item See id. at 19-20.
  \item See A. Lowenfeld, supra note 2, at 23 ("Government restraints on the movement of goods should be kept to a minimum, and if changed, should be reduced, not increased.").
  \item See GATT, supra note 1, preamble (GATT directed at “elimination of discriminatory treatment in international commerce”); A. Lowenfeld, supra note 2, at 23 (same).
  \item This principle is known as “most-favored-nation” treatment. Because this Note deals only with discrimination of the “national treatment” variety, see note 45 infra, no further discussion of the “most-favored-nation” principle or of article I of GATT is provided.
  \item See GATT, supra note 1, art. III (“The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.”). This principle is known as “national treatment.”
  \item See J. Jackson, World Trading System, supra note 2, at 189.
  \item See A. Lowenfeld, supra note 2, at 23.
  \item See A. Lowenfeld, supra note 2, at 23.
  \item GATT, supra note 1, art. XXVIII, para. 1; United States—Restrictions on Imports of Sugar, GATT Doc. L/6514 (1989), reprinted in BISD, supra note 1, at 331, 342, para. 5.3 (36th Supp. 1990); J. Jackson, World Trade, supra note 2, at 240-41; A. Lowenfeld, supra note 2, at 23.
  \item See A. Lowenfeld, supra note 2, at 24-27 (discussing exceptions, grandfather clauses, and special cases).
\end{enumerate}
\end{footnotesize}
B. Antidumping Laws and GATT

1. The Policies Underlying Antidumping Laws

Antidumping laws are a type of “market corrective,” providing a remedy when a foreign industry engages in certain unfair acts to the detriment of a domestic industry. These acts are viewed as deviations from the “natural” rules of efficient, competitive markets. Antidumping laws, therefore, correct “exceptional events” by imposing a duty raising the low price of imports to what it should have been if the foreign producer had operated under the “normal” conditions of competitive markets.

There are three types of dumping: sporadic, continuous, and predatory. Sporadic dumping is the occasional sale of overstock at low prices in a “fire sale” fashion. In this situation, a foreign producer unloads overstock in a nondomestic market so that its domestic price structure is not endangered. In contrast, a foreign producer who dumps continuously assumes that its long-term costs will be reduced if it manufactures a large number of items, thus realizing maximum economies of

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50 See Tarullo, Beyond Normacly of International Trade, 100 Harv. L. Rev. 547, 549 (1987).
51 See id.
52 See id. “Normal” conditions are those conditions prevailing without government intervention. Id. at 550.
Some delegates at the drafting of GATT argued that treatment should vary according to the type of dumping. They proposed limiting the restriction on dumping under article VI to only the practice of “systematical dumping.” See Preparatory Comm. of the International Conference on Trade and Employment, Sub-Comm. for General Commercial Policy at 7, U.N. Doc. E/PC/T/C.II/32 (1946) (one can only speak of commercial dumping when there is systematical manner in acting); Preparatory Comm. of the International Conference on Trade and Employment, Technical Sub-Comm. (6th mtg.) at 13, U.N. Doc. E/PC/T/C.II/46 (1946) (statement of Mr. le Bon, Delegate, Belgium) (definition should embody concept of systematic dumping). This attempt was unsuccessful in part because it was noted that sporadic dumping could be as injurious as systematic dumping. See id. at 14 (statement of Mr. Johnson, Delegate, United States) (sporadic dumping apt to be more injurious in particular cases than systematic dumping).
55 See J. Viner, supra note 8, at 23-24; Fisher, Antidumping Law, supra note 53, at 88.
Provided a product’s average price exceeds its average cost of production, the producer is assured a sustained profit from overall sales. Finally, predatory dumping is used to strengthen or secure a foothold in a nondomestic market by forestalling the development of competition or by eliminating existing competition entirely. A foreign producer will sell its product abroad at prices below marginal cost for brief periods, undercutting any competitors. Once competition is limited severely, the foreign producer then charges monopolistic prices for the product in the target market, thus recouping its losses.

For decades, injurious dumping has been considered unfair. Both international and domestic rules have developed permitting duties to be levied to offset such practices, even though the distinction between “fair” and “unfair” trade increasingly has become blurred. The prevailing explanation of why dumping practices are unfair is based on market efficiency. Normally, those enterprises that survive are the most efficient and thus deserve the benefits of their efficiency. When, by means of dumping, a producer receives benefits for reasons other than superior efficiency, the market’s “weeding out” function is undermined. A producer able to reduce prices below cost because of a subsidy received from higher prices elsewhere is deemed to be operating “unfairly.” Other producers, proponents argue, should not be forced to bear the loss.

56 See Fisher, Antidumping Law, supra note 53, at 89.
57 See id. Whether antidumping laws should regulate continuous dumping also is contested. Compare Fisher, Confronting the Paradox, supra note 53, at 13-14, 23 (arguing that continuous dumping scheme cannot endure without government regulation) with Barceló, supra note 54, at 75-77 (products continuously dumped indistinguishable from other imports).
58 See Fisher, Confronting the Paradox, supra note 53, at 13.
59 See J. Viner, supra note 8, at 26-27; Fisher, Antidumping Law, supra note 53, at 88-89. Professor Barceló questions the likelihood of international predatory dumping. See Barceló, supra note 54, at 65-66; Barceló, Antidumping Laws as Barriers to Trade—The United States and the International Antidumping Code, 57 Cornell L. Rev. 491, 502 (1972).
60 Monopolistic pricing can be sustained only if there are high barriers to market entry. “[I]t is not enough simply to achieve monopoly power, as monopoly pricing may breed quick entry by new competitors . . . .” Matsushita Elec. Indus. v. Zenith Radio, 475 U.S. 574, 589 (1985).

While it generally is agreed that predatory dumping is condemnable and should be regulated, the issue is still debated. Compare Fisher, Confronting the Paradox, supra note 53, at 13 (consensus is that predatory dumping is unfair trade practice) with Barceló, supra note 54, at 65-69 (same) and Barceló, supra note 59, at 500-02 (arguing that duties to counteract predatory dumping produce chilling effects on price competition and should be cautiously applied).
62 See J. Jackson, World Trading System, supra note 2, at 217; J. Jackson & W. Davey, supra note 4, at 648; Lowenfeld, supra note 61, at 206.
from such unfair competitive practices.\textsuperscript{64}

Trade laws aimed at unfair dumping practices typically seek to "level the playing field."\textsuperscript{65} Implicit in this concept is the notion that a business that sells the same product at different prices to different persons is acting unfairly,\textsuperscript{66} and that it must set a single, universal price based on the cost of production.\textsuperscript{67} In particular, these laws attempt to prevent predatory "price gouging"\textsuperscript{68} by which a large, economically powerful firm uses other aspects of its business to subsidize lower prices for a particular product to undersell small businesses competing in the same market, eventually reducing competition so in the long run it can raise prices and reap monopoly benefits.\textsuperscript{69}

While the theoretical rationale behind antidumping laws may be sound,\textsuperscript{70} their practical application is considerably more problematic because not every instance of differential pricing represents economic inefficiency or predatory intent. "[T]here can be dumping for honorable and rational enterprise motives of competitive profit maximization."\textsuperscript{71} For example, a rational, nonpredatory supplier may set different domestic and export prices in response to varying demand conditions in a genuine effort to maximize profits.\textsuperscript{72} Likewise, a corporation may be forced to dump because it perceives technological change to be moving so quickly that it must sell its inventory of a particular product or run the risk of its obsolescence.\textsuperscript{73} Finally, a corporation may price a product lower in a

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  \item \textsuperscript{64} See Hudec, supra note 63, at 206.
  \item \textsuperscript{65} J. Jackson, World Trading System, supra note 2, at 218. By attempting to "level the playing field," a government seeks to preserve competitive markets from foreign governments advancing their own national objectives through subsidies or from foreign manufacturers engaging in noncompetitive practices by dumping. See id. at 17.
  \item \textsuperscript{66} See id. at 223; Jackson, Dumping in International Trade, in Antidumping Law and Practice 1, 4 (J. Jackson & E. Vermulst eds. 1989).
  \item \textsuperscript{67} See Barceló, supra note 54, at 59. Barceló calls this the "most important misconception about dumping." Id.
  \item \textsuperscript{68} Deardorff, Economic Perspectives on Antidumping Law, in Antidumping Law and Practice 23, 25 (J. Jackson & E. Vermulst eds. 1989).
  \item \textsuperscript{69} See K. Dam, supra note 25, at 169; J. Jackson, World Trading System, supra note 2, at 223-24; Fisher, Antidumping Law, supra note 53, at 85, 87. The likely success of such a scheme is subject to serious question. See Matsushita Elec. Indus. v. Zenith Radio, 475 U.S. 574, 589 (1985) (predatory pricing schemes rarely tried and even more rarely successful).
  \item \textsuperscript{70} This rationale is subject to the assumption that predatory pricing permits an enterprise to hold on to its price-cutting advantage long enough to recoup its initial losses. See note 297 and accompanying text infra.
  \item \textsuperscript{71} Jackson, Introduction: Perspectives on Antidumping Law and Policy, in Antidumping Law: Policy and Implementation 1, 4 (1979) (emphasis in original).
  \item \textsuperscript{72} See K. Dam, supra note 25, at 170 (difference in price may reflect differences in competitive conditions); Barceló, supra note 54, at 59 ("A rational, nonpredatory supplier may dump merely because he is responding to different demand conditions in a genuine effort to maximize profits.").
  \item \textsuperscript{73} See Memo from Finance Comm. Trade Staff to Finance Comm. Members (1986), reprinted in 1986 Hearing, supra note 12, at 7; note 134 and accompanying text infra.
\end{itemize}
particular foreign market simply to meet competition in that market.\footnote{See K. Dam, supra note 25, at 168.}

Insofar as antidumping laws fail to distinguish procompetitive from anticompetitive dumping, their ultimate effect will be higher consumer costs.\footnote{See Barcelò, supra note 59, at 501 (mere existence of antiprice discrimination laws produces some chilling effect on price competition).} Therefore, the policies underlying antidumping laws often may be at odds with the policies embodied in other laws governing trade, particularly antitrust laws.\footnote{See Vermulst, The Antidumping Systems of Australia, Canada, the EEC and the USA, in Antidumping Law and Practice 425, 459 (J. Jackson & E. Vermulst eds. 1989).} Antitrust laws generally are intended to benefit consumers.\footnote{See, e.g., NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 112 n.49 (1984) (antitrust statute especially intended to serve interests of consumers); A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1400 (7th Cir. 1989) (antitrust laws designed for consumers), cert. denied, 110 S. Ct. 1326 (1990); Schachar v. American Academy of Ophthalmology, Inc., 870 F.2d 397, 399 (7th Cir. 1989) (antitrust laws concern consumers' welfare and efficient organization of production); cf. Fox & Sullivan, Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?, 62 N.Y.U. L. Rev. 936, 957 (1987) (economics tool that can help keep antitrust system on course to help consumers and to facilitate dynamic competition).} Antidumping laws, on the other hand, protect domestic competitors from low-priced imports even when such protection does not benefit consumers or enhance competition.\footnote{See Report of the Ad-Hoc Comm. on Antitrust and Antidumping of the Am. Bar Assoc. Section on Antitrust Law, 43 Antitrust L.J. 653, 691 (1974).} Antitrust policy favors vigorous competition from all sources, including imports. Antidumping policy seeks to protect American competitors from unfair foreign price discrimination and is skeptical of vigorous import competition.\footnote{See notes 114-18 and accompanying text infra.} These policy differences often come into sharp conflict, especially when antitrust laws\footnote{See 1983 Hearing, supra note 21, at 124-30 (testimony of A. Paul Victor, Partner, Weil, Gotshal & Manges) (discussing purpose of 1916 Antidumping Act in prohibiting predatory dumping); text accompanying notes 119-20 infra.} are viewed as a means of remediying antidumping activities.\footnote{A private right of action also might undercut consumer rights protected by the antitrust laws because domestic firms "injured" by efficient foreign competition may sue, and the threat of private lawsuits will deter competitive low pricing by foreign firms. Interview with Eleanor Fox, Professor of Law, New York University School of Law, in New York City (May 4, 1990).} These special provisions were approved by the negotiators because "[t]here was general con-
drafts, article VI was finalized to provide:

The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping.

As worded, article VI is an anomaly. It is an "exception" to GATT allowing measures that contravene GATT's general principles of trade liberalization and nondiscriminatory treatment. But the article also is careful to limit the scope of this exception by imposing an affirmative obligation upon GATT contracting parties to use only narrowly circumscribed measures to counteract dumping.

Because antidumping duties easily can be used as a protectionist device, the GATT contracting parties occasionally have attempted to update the antidumping laws to respond to the realities of international economic relations. Following the failure of a previous Antidumping Code, the contracting parties negotiated the Antidumping Code of

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83 See J. Jackson, World Trade, supra note 2, at 405-06.
84 GATT, supra note 1, art. VI, paras. 1-2.
86 See J. Jackson, World Trade, supra note 2, at 411. Article VI is an exception because antidumping duties are applied in addition to the normal duty imposed on the imports from the country concerned. As a result, imports from the dumping country are treated less favorably than imports of nondumping countries, thus deviating from the GATT norm of nondiscriminatory treatment. See A. Lowenfeld, supra note 2, at 155. Furthermore, because article VI permits governmental interference through the imposition of antidumping duties, it is somewhat incongruous with GATT's principle of trade liberalization. See text accompanying notes 35-42 supra.
87 See J. Jackson, World Trade, supra note 2, at 411; see also EEC—Regulation on Imports of Parts and Components, GATT Doc. L/6657 para. 5.17 (1990) (article VI recognizes legitimacy of certain policy objectives but at same time sets out conditions as to obligations that may be imposed to secure attainment of that objective) (on file at New York University Law Review).
88 See J. Jackson, World Trading System, supra note 2, at 226. Problems often result from antidumping procedures such as miscalculations of the margin of dumping and inaccurate injury determinations. Such activity can cause distortions of international trade and transform the antidumping duties into a protectionist device. See id.
1979, which provides for significant procedural and administrative changes designed to guard against protectionist abuse in the administration of the antidumping laws.

Together, GATT and the Antidumping Code require a showing of a disparity between a product’s export price and its “normal” price and proof of material injury or threat of material injury to the competing domestic industry. If both conditions are met, the importing country may apply antidumping duties. Thus combined, article VI of GATT and the Antidumping Code of 1979 represent the current international commitments concerning dumping and provide the means of redress available to contracting parties.

It generally is agreed that the Antidumping Code of 1967 and the Kennedy Round were unsuccessful in reducing nontariff barriers. See L. Glick, supra note 39, at 8 (little progress in nontariff arena at Kennedy Round); J. Jackson, World Trade, supra note 2, at 229 (“[T]he Kennedy Round made little dent on the plethora of ingenious nontariff barriers . . .”); J. Jackson, J. Louis & M. Matsushita, Implementing the Tokyo Round 164 (1984) (United States not living up to its 1967 Antidumping Code obligations).


See L. Glick, supra note 39, at 110-11.


See GATT, supra note 1, art. VI, para. 1. Injury is based on positive evidence and an objective examination of the volume of the dumped imports, their effect on prices in the domestic market, and the impact of those imports on domestic producers. Antidumping Code of 1979, supra note 90, art. 3, para. 1.


Note that GATT does not impose an obligation on contracting parties to act when dumping occurs. Rather, it merely permits them to act against dumping. See Swedish Antidumping Duties, GATT Doc. L/328 (1955), reprinted in BISD, supra note 1, at 81, 83, para. 8 (3d Supp. 1955) (article VI does not oblige importing country to levy antidumping duty).

See J. Jackson, World Trading System, supra note 2, at 227. The Antidumping Code, like all other codes resulting from the GATT Rounds, is not an amendment to GATT but is a “stand-alone” treaty binding in theory only upon those GATT parties who are signatories to that code. See id. at 55-56. But see Hufbauer, Erb & Starr, The GATT Codes and the Unconditional Most-Favored-Nation Principle, 12 Law & Pol’y Int’l Bus. 59, 62 (1980) (questioning whether contracting parties may be obliged to extend benefits of newly assumed code obligations to all GATT members).
C. Antidumping Laws of the United States

1. Implementation of GATT

American antidumping laws closely parallel those of GATT, with the United States taking full advantage of the powers vested in contracting parties by the GATT provisions. Under United States law, an antidumping duty must be imposed on merchandise that is being, or is likely to be, sold in the United States at less than its fair value if this sale materially injures, threatens to injure materially, or materially retards the establishment of a domestic industry. The duty imposed must equal the margin of dumping. The United States's antidumping laws are less flexible than GATT's, the former requiring a duty to compensate for dumping, whereas the latter merely allows for such a duty.

For an antidumping duty to be levied on an import into the United States, two administrative agencies must agree that a duty is mandated. The Department of Commerce (DOC) determines whether dumping exists; the International Trade Commission (ITC) determines whether the dumping has inflicted a "material injury" to a domestic industry. The determination process is initiated once an interested party files a complaint. The ITC then must make a preliminary determination within forty-five days as to the likelihood of finding an injury, and the DOC must make a preliminary determination within 160 days as to the likelihood of dumping. If both make positive findings, a new inquiry is begun that results in a final determination. Again, the ITC determines

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97 See 19 U.S.C. § 1673(2) (duty must equal amount by which foreign market value exceeds United States price for merchandise).
98 See id. (if dumping and injury occurs, then antidumping duty "shall be imposed"); Horlick, The United States Antidumping System, in Antidumping Law and Practice 99, 102 (J. Jackson & E. Vermulst eds. 1989) (American antidumping law is nondiscretionary).
99 See GATT, supra note 1, art. VI, para. 2 (Stating that "a contracting party may levy . . . an antidumping duty").
100 See J. Jackson, World Trading System, supra note 2, at 229.
103 See id. § 1673a(b). Although the Commerce Department also may initiate an investigation, this is not the normal practice. See id. § 1673a(a); Restani, An Introduction to Statutory Responses to Import Penetration, 18 N.Y.U. J. Int'l L. & Pol. 1087, 1088 (1986).
whether material injury to an existing or emerging domestic industry has resulted from the dumping,\textsuperscript{106} and the DOC determines whether the merchandise is being sold at less than fair value.\textsuperscript{107} An affirmative final determination by both agencies results in the imposition of an antidumping duty.\textsuperscript{108}

Little power actually is vested in the hands of the private party initiating this process. Under the current procedure, a private party only can file a petition requesting an investigation of alleged dumping, appear at hearings, and submit pre- and posthearing briefs.\textsuperscript{109} No private right of action is available under the current American implementation of GATT.

2. The Antidumping Act of 1916

There may be a private right of action, under legislation predating GATT, that theoretically provides relief to domestic industries injured by foreign predatory dumping: the Antidumping Act of 1916 (Act).\textsuperscript{110} To prove a violation of the 1916 Act, there must be evidence that (1) an importer has imported or sold articles within the United States at prices substantially less than the actual market value or wholesale price of such articles; (2) the resulting international price discrimination was common and systematic; and (3) the discriminatory pricing was undertaken with the intent of destroying or injuring an industry in the United States, preventing the establishment of an industry in the United States, or restraining or monopolizing any part of trade and commerce in such articles in the United States.\textsuperscript{111} Violators of the Act are subject to civil\textsuperscript{112}

\textsuperscript{106} See 19 U.S.C. § 1673d(b).
\textsuperscript{107} See id. § 1673d(a)(1).
\textsuperscript{108} See id. § 1673d(c)(2), e(a).

It shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, commonly and systematically to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported. . . . \textit{Provided}, That such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.

Id.

\textsuperscript{112} See 15 U.S.C. § 72 (providing for treble civil damages).
and criminal liability.\textsuperscript{113}

The legislative history\textsuperscript{114} and subsequent judicial construction\textsuperscript{115} of the Act emphasize that it is essentially an antitrust remedy\textsuperscript{116} "aimed only at international price discrimination engaged in with a specific predatory intent."\textsuperscript{117} Thus, the Act is merely a remedy for particularly egregious forms of deliberate price undercutting.\textsuperscript{118} Any attempt to amend the Act by lessening its predatory intent requirement must wrestle with its history and subsequent construction as an antitrust remedy.\textsuperscript{119} This would prove difficult. For example, extending the Antidumping Act of 1916 to cover other forms of antidumping activity other than predatory dumping probably could not be reconciled with the antitrust policy of encouraging vigorous price competition.\textsuperscript{120}

The specific intent requirement essentially abrogates the effectiveness of the Act as a remedy for unfair foreign competition.\textsuperscript{121}

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\textsuperscript{113} See id. (criminal conviction punishable as misdemeanor).


Arguably, the Act has a dual role of protecting domestic industries and discouraging anticompetitive activity. The goal of the first two sections of the specific intent proviso is the protection of domestic industries. The third seeks to discourage anticompetitive activity. See 15 U.S.C. § 72. The 1916 Act is thus a hybrid, having both antitrust and antidumping underpinnings. See J. Jackson, World Trade, supra note 2, at 401 (antidumping duties seek to impose tariff and antitrust penalties).

\textsuperscript{117} Kessler, supra note 111, at 493.

\textsuperscript{118} See 1980 Hearing, supra note 21, at 133 (testimony of Dudley H. Chapman, Former Assistant Chief, Department of Justice Foreign Commerce Section of the Antitrust Division); Kessler, supra note 111, at 488.

\textsuperscript{119} See 1986 Hearing, supra note 12, at 212 (testimony of Charlene Barshefsky, Partner, Steptoe & Johnson) (disassociating Act from its antitrust foundations would nullify careful distinction between predatory and competitively neutral dumping).

\textsuperscript{120} See Kessler, supra note 111, at 495; text accompanying notes 75-78 supra.

\textsuperscript{121} See 1980 Hearing, supra note 21, at 24 (statement of the Ad-Hoc Labor-Industry Trade Coalition); id. at 134 (testimony of Peter O. Suchman and Gail T. Cumins, Attorneys, Sharretts, Paley, Carter & Blauvelt, P.C.).

In addition to the intent requirement, other obstacles exist that prevent the Act from being a strong antidumping measure. The "common and systematic" element, for example, requires that the price discrimination be something other than an irregular or single instance of
lish a prima facie claim under the Antidumping Act of 1916, plaintiffs must show more than a general intent to restrain trade. They must prove that the act of selling at low prices was done with the conscious object of undermining competitors—that is, specific intent. Because of this stringent “specific, predatory, [and] anticompetitive intent” requirement, there has never been a successful claim under the 1916 Act in its seventy-five year history. Thus, there is general agreement among commentators that the Antidumping Act of 1916, as it now stands, is a “dead letter.” Consequently, victims of predatory dumping practices in the United States have no practical private right of action available to them.

II
RESPONSES TO PERCEIVED INADEQUACIES IN UNITED STATES ANTIDUMPING LAWS: A PRIVATE RIGHT OF ACTION

Few would argue that present laws in the United States successfully meet the needs of domestic industries competing with foreign competition. See Kessler, supra note 111, at 486. That is, only continuous predatory dumping, not sporadic dumping, gives rise to liability.  


Other factors weakening the effectiveness of the Antidumping Act of 1916 include: the obtuseness of its statutory language; its stringent evidence requirements; and the apparent willingness of private businesses to let the government regulate dumping through other means. See Hiscocks, supra note 123, at 232.  

tors who are unfairly dumping. Only some, however, argue that fundamental changes are needed in the United States's antidumping strategy. Others maintain that only minor changes are in order. A private right of action for manufacturers injured by dumping frequently is suggested as a solution. As will be shown, however, this alternative is incompatible with GATT.

A. Inadequacies in Current United States Antidumping Laws

A grave flaw in the current antidumping scheme is its failure to deter injurious dumping adequately. Presently, dumping is a risk-free, no-lose proposition to the extent that relief is entirely prospective. And foreign companies have been ingenious in their ability to circumvent the imposition of even a prospective antidumping duty. Evasive activities include "hit and run" dumping, inventory dumping, short life-

127 See, e.g., 1986 Hearing, supra note 12, at 78 (testimony of Alan W. Wolff, Partner, Dewey Ballantine) (existing law clearly is inadequate); id. at 132 (statement of Sen. Heinz) ("Clearly, our current laws aren't working."); 1985 Hearing, supra note 19, at 51 (testimony of Richard O. Cunningham, Partner, Steptoe & Johnson) (antidumping laws inadequate to deal with dumping problems encountered by American industries); id. at 57 (testimony of Peter D. Ehrenhaft, Partner, Hughes Hubbard & Reed) (current laws do not make much sense).


129 The present antidumping scheme also contains numerous other faults which are beyond the scope of this Note. These problems include the circumvention by foreign companies of United States antidumping laws, see 1987 Hearings, supra note 21, at 653 (testimony of Gilbert B. Kaplan, Department of Commerce Deputy Assistant Secretary for Import Administration) (discussing increasing problem of circumvention of antidumping duty orders), and multiple dumping. See 1986 Hearing, supra note 12, at 91-95 (testimony of Alan W. Wolff, Partner, Dewey Ballantine) (discussed proposals to address multiple offenders of antidumping orders); 132 Cong. Rec. S5330 (daily ed. May 6, 1986) (statement of Sen. Bingaman) (discussing harm resulting from repeat offenders of current antidumping laws); T. Vakerics, D. Wilson & K. Weigel, supra note 105, at 36-37 (discussing multiple dumping requirements of new "short life cycle" product category).


131 See 1986 Hearing, supra note 12, at 58 (testimony of Barton C. Green, General Counsel and Secretary, American Iron and Steel Inst.); id. at 65 (testimony of William Knoell, President and Chief Executive Officer, Cyclops Corp.); 133 Cong. Rec. S5615 (daily ed. Apr. 28, 1987) (statement of Sen. Specter).

132 "Hit and run" dumping occurs most often in cyclical and seasonal markets. Where there is a sharp, sudden, and cyclical downswing in demand, there is a major incentive for companies to increase export sales, even below fully allocated costs. This may be done to minimize a seasonal devaluation in the price of a product. In this instance, any damage to a domestic industry occurs before any antidumping action can be prepared and filed. See Memo from Finance Comm. Trade Staff to Finance Comm. Members (1986), reprinted in 1986 Hearing, supra note 12, at 7; 1986 Hearing, supra note 12, at 58 (statement of Barton C. Green, General Counsel and Secretary, American Iron and Steel Inst.); 1985 Hearing, supra note 19,
cycle dumping, and diversionary dumping. The existing prospective remedy cannot prevent such dumping activity because the foreign industry has raised its prices above the discriminatory level by the time a dumping proceeding is brought or a final order is issued. Proponents of a private right of action argue that a damages remedy would "provide an effective deterrent to foreign producers who contemplate such activity and thus hopefully obviate the need for actual litigation." Such a private remedy would "have a pronounced effect on the pricing policies of foreign exporters."

Proponents of a private right of action also argue that a retrospective remedy will force foreign manufacturers to compensate American industries for unfair pricing practices. Domestic companies that have


Foreign manufacturers can dump inventory by setting up subsidiary companies in the United States to import inventory and sell merchandise manufactured in the foreign plant. Dumping occurs from the domestic subsidiary only after the merchandise has passed through customs. Because duties can be imposed only upon the crossing of a border, such activity is immune from any possibility of a duty. See 1986 Hearing, supra note 12, at 58 (testimony of Barton C. Green, General Counsel and Secretary, American Iron and Steel Inst.); 1985 Hearing, supra note 19, at 48-49 (testimony of Richard O. Cunningham, Partner, Steptoe & Johnson); 1983 Hearing, supra note 21, at 43-44, 61-63 (same); 133 Cong. Rec. S8690 (daily ed. June 25, 1987) (same).

Short life-cycle dumping occurs when there is a fast turnover of or a short life span of a product because of expanding technology. By the time a dumping case can be brought, the market has moved on to the next generation of products. See Memo from Finance Comm. Trade Staff to Finance Comm. Members (1986), reprinted in 1986 Hearing, supra note 12, at 7.

Diversionary dumping occurs when a foreign industry sends its product into another market to avoid the preexisting duty that would be imposed on the product if it were imported directly into the country from the country of origin. See T. Vakerics, D. Wilson & K. Weigel, supra note 105, at 24 n.66 (diversionary dumping subject to new 1988 laws when parts sent to third country to be made into final product or when third country used to circumvent antidumping order on final product).

One proponent of retrospective remedies for dumping noted that the pendency of a dumping case actually encourages a foreign producer to ship in as much as it can prior to the conclusion of the case and the issuance of the final dumping order to avoid any duty. See 1985 Hearing, supra note 19, at 8 (statement of Sen. Heinz); 133 Cong. Rec. S8725 (daily ed. June 25, 1987) (same).

As an attorney for a major steel association observed, "Nothing would make us happier than having a statute that would so effectively deal with the pernicious commercial practice of dumping that it was not necessary to file either an administrative dumping case or a private action for damages." 1986 Hearing, supra note 12, at 55 (testimony of Barton C. Green, General Counsel and Secretary, American Iron and Steel Inst.).

In essence, a private right of action would prevent the foreign manufacturer from taking a free "first bite at the apple." Id.

See id. ("[T]he need for and the logic behind such a [retrospective] damage remedy is so
suffered a material injury as a result of dumping presently have virtually no chance for reparations. Under the United States's current antidumping scheme, financial compensation is paid, if at all, into the United States Treasury, not to those companies injured by foreign dumping. Domestic industries believe they suffer an injustice when, after attempting to require the foreign manufacturer to pay for its unfair practices through administrative agency litigation, they find that the proceeds of any duty imposed fill the pockets of the federal government. "The company or industry . . . that may have been badly hurt over a period of . . . several years is left with . . . nothing to show for [its] victory except perhaps a ruined business." A private right of action, proponents argue, would correct this problem by allowing domestic companies to obtain monetary and equitable relief against injurious dumping.

B. Attempts to Find a Remedy: Proposals for a Private Right of Action

In the past decade, Congress has introduced at least eighteen bills that would give private parties in the United States a right of action against foreign dumpers. This activity is evidence of the growing perception by Congress that a private right of action is a plausible and desirable means of reducing some of the country's trade problems. Proponents of the bills argue that a private right of action would provide a retrospective remedy that would deter dumping effectively and that would compensate those domestic industries injured by unfair trade
practices adequately. This Note does not address the merits of these arguments. Rather, it only seeks to determine whether a bill granting a private right of action for dumping, if passed, would be consistent with the United States's international obligations under GATT.

Because of the sheer number of bills introduced, the complexity of the different provisions, and the controversy surrounding the creation of a private right of action in this context, it is virtually impossible to determine accurately which type of bill, if any, Congress is most likely to pass. For this reason, instead of discussing each bill in detail, this Note attempts to categorize the bills by various themes and then address each theme's relation to GATT.

Almost every bill with an antidumping provision has sought to amend the Antidumping Act of 1916. Most of these bills attempt to alter significantly the prima facie elements of the Act's cause of action, in particular, the specific predatory intent requirement. To

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145 See, e.g., 133 Cong. Rec. S10,286 (daily ed. July 21, 1987) (statement of Sen. Specter) ("It has been my view that domestic companies that have been injured by unfair trade practices should be compensated for their losses. In addition, a viable damages remedy would provide an effective deterrent to foreign producers . . . ."); 133 Cong. Rec. S5615 (daily ed. Apr. 28, 1987) (statement of Sen. Specter) ("[A] damage remedy for injury from illegal imports would provide a more effective deterrent than current law, would provide retroactive relief to fill the gap under existing law . . . . and would provide damage awards directly to the injured American industries.").


147 A table summarizing the salient features of each bill is attached as an Appendix to this Note.


149 See text accompanying note 111 supra.

150 The relevant portions of a representative bill are illustrative:

(A) No person shall import or sell within the United States any article manufactured or produced in a foreign country if: (1) such article is imported or sold within the United States at a United States price which is less than the foreign market value or constructed value of such article; and (2) such importation or sale—(i) causes or threatens material injury to industry or labor in the United States, or (ii) prevents, in whole or in part, the establishment or modernization of any industry in the United States.

(B) Any interested party who shall be injured in his business or property by reason of an importation or sale in violation of this section, may bring a civil action in the district court of the District of Columbia or in the Court of International Trade against any manufacturer or exporter of such article or any importer of such article into the United States who is related to such manufacturer or exporter.

S. 1655, 99th Cong., 1st Sess. § 3(a) (1985). For similar provisions, see, e.g., S. 1396, 100th Cong., 1st Sess. § 1(b), 133 Cong. Rec. S8393 (daily ed. June 19, 1987); S. 361, 100th Cong.,
offset the reduced intent requirement, most of these bills eliminate the Act's criminal penalty\textsuperscript{152} and its treble damages provision.\textsuperscript{153}

Proving that a product was "commonly and systematically" imported or sold within the United States presents another barrier to recovery under the Act.\textsuperscript{154} Consequently, virtually all the bills that attempt to amend the Act eliminate this element.\textsuperscript{155} Finally, many of these bills also reduce the dumping differential that must be shown from "a price substantially less than"\textsuperscript{156} to a price "less than" that of the country of origin.\textsuperscript{157}

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Still others allow courts to infer predatory intent or shift the burden of proof to the defendants. Under S. 1104, for example, if the defendant knew, or had reason to know it was dumping, the defendant shall be treated as having the specific predatory intent. S. 1104, 100th Cong., 1st Sess. § 801(c)(2)(b)(iii), 133 Cong. Rec. S5616 (daily ed. Apr. 21, 1987). Under this bill, the defendant has the burden of showing that it did not have the specific predatory intent. See id. § 801(b)(2). This provision parallels another bill under which a repeat offender would face a "rebuttable presumption" that it had the intent of destroying or injuring an industry in the United States. See H.R. Rep. No. 40, 100th Cong., 1st Sess. § 166(5), 133 Cong. Rec. H2642 (daily ed. Apr. 29, 1987) (amending H.R. 3, 100th Cong., 1st Sess. (1987)).


\textsuperscript{154} See text accompanying note 111 supra; note 121 supra.

The Antidumping Act of 1916 was intended to be an antitrust remedy, having the dual roles of protecting American industries while discouraging anticompetitive activity. But of those bills proposing amendments to the Act, only five maintain this dual purpose. Most only focus on whether there has been some material injury to a domestic industry.

Some of these bills also depart from the Act by granting injunctive relief against foreign exporters who engage in dumping. Under these bills, foreign dumpers generally could be enjoined from importing or selling their articles in the United States regardless of the foreign exporters' willingness to raise prices to an acceptable level. Most of these bills also provide for a final version of discretionary injunctive relief if a defendant fails to comply with a discovery order or other decree of the court.

158 See text accompanying notes 114-20 supra; note 116 supra.
159 For example, one of these five bills penalizes foreign underselling if:

[T]he sale of such articles at such price would (i) cause material injury to an industry . . .
[in the United States], (ii) prevent, in whole or in part, the establishment of an industry in the United States, or (iii) restrain or monopolize any part of trade and commerce in such articles in the United States . . . .


One bill reduces the Act to an antitrust remedy alone, with the inquiry being limited to whether "the effect of such sale has been to substantially lessen competition or to restrain trade or monopolize any part of trade or commerce within the United States." S. 223, 96th Cong., 1st Sess. § 501 (1979).

160 Thus, none of these bills contains any mention of protecting the marketplace in general. Rather, they typically state:

No person shall import or sell within the United States any article manufactured or produced in a foreign country . . . [at a price less than the foreign market value of such article where] such importation or sale—(A) causes or threatens material injury to industry . . . in the United States; or (B) prevents the establishment or modernization of any industry in the United States.


Procedurally, the bills generally are silent as to whether bringing a private right of action would displace the existing administrative remedy. Such silence reasonably could be construed as allowing the petitioner to file a complaint in both forums and thus petition for either monetary damages and/or an antidumping duty. Two bills, however, do provide the complainant explicitly with a choice between antidumping duty or private damages.

Thus the proposed bills largely attempt to amend the Antidumping Act of 1916 by diluting its prima facie elements. To succeed, a plaintiff only need show a general intent to sell at less than the home price and that more than a de minimis injury was suffered by a domestic industry. If these weakened requirements are met, both monetary and equitable relief are available. Nevertheless, most of these bills also state, “It is the sense of Congress that the provisions of this Act are consistent with, and in accord with, the General Agreement on Tariffs and Trade (GATT).” The burden is on the United States, however, to show that this is the case. Whether it can satisfy this burden is an open question.

163 See text accompanying notes 96-108 supra.

Despite the silence as to whether most bills would allow a petitioner to take the “duty route” or the “damages route,” many bills do allow a petitioner to seek damages in either the federal district court of the District of Columbia or before the United States Court of International Trade. See, e.g., S. 1204, 101st Cong., 1st Sess. § 13(a) (1989); S. 179, 101st Cong., 1st Sess. § 1(b), 135 Cong. Rec. S120 (daily ed. Jan. 25, 1989); S. 1655, 99th Cong., 1st Sess. § 3(a) (1983).


In a more elaborate fashion, another bill states, “No award of damages or assessment of civil penalties shall be made under any portion of this Act which is found to violate . . . the General Agreement on Tariffs and Trade.” S. 2408, 99th Cong., 2d Sess. § (r), 132 Cong. Rec. S5330 (daily ed. May 6, 1986).

167 Canada—Import Restrictions on Ice Cream and Yoghurt, GATT Doc. L/6568 (1989), reprinted in BISD, supra note 1, at 68, 84-85, para. 59 (36th Supp. 1990) (parties claiming exception have burden of proving all conditions of exception); Quantitative Restriction and Other Non-Tariff Measures, GATT Doc. L/5713, reprinted in BISD, supra note 1, at 211, 216, para. 23 (31st Supp. 1985) (if party imposing quantitative restriction did not advance GATT, working hypothesis would be that measure was not in conformity with GATT); Canada—Administration of the Foreign Investment Review Act, GATT Doc. L/5504, reprinted in BISD, supra note 1, at 140, 164, para. 5.20 (30th Supp. 1984) (parties seeking protection.
III
THE COMPATIBILITY OF A PRIVATE RIGHT OF ACTION WITH GATT

There are five major questions to consider in determining whether a private right of action against dumping would violate GATT. First, would an amendment to the Antidumping Act of 1916 that drastically changes the Act’s prima facie elements be considered “grandfathered legislation” under GATT’s Protocol of Provisional Application? Second, would a private right of action create a remedy that is not sanctioned by GATT as a permissible response to injurious dumping? Third, is a private right of action employing injunctive relief in violation of GATT article XI’s limitation on import prohibitions? Fourth, would a private right of action violate GATT article III’s “national treatment” limitation by substantively and procedurally treating imports less favorably than products of national origin? Fifth, in the event that such a private right of action does violate GATT, would it nevertheless be allowed within the general exception of article XX(d)? Analysis of these central issues will lead to an accurate conclusion as to the compatibility of these proposals with the General Agreement.

A. The Protocol of Provisional Application

One reason Congress has proposed amending the Antidumping Act of 1916 to provide a private right of action is that such a provision may circumvent GATT by being “grandfathered in.” The Antidumping Act of 1916 is permissible under GATT despite its inconsistencies with the General Agreement because it is considered “existing legislation” within the meaning of GATT’s Protocol of Provisional Application. Many lawmakers and international trade lawyers have assumed that the proposed amendments to the Act will share in this grandfather protection.

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168 See Protocol of Provisional Application, supra note 29 (contracting parties undertake to apply provisionally Part II of GATT to fullest extent not inconsistent with existing legislation); text accompanying notes 173-242 infra.
169 See GATT, supra note 1, art. VI, para. 2; text accompanying notes 243-63 infra.
170 See GATT, supra note 1, art. XI, para. 1; text accompanying notes 264-77 infra.
171 See GATT, supra note 1, art. III; text accompanying notes 278-339 infra.
172 See GATT, supra note 1, art. XX(d); text accompanying notes 340-84 infra.
173 For a discussion of how the Act is inconsistent with GATT, see text accompanying notes 218-22 infra.
174 For a law to be considered “existing legislation” under the Protocol, it must be legislation in a formal sense, predate the Protocol, and be mandatory in character by its terms or expressed intent. See Norway—Restrictions on Imports of Apples and Pears, GATT Doc. L/6474 (1989), reprinted in BISD, supra note 1, at 306, 320, para. 5.6-5.7 (36th Supp. 1990). The Antidumping Act of 1916 fulfills these requirements.
175 But this assumption is questionable under GATT law.

1. GATT Law on “Grandfather Rights”

By interpreting GATT narrowly, one could conclude that any change to preexisting legislation, even to statutory form, nullifies that legislation’s grandfather protection. This, however, is not the interpretation given to the Protocol by the GATT Dispute Panels. In its Brazilian Internal Taxes decision, the panel’s conclusions were based on the assumption that the mere fact of amendment does not undermine the legality of grandfathered laws under the Protocol. Likewise, in United States Manufacturing Clause, the panel noted that merely amending a statute does not necessarily disqualify it as “existing legislation.” Rather the crucial question is whether the substance of a change undermines the law’s compliance with GATT.

More specifically, the proper query is whether the amendment increases the statute’s inconsistency with GATT. As noted in United States Manufacturing Clause, “changes to the [statute] that [do] not alter its degree of inconsistency with the General Agreement, or which constitute a move towards a greater degree of consistency, [do] not cause it to cease to qualify as ‘existing legislation’ . . . [under] the Protocol of

175 See, e.g., 131 Cong. Rec. S478 (daily ed. Jan. 22, 1985) (letter from Peter Ehrenhaft, Partner, Hughes Hubbard & Reed) (Antidumping Act of 1916 enjoys grandfather protection; amendments now proposed are continuation of that statute and embraced by Protocol); Almstedt, supra note 22, at 779-80 (as to whether amending Act would violate GATT, even assuming remedial relief statutes such as Act would be inconsistent with GATT, United States not bound because of grandfather protection).

176 GATT disputes are referred to a panel of experts known as the “Dispute Panel.” These experts act in their own capacity and not as representatives of any government. See Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, GATT Doc. L/4907 (1979), reprinted in BISD, supra note 1, at 210, 212-13, paras. 10-14 (26th Supp. 1980); J. Jackson, supra note 6, at 63. Dispute Panel Reports are forwarded to the contracting parties and usually “adopted.” See J. Jackson, supra note 6, at 66. Once adopted, the reports bind the parties to the dispute. As to precedential effect, the reports have at least some persuasive authority and may constitute a definitive interpretation of GATT. See id. at 68-69.

177 GATT Doc. CP.3/42 (1949), reprinted in II BISD, supra note 1, at 181 (1951), noted in Hansen & Vermulst, supra note 22, at 277; see text accompanying notes 192-97 infra.

178 See id. (GATT could be modified without losing its status of “existing legislation” provided degree of inconsistency not increased); Hansen & Vermulst, supra note 22, at 277 (same).

Provisional Application." The implication is that GATT does permit a "one-way street" in the direction of greater compliance, but that amendments that move a statute away from a greater degree of consistency with GATT are not grandfathered.

This interpretation is consistent with the basic purpose of the Protocol—to enable governments to accept the obligations of the General Agreement without having to adjust their domestic legislation. It would be inconsistent with the purposes of the General Agreement if a contracting party felt free to reverse at any time the steps previously taken to bring its legislation into conformity with GATT. Therefore, a contracting party would be unjustified in giving the Protocol "an interpretation that would extend its function beyond those it was originally designed to serve." As such, the Protocol must be interpreted to further the full application of the General Agreement.

2. Determining Proposed Amendments' Conformity with GATT

What remains to be determined, then, is whether the creation of a private right of action is a departure from or is consistent with GATT. Significantly, no definitive standard has been promulgated for determining if a particular amendment is a movement toward greater consistency with GATT. One test that has been suggested is a "commercial impact" test. Under this approach, an amendment of any preexisting legislation is not allowed if the "commercial impact of the new law is more restrictive than the impact of the law which was in effect on October 30, 1947."

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185 See id. (concluding that Protocol should be interpreted as opening "one-way street" permitting only movements toward greater consistency with GATT), reprinted in BISD, supra note 1, at 74, 90, paras. 38-39 (31st Supp. 1985); see also Norway—Restrictions on Imports of Apples and Pears, GATT Doc. L/6474 (1989), reprinted in BISD, supra note 1, at 306, 320, para. 5.6 (36th Supp. 1990).
186 United States Manufacturing Clause, GATT Doc. L/5609 (1984), reprinted in BISD, supra note 1, at 74, 89-90, paras. 37, 39 (31st Supp. 1985). The Panel also noted that amendments leading to a greater inconsistency with GATT are not justified even if the resulting degree of inconsistency is less than that which existed in the statute at the time of GATT's formation. Thus, if an amendment already had moved legislation two steps toward GATT, a later amendment moving the legislation one step back would be disallowed even though the net effect of both amendments is one step forward. See id., reprinted in BISD, supra note 1, at 74, 90, para. 39 (31st Supp. 1985).
190 See Brazilian Internal Taxes, GATT/CP.3/42 (1949), reprinted in II BISD, supra note 1, at 181, 184 para. 13 (1951).
The first attempt to use this test occurred in Brazilian Internal Taxes. There, the Brazilian government enjoyed a protection under the Protocol for certain liqueur taxes. Domestic liqueurs were taxed three cruzeiros while imported liqueurs were taxed six cruzeiros. The dispute arose when Brazil increased both taxes but maintained the proportional relationship. Brazil, using the commercial impact test, argued that "unless it could be shown that the effect of the law... had been to increase the protection of the national product, the law could not be held to be incompatible with [the relevant provisions of GATT]." The opposing contracting party (France) argued that the absolute, not the proportional, difference in the taxes mattered. However, the conflict was not resolved, and neither approach was adopted.

More recently in United States Manufacturing Clause, however, the panel adopted an alternative to the "commercial impact" test. The statute at issue there, the "Manufacturing Clause," prohibited the importation of certain literary materials into the United States unless the materials were manufactured in the United States or Canada. In 1976, an amendment to the statute provided that the Manufacturing Clause would expire on July 1, 1982. In 1982, however, Congress extended...
the expiration date by four years. The European Communities claimed that this extension was not covered by the Protocol of Provisional Application because it violated the other contracting parties' "reasonable expectations" that the Manufacturing Clause would no longer be applied after the original expiration date. The GATT Dispute Panel accepted their "reasonable expectations" argument, reasoning that an amendment can be made only if it leads to greater consistency with GATT, and whether an amendment is a movement toward greater consistency must be determined by the reasonable expectations of the contracting parties. "[T]he Panel found that the European Communities had been justified in reaching the conclusion that the expir[ation] date" of July 1, 1982 had represented a move toward greater GATT conformity. As a consequence, the panel found that the 1982 postponement of the expiration date by four years "constituted a reversal of this move towards greater GATT conformity and, therefore, increased the degree of inconsistency with the General Agreement.

Because a contracting party's expectations must be "reasonable," ultimately a proposed amendment's consistency with GATT must be measured against the purposes underlying the Protocol, the General Agreement, and GATT's antidumping provisions. Given the choice between two possible interpretations, the interpretation that remains faithful to these purposes is the appropriate one. The Protocol's primary purpose is to provide a "temporary dispensation to enable contracting parties to apply . . . the General Agreement without changing existing

203 See id., reprinted in BISD, supra note 1, at 74, 77 para. 7 (31st Supp. 1985).
204 See id., reprinted in BISD, supra note 1, at 74, 77 para. 8 (31st Supp. 1985).
205 See id., reprinted in BISD, supra note 1, at 74, 80 para. 17 (31st Supp. 1985). In particular, the European Communities noted that the United States gave repeated assurances during the Tokyo Round that the Manufacturing Clause would expire in 1982, eliminating any need to address concerns about the clause. See id., reprinted in BISD, supra note 1, at 74, 82-86 paras. 24-29 (31st Supp. 1985).
206 The following discussion of "reasonable expectations" should not be confused with the "reasonable expectations" approach used by GATT when considering "nullification and impairment" under GATT article XXIII. Under that analysis, nullification and impairment occur where "reasonable expectations" are frustrated, even though the measures are not inconsistent with the General Agreement. See Treatment by Germany of Imports of Sardines, GATT Doc. G/26 (1952) (Norway had reason to assume that it would not be treated less favorably by unilateral action of Germany), reprinted in BISD, supra note 1, at 53, 58 para. 16 (1st Supp. 1953); Australian Subsidy on Ammonium Sulphate, GATT Doc. CP.4/39 (1950) (nullification and "impairment would exist if the action of the Australian Government . . . could not reasonably have been anticipated by the Chilean Government"), reprinted in II BISD, supra note 1, at 188, 193-94 para. 12 (1952).
208 Id. (emphasis added).
209 Id.
legislation or acting inconsistently with it,"211 while GATT’s purposes include providing “security and predictability in trade relations among contracting parties.”212 As for antidumping, one of the basic goals of these provisions is to combat unfair competition by imposing duties that “level the playing field”213 among competing nations. Thus any test used to determine whether an amendment is a movement away from greater GATT consistency must be faithful to these purposes.

Thus, the standard that most appropriately reflects the GATT law on amending preexisting legislation is that a contracting party may not amend its grandfathered legislation in a way that makes the new law more restrictive than any version of that law in effect since October 30, 1947, when the Protocol opened for signature.214 Whether a law is “more restrictive” must be determined in light of practice215 and in accordance with the purposes behind the Protocol and the General Agreement.216

3. Amendments to the 1916 Act

Under the foregoing analysis, GATT compatibility of the proposed changes in the Antidumping Act of 1916 varies with the terms of each particular amendment. A few of the proposed changes are movements toward greater consistency with GATT, while others are movements toward greater inconsistency. But before discussing the proposed amendments to the Act, it is necessary to discuss how the Act currently is inconsistent with GATT.217 Only then can the proposals be examined properly.

There are several ways in which the Act arguably is inconsistent

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213 See note 65 supra.
214 See Hansen & Vermulst, supra note 22, at 283.
215 See id. at 282.
217 Several commentators argue that the Act is not inconsistent with GATT. See, e.g., 1985 Hearing, supra note 19, at 63 (testimony of Peter D. Ehrenhaft, Partner, Hughes Hubbard & Reed) (no claim ever has been made that any of the provisions of Act contravenes GATT); 1980 Hearing, supra note 21, at 23 (statement of Peter Feller, Attorney, McClure & Trotter, Charles Verrill, Attorney, Patton, Boggs & Blow, and Gary Horlick, Attorney, Steptoe & Johnson) (neither Act nor proposed amendments is contrary to United States's obligations in GATT article VI); id. at 38 (statement of Peter D. Ehrenhaft, Partner, Hughes Hubbard & Reed) (no claim ever has been made by any foreign government or United States agency that existing Act contravenes Antidumping Code). If this is so, then the Act would be consistent with the General Agreement and would not be subject to the Protocol's grandfather clause protection. See Protocol of Provisional Application, supra note 29.
with GATT. First, GATT "allows only one remedy against dumping, that is, the imposition of antidumping duties." Yet the Act resorts to remedies not contemplated by GATT's article VI, including criminal penalties. Second, the Act's treble damage and criminal penalty provisions effectively treat imports from dumping nations less favorably than nonoffending imports of other countries, deviating from the GATT norm of "Most Favored Nation" treatment. Moreover, products of foreign origin are treated less favorably than products of domestic origin because comparable domestic antitrust laws include special intent requirements and various defenses that are absent from the Antidumping Act of 1916. Finally, because the Antidumping Act of 1916 allows private and government interference through the imposition of civil and criminal penalties, these laws are incongruous with the principle of trade liberalization and effectively function as additional nontariff barriers. The proposed amendments can be measured against this background.

Certain proposals would mark a clear movement away from greater consistency with GATT. For instance, injunctive relief is not part of the Antidumping Act of 1916. Given that such a remedy is inconsistent with article XI's limitations on import prohibitions, adding injunctive relief to the Act would be a movement away from a greater degree of consistency with GATT. Moreover, such a new, inconsistent remedy would not accord with the accepted practice of the contracting parties and would not further the Protocol's purpose of providing a "temporary dispensation" to existing legislation.

More importantly, the proposed amendments which alter the prima facie elements of the Act would move the statute further away from GATT compliance. Most of the proposed legislation would require only a showing of an intent to dump, rather than require proof of a specific

218 Hansen & Vermulst, supra note 22, at 304. But see text accompanying notes 243-63 infra.
219 For a discussion of this principle, see note 44 and accompanying text supra. Specifically, this treatment is a violation of article I. See GATT, supra note 1, art. I; cf. A. Lowenfeld, supra note 2, at 155 (traditional dumping remedies are deviation from principle of nondiscrimination).
222 See text accompanying notes 35-42 supra.
223 See text accompanying notes 264-77 infra.
224 See text accompanying note 211 supra.
225 See text accompanying notes 148-57 supra.
intent to injure competition or monopolize.226 Furthermore, these bills would reduce the dumping differential from "a price substantially less" to "a price less" than that of the country of origin.227 Finally, most of the bills would eliminate the requirement that the dumped item be "commonly and systematically" imported.228

Substantially altering the prima facie elements would transform the Act from a "dead letter"229 into an effective means to remedy dumping. Thus, these proposals would violate the "commercial impact" test by changing the current trade environment from one in which foreign dumpers are not subject in practice to any liability230 to one in which they are exposed to a significant amount of liability.231

Under a "reasonable expectations" analysis, altering the elements of the Act likewise would be viewed as a movement away from GATT consistency. Currently, only the United States provides a private right of action to redress foreign dumping.232 A newly empowered Antidumping Act of 1916 with a reduced intent requirement likely would be intolerable to the other contracting parties who have resorted to the traditional remedy of imposing a duty equal to the margin of dumping.233

Finally, altering the Act's elements would not be in accordance with the purposes of the Protocol or the General Agreement. Conceived as only a temporary dispensation,234 the Protocol would be used as a means to reawaken a dead law that, in effect, would be a replacement for, or an addition to, the currently sanctioned remedy for dumping—a duty equal to the margin of dumping. Contracting parties cannot manipulate their "grandfathered rights" by extending the use of the Protocol beyond the functions it was originally designed to serve.235 Furthermore, GATT's goal of providing predictability and security in trading relations would

226 See text accompanying notes 149-51 supra; note 151 supra.
227 See text accompanying notes 156-57 supra.
228 See text accompanying notes 154-55 supra.
229 See text accompanying note 126 supra.
230 See text accompanying notes 121-26 supra.
231 See Hansen & Vermulst, supra note 22, at 279.
233 See 1986 Hearing, supra note 12, at 27 (testimony of Alan Holmer, General Counsel, United States Trade Representative) ("[W]e should think twice before we expose our exporters . . . to the risk of embargoes or extra antidumping penalties. I suspect our trading partners would be happy to match us dollar for dollar and injunction for injunction.").
234 See text accompanying notes 28-29, 211 supra.
not be advanced by these proposals. Using the Protocol as a vehicle to change the Act’s elements would create insecurity among trading parties because the same margin of dumping by foreign industries in any other nation would result in an antidumping duty, while dumping in the United States would subject the foreign industry to protracted litigation with an American industry seeking monetary compensation in addition to administrative relief.

In defense of the proposed amendments, it can be argued that certain provisions would move the Antidumping Act of 1916 closer to GATT. By itself, an amendment that both would reduce the civil penalty from treble to single damages and would eliminate the criminal penalty from the Act would be a movement toward greater consistency with GATT. These changes would further the purposes of the General Agreement by ensuring predictability and security in trading relations and would parallel the general purpose of antidumping laws by leveling the playing field. The current GATT remedy for injurious dumping is a duty equal to the margin of dumping and a damage reduction to a level parallel to the margin of dumping would be a movement toward greater consistency. But to argue that such changes alone would result in a move closer to GATT fails to recognize that such provisions only appear in proposals that also radically depart from GATT, such as easing the prima facie elements of the Act.

The various proposals for altering the elements of the Antidumping Act of 1916 would fail to pass the “commercial impact” test, would not advance the aims of the Protocol or the General Agreement, and would undermine the “reasonable expectations” of the United States’s trading partners. For these reasons, substantially altering the prima facie elements of the Antidumping Act of 1916 would be a movement away from a greater consistency with GATT. The proposed amendments herefore would not be protected as “grandfathered legislation” under the Protocol.

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236 See, e.g., 1983 Hearing, supra note 21, at 65-66 (testimony of Richard O. Cunningham, Partner, Steptoe & Johnson) (“Surely our trading partners would not argue that a reduction in the recoverable damage is such a change in the 1916 Act as to make it more detrimental to their trading interests.”).

237 See note 153 and accompanying text supra.

238 See note 152 and accompanying text supra.

239 See United States Manufacturing Clause, GATT Doc. L/5609 (1989), reprinted in BISD, supra note 1, at 74, 90 para. 39 (31st Supp. 1985) (basic aim of General Agreement is security and predictability in trade relations). In particular, the availability of treble damages or criminal penalties in only one nation undermines the security in trading relations among all parties. Eliminating these remedies would further the purposes of predictability and security by creating greater uniformity in application of antidumping laws among contracting parties.


241 See text accompanying note 84 supra.

col. This Note now examines the specific hurdles that a private right of action must clear to be consistent with GATT.

B. Article VI and Antidumping Duties

GATT article VI, which contains the remedy provision for dumping, states that "to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product."\(^{243}\) One of the fundamental questions that must be addressed before attempting to fashion a private right of action that complies with GATT is whether article VI provides the exclusive remedy for dumping. The congressional hearings on the proposed bills are replete with references to the article VI antidumping duty as the only permissible remedy to counteract dumping.\(^{244}\) Article VI's limitation on the use of a duty equal to the margin of dumping is reinforced by the Antidumping Code of 1979, which states that "[n]o specific action against dumping of exports from another Party can be taken except in accordance with the provisions of the General Agreement, as interpreted by this Agreement."\(^{245}\) This language implies that GATT contains all available remedies for dumping. Still, simple reliance on the ordinary meaning of article VI of GATT fails to resolve the question. Article VI merely states that a contracting party "may levy on any dumped product an anti-dumping duty,"\(^{246}\) leaving doubt as to whether it simply provides a remedy to counteract dumping or the remedy against dumping. Because the language of the General Agreement is ambiguous, an examination of the preparatory work, context, and purpose of the provision is necessary to aid in its interpretation.\(^{247}\)

\(^{243}\) GATT, supra note 1, art. VI, para. 2. For a discussion of the GATT antidumping scheme, see text accompanying notes 82-95 supra.

\(^{244}\) See, e.g., 1986 Hearing, supra note 12, at 23 (statement of Sen. Heinz) (some argue that dumping duties are only remedy for dumping); id. at 214 (testimony of Charlene Barshefsky, Partner, Steptoe & Johnson) (duties are exclusive remedy); see also Fourth Annual Judicial Conference of the United States Court of Appeals for the Federal Court, 112 F.R.D. 439, 545 (1986) (statement of Charlene Barshefsky, Partner, Steptoe & Johnson) (GATT provides that no measures other than antidumping duties can be applied to offset dumping); Hansen & Vermulst, supra note 22, at 304 (GATT allows only one remedy against dumping, an antidumping duty).

\(^{245}\) Antidumping Code of 1979, supra note 90, art. 16, para. 1.

\(^{246}\) GATT, supra note 1, art. VI, para. 2 (emphasis added).

\(^{247}\) This approach is analogous to the general method of treaty interpretation under articles 31 and 32 of the Vienna Convention. See Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 8 I.L.M. 679 (1969) [hereinafter Vienna Convention]. The United States has signed, but not ratified, the Vienna Convention.

Preparatory work, or travaux préparatoires, refers to the background materials utilized to afford useful evidence regarding the intentions of the parties. See I. Sinclair, The Vienna Convention on the Law of Treaties 116, 141 (2d ed. 1984). Recourse may be had to preparatory work of a treaty to confirm its meaning when a good faith interpretation of the ordinary mean-
The preparatory work of GATT is somewhat ambiguous regarding whether measures other than a duty may be used to counteract injurious dumping. During the drafting of article VI, one delegate proposed adding the words “and measures” after the term “antidumping duty.” Another delegate argued that quotas should be allowed in certain cases of dumping. But these measures failed to receive approval and were not incorporated into article VI, suggesting that the delegates intended to exclude other countermeasures against dumping. Still, it is apparent that some countries felt that remedies for dumping “should not be limited to duties as such but should permit the adoption of other countermeasures.”

Any confusion caused by this conflicting evidence is lessened by the context of article VI, which makes clear that measures other than duties are permissible to counteract dumping. According to a 1948 report,

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251 Reports of Comm. and Principal Sub-Comms., U.N. Doc. ICITO I/8 (1948). This document was drafted at the conclusion of the Havana negotiations for the formation of the International Trade Organization. Documents from the Havana conferences have been used frequently as a means of interpreting GATT. See, e.g., Japan—Restrictions on Imports of Certain Agricultural Products, GATT Doc. L/6253 (1988), reprinted in BISD, supra note 1, at 163, 222 para. 5.1.2 (35th Supp. 1989); Canada—Import, Distribution and Sale of Alco-
the committee responsible for the drafting of the antidumping article agreed to delete a portion of an earlier draft which would have prohibited the use of measures other than antidumping duties. It made this deletion with the "definite understanding that measures other than compensatory anti-dumping . . . duties may not be applied to counteract dumping . . . except in so far as such other measures are permitted under other provisions of the charter." From this background, it can be argued that article VI contains an exception to GATT obligations for antidumping duties. Nevertheless, alternative measures also can be used to counteract dumping provided they do not violate other GATT provisions.

But even if other remedies are available, there remains a critical difference. Because article VI is a permitted exception within GATT, duties levied pursuant to it comply with all of GATT's provisions. However, if a country intends to use other types of measures to counteract dumping, these measures must comply fully with the General Agreement. For example, if a product is being dumped in a particular country, and tariffs on that product are not bound in a GATT Schedule, the tariffs arguably could be raised without limitation in counteracting dumping provided that the tariffs were applied on a "Most Favored Nation" basis. But a country could not impose quantitative restrictions because that would violate article XI. The focus shifts beyond

holic Drinks by Canadian Provincial Marketing Agencies, GATT Doc. L/6304 (1988), reprinted in BISD, supra note 1, at 37, 86 para. 4.9 (35th Supp. 1989); Special Import Taxes Instituted by Greece, GATT Doc. G/25 (1952), reprinted in BISD, supra note 1, at 48, 49-50 para. 6 (1st Supp. 1953); J. Jackson, World Trade, supra note 2, at 45-46. Accordingly, this Note treats documents drafted pursuant to the Havana conferences as part of GATT's context.


See id. at 403.

See id. at 411.

If a product is "bound" in a GATT "Schedule," the contracting party has made a commitment to levy no more than a stated tariff on that particular item. See id. at 201.

See id. at 411-12 (citing Swedish Antidumping Duties, GATT Doc. L/328 (1955), reprinted in BISD, supra note 1, at 81 (3d Supp. 1955)).

See id. at 412; Interview with Andreas Lowenfeld, Professor of Law, New York University School of Law, in New York City (April 13, 1990). For a discussion of the Most Favored Nation principle, see note 44 and accompanying text supra.

See J. Jackson, World Trade, supra note 2, at 412 n.4.
article VI to include the other provisions of GATT as well.\textsuperscript{261}

The Antidumping Code of 1979 suggests a similar reading of GATT.\textsuperscript{262} Although article 16 of the Antidumping Code intimates that an antidumping duty is the only "specific action" permissible to counteract dumping, it also states, "This [provision] is not intended to preclude action under other relevant provisions of the General Agreement, as appropriate."\textsuperscript{263}

While the text of article VI is ambiguous as to whether an antidumping duty is the exclusive remedy to counteract dumping, the context and subsequent interpretations show that article VI permits alternative measures to counteract dumping provided that such measures comply with all other provisions of GATT. Specifically, the 1948 report and article 16 of the Antidumping Code of 1979 demonstrate that other measures compatible with GATT also can be used to counteract dumping. Thus, article VI is not a barrier to a private right of action against dumping, provided that such a remedy is drafted to comply with all other provisions of GATT.

\textbf{C. Article XI and Injunctive Relief}

Although there is some question as to whether a private right of action for damages is permissible under article VI of GATT, granting injunctive relief clearly is not allowable under the General Agreement. Such relief would violate article XI by imposing a prohibition against the importation of a particular product, which is recognized widely by both opponents and proponents of a private right of action.\textsuperscript{264}

With few exceptions, the General Agreement does not allow import prohibitions.\textsuperscript{265} Under article XI, "[n]o prohibitions or restrictions other

\textsuperscript{261} This restriction also alleviates some of the concern about an antidumping "free-for-all," in which a government would be free to use any means that it chooses to punish dumping, including imprisonment. See 1986 Hearing, supra note 12, at 32 (testimony of Alan F. Holmer, General Counsel Office of United States Trade Representative).

\textsuperscript{262} See Antidumping Code of 1979, supra note 90, art. 16 n.1.

\textsuperscript{263} Id. art. 16 n.16.


\textsuperscript{265} Exceptions are made for critical shortages of foodstuffs, agricultural and fisheries products under certain conditions, and prohibitions necessary to the application of standards or regulations for the classification, grading, or marketing of commodities. See GATT, supra note 1, art. XI, para. 2; see also A. Lowenfeld, supra note 2, at 25 (quotas inapplicable to agricultural products subject to price-support scheme). Other articles of GATT provide exceptions for balance of payments problems and exceptions for developing countries. See
than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party."\(^{266}\)

The fact that injunctive relief is incompatible with article XI follows from the GATT Dispute Panel's decision striking down a United States prohibition on Canadian tuna imports.\(^{267}\) In 1979, the United States prohibited all tuna imports from Canada.\(^{268}\) This prohibition was comprehensive, excluding the imports of all tuna and tuna products from Canada.\(^{269}\) The Dispute Panel held that this was a clear violation of article XI.\(^{270}\) It found that the United States's decision "prohibit[ing] with immediate effect the entry for consumption . . . of tuna and tuna products from Canada constituted a prohibition in terms of Article XI:1."\(^{271}\) Injunctive relief essentially has the same impermissible effects. It thus would be contrary to article XI.

This conclusion is bolstered by the decision in United States Manufacturing Clause.\(^{272}\) Recall that the statute at issue in that decision prohibited the importation of certain literary materials unless they had been manufactured in the United States or Canada.\(^{273}\) That the statute also

\footnotesize{GATT, supra note 1, art. XII (balance of payments); id. art. XVIII (developing countries); K. Dam, supra note 25, at 20-21 (exceptions for balance of payments and to further economic development); J. Jackson, World Trading System, supra note 2, at 129 (quotas made inapplicable in case of serious balance of payments difficulties); A. Lowenfeld, supra note 2, at 26 (same). For a discussion of the policies underlying the general disfavor for quotas, see J. Jackson, World Trade, supra note 2, at 312-13; J. Jackson, World Trading System, supra note 2, at 116.}

\(^{266}\) GATT, supra note 1, art. XI, para. 1. Unlike other provisions of GATT, article XI does not refer to laws or regulations but refers instead to measures. See Japan—Trade in Semiconductors, GATT Doc. L/6309 (1988), reprinted in BISD, supra note 1, at 116, 153-54 (35th Supp. 1989). This reference implies that any measure instituted or maintained by a contracting party that restricts the importation of any foreign product is covered by its terms. See id., reprinted in BISD, supra note 1, at 116, 154 (35th Supp. 1989). This broad interpretation is consistent with one of the aims of article XI: protecting the contracting parties' expectations that competitive conditions exist in trading relations. See EEC—Restrictions on Imports of Apples—Complaint by the U.S., GATT Doc. L/6513 (1989) (article XI protects expectations of contracting parties as to competitive conditions, not trade volumes), reprinted in BISD, supra note 1, at 135, 167 para. 5.25 (36th Supp. 1990).


\(^{268}\) See id., reprinted in BISD, supra note 1, at 91, 92 (29th Supp. 1983).

\(^{269}\) See id.

\(^{270}\) See id., reprinted in BISD, supra note 1, at 91, 107 (29th Supp. 1983).

\(^{271}\) Id. For a similar finding with respect to export prohibitions, see Canada—Measures Affecting Exports of Unprocessed Herring and Salmon, GATT Doc. L/6268 (1988) (export prohibitions are contrary to article XI), reprinted in BISD, supra note 1, at 98, 111-12 para. 4.1 (35th Supp. 1989).


\(^{273}\) See United States Manufacturing Clause, GATT Doc. L/5609 (1984), reprinted in
violates article XI is evidenced by the treatment it received by the parties and by the Panel. The United States conceded that it violated article XI, while the Panel, in an extremely brief discussion, likewise found this prohibition of imports to be inconsistent with article XI.

The ineluctable conclusion drawn from the language of subsequent interpretations of article XI is that injunctive relief, either as a primary or secondary remedy, would violate GATT. This conclusion therefore calls into question many of the proposed bills that provide for such relief. The United States thus has the obligation to prevent the implementation of such import prohibitions. In sum, it is clear that the proposed private right of action violates article XI of GATT. However, it is less clear whether the proposals run afoul of article III's requirement of national treatment.

D. Article III and National Treatment

GATT article III requires that contracting parties treat imported products "no less favorably than that [treatment] accorded to like products of national origin" with respect to all laws, regulations, and requirements affecting their internal sale, purchase, distribution, or use. Thus, any law that treats foreign products less favorably than domestic products violates GATT. One of the major goals of the national treatment provision is to prevent domestic taxes and regulatory schemes from being used as protectionist measures that would defeat the purpose of the tariff agreements. Article III seeks to provide equal conditions of competition once goods clear customs, thereby protecting the benefits accruing from tariff concessions. Thus, its fundamental

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275 See id. ("[T]he prohibition of imports of certain printed matter provided for in the Manufacturing Clause [is] inconsistent with paragraph 1 of Article XI."), reprinted in BISD, supra note 1, at 74, 88 (31 Supp. 1985).
276 See text accompanying notes supra.
278 GATT, supra note 1, art. III, para. 4.
279 See J. Jackson, World Trading System, supra note 2, at 189; see also J. Jackson, World Trade, supra note 2, at 277 (purposes of national treatment article include prevention of use of regulations as system of protection and protection of tariff concessions).
philosophy is to ensure a certain trade neutrality and to reinforce trade liberalization through the minimization of governmental interference and distortion of international transactions.

The language of article III is broad in scope, governing any laws, regulations, and requirements affecting the sale, purchase, transportation, distribution, or use of products. It uses the word “affecting,” implying that article III covers not only the laws and regulations that directly govern the conditions of sale or purchase, but also any laws or regulations that might modify adversely the conditions of competition between domestic and imported products in internal markets. The question of fidelity to the national treatment principle therefore must focus both on laws affecting imports directly and on the procedural elements of those laws that operate unfairly.

1. **Substantive Import Discrimination**

Granting a private right of action for dumping could run afoul of article III by treating actions that would be permissible if practiced by a domestic party as illegal if practiced by a foreign party. That is, “the same conduct by two firms, one domestic and one foreign, could be deemed unfair competition subject to treble damages in the case of the foreign firm, and not punishable at all in the case of the domestic firm.” Therefore, for a private right of action to comply with GATT, the national treatment test somehow must be met.

One means by which the national treatment obligation of article III

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282 See J. Jackson & W. Davey, supra note 4, at 483.

283 See GATT, supra note 1, art. III, para. 1.


285 1986 Hearing, supra note 12, at 31 (statement of Alan F. Holmer, General Counsel, Office of the United States Trade Representative).

286 See id. at 54 (amendments must show that foreign firms and their products are on equal footing with United States firms and their products in accordance with article III of GATT); 1985 Hearing, supra note 19, at 63 (testimony of Peter D. Ehrenhaft, Partner, Hughes Hubbard & Reed) (amendments should not breach article III to extent that it parallels comparable domestic law); 1980 Hearing, supra note 21, at 106 (testimony of Seymour Rubin, Member of Board of Directors, Consumers for World Trade) (“[S]ubjecting imported products to treatment especially reserved for such products and not equally applicable to products of national origin would see[m], on any reasonable reading, to conflict with the requirement of Article III(4) of the GATT . . . .”); Almstedt, supra note 22, at 780 (amendments to Act contravene national treatment test).
can be met while still providing a private right of action against dumping is to structure the right so that it is analogous to some currently existing domestic remedy for price discrimination or predation.\textsuperscript{287} The most apparent analogue is the Robinson-Patman Act,\textsuperscript{288} which has been noted both by scholars\textsuperscript{289} and by congressional proponents of the bills.\textsuperscript{290} Among the available Robinson-Patman remedies, the so-called "primary line" test is the domestic price discrimination law most closely paralleling the proposed remedies. Under the "primary line"\textsuperscript{291} test, it is unlawful for a seller to discriminate in the price charged to purchasers of like commodities where the effect may be to injure, destroy, or prevent competition.\textsuperscript{292} Thus, price discrimination that has the effect of driving competitors out of the market is prohibited.\textsuperscript{293}

To distinguish between permissible vigorous price competition and prohibited price predation, courts use several differing approaches.\textsuperscript{294}

\begin{itemize}
\item \textsuperscript{287} See 1980 Hearing, supra note 21, at 39 (letter from Peter Ehrenhaft, Partner, Hughes Hubbard & Reed).
\item \textsuperscript{288} 15 U.S.C. § 13 (1988). The Robinson-Patman Act provides in pertinent part:

\begin{quote}
It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination . . . .
\end{quote}

Id.
\item \textsuperscript{289} One proponent of a private right of action has argued, "The creation of a remedy addressed to imported goods causing injury to competition . . . should not breach [the national treatment test] to the extent that it parallels comparable domestic law. Mere extension of the Robinson-Patman Act to international trade would be one way to achieve that result." 1980 Hearing, supra note 21, at 39 (letter from Peter Ehrenhaft, Partner, Hughes Hubbard & Reed). But see R. Dale, Anti-dumping Law in a Liberal Trade Order 46 (1980) (Robinson-Patman inappropriate as model to be applied to international price discrimination).
\item \textsuperscript{290} See S. 223, 96th Cong., 1st Sess. § 501 (1979); see also 1980 Hearing, supra note 21, at 23 n.1 (testimony of Peter Feller, McClure & Trotter, Charles Verrill, Patten, Boggs & Blow, and Gary Horlick, Steptoe & Johnson) (S. 223 effectively would make Robinson-Patman Act applicable to imports).
\item \textsuperscript{291} By "primary line" injury, courts refer to injury experienced by competitors of the seller. See Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 702 (1967) (primary line cases involve sellers' markets); E. Sullivan & J. Harrison, Understanding Antitrust and Its Economic Implications 308 (1988) (primary line cases concern discrimination injuring seller's competitors). It also may be described as "horizontal competitive effects." L. Sullivan, Handbook of the Law of Antitrust 683-89 (1977).
\item \textsuperscript{292} See 15 U.S.C. § 13(a); L. Sullivan, supra note 291, at 677.
\item \textsuperscript{293} See L. Sullivan, supra note 291, at 683; see also E. Sullivan & J. Harrison, supra note 291, at 323 (harm may be shown by evidence of competitive injury or of predatory intent).
\item \textsuperscript{294} Although a complete synchronization between the tests for price predation under Robinson-Patman and the same tests under § 2 of the Sherman Act, 15 U.S.C. § 2, does not exist, several circuits have indicated that the analysis for each is essentially the same. See P. Areeda & L. Kaplow, Antitrust Analysis: Problems, Text, Cases 942 (1988); E. Fox & L.
Some focus on predatory intent as a means of inferring anticompetitive effects; others focus on sales below cost, while still others focus on the potential for future monopolization and the likelihood of recoupment. Regardless of the focus, courts in general look to several factors


295 See, e.g., Utah Pie Co., 386 U.S. at 702 (existence of predatory intent might bear on likelihood of injury to competition); McGahee v. Northern Propane Gas Co., 858 F.2d 1487, 1500 (11th Cir. 1988) (subjective intent relevant to determine predatory pricing); D.E. Rogers, 718 F.2d at 1439 (Robinson-Patman Act plaintiff may prove anticompetitive effect inferentially from proof of defendant's anticompetitive intent); O. Hommel Co., 659 F.2d at 347 (analysis must focus on predatory intent to infer competitive harm).

Many courts, however, strongly disfavor reliance on intent as a basis of determining predatory pricing. See, e.g., A.A. Poultry Farms, 881 F.2d at 1402 (intent removed as basis of liability in predatory pricing cases (citing P. Areeda, 7 Antitrust Law ¶ 1506 (1986))); Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 232 (1st Cir. 1983) ("intent to harm" is too vague); MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1113 (7th Cir.) (test based on intent unworkable), cert. denied, 464 U.S. 891 (1983).

296 See, e.g., Barry Wright Corp., 724 F.2d at 236 (price above incremental and average cost per se lawful); MCI, 708 F.2d at 1112 (no reliable way to determine whether predatory pricing has occurred without some comparison between prices charged and cost of production); Hanson v. Shell Oil Co., 541 F.2d 1352, 1359 (9th Cir. 1976) (pricing below marginal or average variable cost fails to establish prima facie case under Sherman Act), cert. denied, 429 U.S. 1074 (1977); see also Areeda & Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 Harv. L. Rev. 697, 733 (1975) (prices at or above marginal cost should be conclusively presumed nonpredatory). But see Transamerica Computer Co. v. IBM Corp., 698 F.2d 1377, 1388 (9th Cir.) (cost-price relation not exclusive method of proving predation), cert. denied, 464 U.S. 955 (1983); Scherer, Predatory Pricing and the Sherman Act: A Comment, 89 Harv. L. Rev. 869, 890 (1976) ("[i]t is unrealistic and even analytically wrong to apply a simple short-run price-cost rule for determining whether exclusionary pricing by a monopolist is socially undesirable and therefore predatory.").

The Supreme Court has defined predatory pricing as "pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run." Cargill, Inc. v. Monfort, Inc., 479 U.S. 104, 117 (1986); see also Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 585 n.8 (1985) (predatory pricing includes "(i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure of cost")]. But the Court explicitly has refused to consider whether recovery should ever be available when the pricing in question is above some measure of incremental cost, see Cargill, 479 U.S. at 117 n.12; Matsushita, 475 U.S. at 585 n.9, or whether above-cost pricing coupled with predatory intent is ever sufficient to state a claim of predation. See Cargill, 479 U.S. at 116 n.12.

297 See A.A. Poultry Farms, 881 F.2d at 1401 (contemporary cases strongly favor using likelihood of future recoupment as basis for determining predatory pricing); Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1415 (7th Cir. 1989) (reduced likelihood of predatory low price if rivals survive or entry occurs (citing Areeda, Monopolization, Mergers, and
when determining whether a "primary line" injury to sellers has occurred.\textsuperscript{298} Factors supporting a finding of price discrimination include: a large market share for the seller; evidence of aggressive stances toward weaker rivals; deep and sustained undercutting; and the demise of rivals.\textsuperscript{299} The Robinson-Patman Act allows a defendant to raise the affirmative defenses of cost justification,\textsuperscript{300} meeting competition,\textsuperscript{301} and general marketability concerns\textsuperscript{302} to defeat such a finding.

Under a Robinson-Patman Act analogue, only certain types of international dumping could be actionable. As a practical matter, dumping that injures a domestic industry but is either procompetitive or competitively neutral could not be subject to a private remedy.\textsuperscript{303} Though a domestic industry may be injured by dumping, this activity would not be actionable under a Robinson-Patman analogue as long as competition is not reduced, trade is not restrained, or a monopoly is not created.\textsuperscript{304}

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{298} Overall, the focus of the inquiry into primary line injury is on the probable lessening of competition—meaning here the creation or increase in market power. Interview with Eleanor Fox, Professor of Law, New York University School of Law, in New York City (May 4, 1990).
  \item \textsuperscript{299} L. Sullivan, supra note 291, at 688.
  \item \textsuperscript{300} Price differentials that make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from differing methods or quantities are excepted. 15 U.S.C. § 13(a) (1988); see United States v. Borden Co., 370 U.S. 460, 467 (1962) (Robinson-Patman Act contemplates showing of actual cost differences).
  \item \textsuperscript{301} A seller can rebut a prima facie case of price discrimination by showing that a lower price or that the furnishing of services or facilities to purchasers was in good faith needed to meet an equally low price or services of a competitor. See 15 U.S.C. § 13(b); P. Areeda & L. Kaplow, supra note 294, at 969-79; E. Sullivan & J. Harrison, supra note 291, at 328-30; L. Sullivan, supra note 291, at 702; Applebaum & Grace, supra note 220, at 509-10.
  \item \textsuperscript{302} Discrimination is allowed where it reflects "changing conditions affecting the market for or the marketability of the goods concerned." 15 U.S.C. § 13(a). This defense, though rarely used, see E. Sullivan & J. Harrison, supra note 291, at 309, permits distress sales and sales below normal prices to move obsolete inventory. See Applebaum & Grace, supra note 220, at 510.
  \item \textsuperscript{303} See 15 U.S.C. § 13(a) (domestic price discrimination only unlawful if effect is to lessen competition substantially or to tend to create monopoly).
  \item \textsuperscript{304} This test means that a mere "material injury" standard for dumping would be insufficient to satisfy article III. "[O]ur antitrust laws concern themselves with substantial injury to
\end{itemize}
\end{footnotesize}
Moreover, applying a Robinson-Patman Act analogue to international dumping would mean that the affirmative, procompetitive defenses of cost justification, meeting competition, and changing marketability concerns would be available to defendants. An international price discrimination charge thus could be defended on the grounds that the lower price "was made in good faith to meet an equally low price of a competitor" or that the price reflects due allowance for differences in cost.

Given this overview of domestic antitrust law, it is clear that the vast majority of bills proposed by Congress that offer a private right of action against dumping would not meet the national treatment test because the bills provide for remedies in instances where competition flourishes. Indeed, only six of the eighteen proposed bills arguably could meet the national treatment test of article III, because only these six include in whole or in part an anticompetitive component to the injury requirement comparable to that of the Robinson-Patman Act. And only one of these bills includes the Robinson-Patman procompetitive defenses. Clearly then, the majority of the proposed bills would not pass article III scrutiny on the basis of their substantive content alone. And even those that might survive such scrutiny contain procedural defects, rendering them suspect.

2. **Procedural Import Discrimination**

   Article III applies to all laws, regulations, and requirements affecting the internal sale of imported products, thus making no distinction

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305 See 1987 Hearings, supra note 21, at 932 (report of Antitrust Section of ABA on S. 1655); 1986 Hearing, supra note 12, at 165 (same); 1983 Hearing, supra note 21, at 80 (testimony of Joel Davidow, Partner, Mudge Rose Guthrie Alexander & Ferdon); see also W. Davy, Antidumping Laws in the GATT and the EC, in Antidumping Law and Practice 295, 297-98 (J. Jackson & E. Vermulst eds. 1989) (comparing differences in defenses between Robinson-Patman Act and antidumping laws for purposes of article III analysis).

306 1986 Hearing, supra note 12, at 165 (report of Antitrust Section of ABA on S. 1655); see note 301 and accompanying text supra.

307 See note 300 and accompanying text supra.

308 See text accompanying notes 158-60 supra. Under Robinson-Patman, only discrimination that has the effect of substantially lessening competition or tending to create a monopoly is unlawful. 15 U.S.C. § 13(a).

309 S. 223, 96th Cong., 1st Sess. § 501 (1979); see note 159 supra.


between substantive and procedural laws. Any laws "which might adversely modify the conditions of competition between the domestic and imported products" fall within its ambit. To comply fully with GATT's national treatment requirement, therefore, the procedures under parallel domestic laws must be compared with the procedures of the proposed private right of action to determine whether imported products are accorded less favorable treatment. If a procedure exposes "a particular imported product to a risk of discrimination [it] constitutes, by itself, a form of discrimination."

This issue was addressed directly in the recent Dispute Panel decision in United States—Section 337 of the Tariff Act of 1930. The European Economic Community challenged the United States's administrative decisionmaking process under section 337 of the Tariff Act of 1930 as violative of article III. Section 337 declares unlawful unfair competition and unfair acts in the importation of articles, where the effect is to destroy or injure a domestic industry, "prevent the establishment of such an industry," or "restrain or monopolize trade and commerce in the United States." The European Community argued that section 337 violated article III because an alleged domestic patent infringer was subject only to traditional federal district court proceedings, while action against an alleged foreign patent infringer also could be taken under the special administrative procedures of the United States International Trade Commission (USITC). The Panel agreed with the

313 Id. (quoting Italian Discrimination Against Imported Agricultural Machinery, GATT Doc. L/833 (1958), reprinted in BISD, supra note 1, at 60, 64 para. 12 (7th Supp. 1959)). The Dispute Panel carefully noted that the focus is not on whether the laws actually result in discriminatory treatment, but whether the laws are capable of according less favorable treatment to imported products. Id., reprinted in BISD, supra note 1, at 345, 386-87 para. 5.12-.13 (36th Supp. 1990). This approach allows a contracting party to use GATT as a means to prevent discriminatory treatment, not simply to rectify it. Id., reprinted in BISD, supra note 1, at 345, 387 para. 5.13 (36th Supp. 1990).
European Community's interpretation and found the procedures to be violative of article III.\textsuperscript{320}

Two aspects of this decision are particularly relevant to a private right of action against dumping. First, the Panel found the possibility of proceedings in two forums to be discriminatory against foreign imports.\textsuperscript{321} It stated, "While the likelihood of having to defend ... in two fora is small, the existence of the possibility is inherently less favourable than being faced with having to conduct a defence in only one of those fora."\textsuperscript{322} Second, the Panel found that the availability of a forum in which to challenge imported products that is not available to those challenging products of American origin accords imported products less favorable treatment than their domestic counterparts.\textsuperscript{323}

These principles show that the proposed bills would discriminate against imported products and thus would violate article III. First, less favorable treatment is accorded to imported products when petitioners are allowed to seek monetary damages in federal district court or file a complaint with the Department of Commerce for the imposition of an antidumping duty against the dumper.\textsuperscript{324} In contrast, a complainant claiming domestic price discrimination under the Robinson-Patman Act is limited to bringing the action in federal court, with the Federal Trade Commission being the tribunal of first instance.\textsuperscript{325} Providing complainants with a choice of forums against a foreign dumper with no corresponding choice against domestic producers is less favorable treatment in violation of article III.\textsuperscript{326}

A crucial implication of the choice of forum disparity is that a for-

\textsuperscript{320} The Panel relied on the following factors in reaching its conclusion: parties challenging imported products were given a choice of forum, while parties challenging domestic products were not given this choice; foreign importers were given more stringent time limits than domestic producers; only foreign importers were denied the ability to counterclaim; while a general exclusion order is available in United States International Trade Commission proceedings against imports, no such remedy is available in federal court; exclusion orders are enforced automatically; and foreign importers may be defendants in proceedings before the USITC and in federal district court. Id., reprinted in BISD, supra note 1, at 345, 391 para. 5.20 (36th Supp. 1990).

\textsuperscript{321} See id., reprinted in BISD, supra note 1, at 345, 390 para. 5.19 (36th Supp. 1990).

\textsuperscript{322} Id.

\textsuperscript{323} See id.

\textsuperscript{324} See S. 2408, 99th Cong., 2d Sess. § (d), 132 Cong. Rec. S330 (daily ed. May 6, 1986) (petitioner may elect to allow imposition of duties or preserve right to seek damages from foreign producers); text accompanying notes 161-62 supra (discussing possible remedies).


eign dumper may be required to defend itself in two simultaneous pro-
ceedings.\textsuperscript{327} Since the private right of action against dumping does not displace the existing remedy of an antidumping duty,\textsuperscript{328} a complainant could bring an action in federal court seeking monetary and equitable relief while also filing a complaint before the Department of Commerce requesting the assessment of an antidumping duty.\textsuperscript{329} Such an option is not available to parties challenging domestic producers. As the Dispute Panel in \textit{United States—Section 337} found, the possibility that importers of challenged products may have to defend themselves both before the USITC and in federal district court while no such corresponding exposure exists with respect to products of domestic origin, accords less favorable treatment to imported products as opposed to like products of American origin.\textsuperscript{330}

Plaintiffs challenging imported products also would have an eviden-
tiary advantage that is not available to be used against domestic produ-
cers.\textsuperscript{331} Such plaintiffs would be able to use a final administrative determination that dumping and/or domestic injury had occurred as prima facie evidence in a concurrent or subsequent private civil action,\textsuperscript{332} while plaintiffs challenging domestic producers lack this evidentiary advantage because separate administrative hearings on domestic price discrimi-
nation do not exist.

Finally, problems of discriminatory enforcement exist. An interna-
tional Robinson-Patman analogue may be enforced more vigorously be-
cause antidumping laws are enforced more aggressively than the Robinson-Patman Act.\textsuperscript{333} Thus, de facto discrimination would result.\textsuperscript{334}

\textsuperscript{327} See id., reprinted in BISD, supra note 1, at 345, 390 (36th Supp. 1990).
\textsuperscript{329} For a discussion of this latter procedure, see text accompanying notes 100-09 supra.
\textsuperscript{331} See 1987 Hearings, supra note 21, at 831-32 (report of Antitrust Section of ABA S. 1655); 1986 Hearing, supra note 12, at 164 (same).
\textsuperscript{333} See 1986 Hearing, supra note 12, at 28 (testimony of Alan F. Holmer, General Counsel, Office of the United States Trade Representative).
\textsuperscript{334} De facto discrimination occurs when a regulation is not facially discriminatory but has the effect of favoring domestic over imported products. See J. Jackson, World Trading Sys-
tem, supra note 2, at 192, 388 n.100; J. Jackson & W. Davey, supra note 4, at 496. Under article III, neither “facial” nor “as applied” forms of discrimination are permitted against
Although it is difficult to speculate on the nature of future enforcement procedures because of the relatively few Robinson-Patman actions as compared to the numerous antidumping actions, substantial likelihood of a "double standard" does exist.

Thus, even if the substantive aspects of a private right of action against dumping paralleled existing domestic legislation, a law that created a private right of action would violate GATT if it had the effect of affording protection to domestic products. Because a private right of action offers a choice of forums, double proceedings, evidentiary advantages, and unequal enforcement procedures, it violates article III by being procedurally discriminatory against imported products. Thus, a private right of action against dumping would be inconsistent with articles III and XI and would not be protected under the Protocol. The general exception provision of article XX(d) is the only remaining possible means for rescuing the antidumping private right of action.

E. Article XX(d) as a General Exception

Article XX(d) is a general exception to GATT that allows a con-
To invoke article XX(d) successfully, a contracting party must show that: (1) the laws or regulations with which compliance is being secured are themselves consistent with GATT; (2) the measures are necessary to secure compliance with those laws or regulations; and (3) the measures are not applied in a manner which would constitute a means of "arbitrary or unjustifiable discrimination" or a "disguised restriction on international trade." For example, under

GATT exception have the burden of proving that they have met all the conditions of the exception. See Canada—Import Restrictions on Ice Cream and Yoghurt, GATT Doc. L/6568 (1989), reprinted in BISD, supra note 1, at 68, 84-85 para. 59 (36th Supp. 1990); Canada—Administration of the Foreign Investment Review Act, GATT Doc. L/5504 (1984), reprinted in BISD, supra note 1, at 140, 164 para. 5.20 (30th Supp. 1984).

Article XX(d) states:

[Provided] such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this [General Agreement] shall be construed to prevent the adoption or enforcement . . . of measures . . . (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement . . . .

GATT, supra note 1, art. XX(d).


344 GATT, supra note 1, art. XX(d); see, e.g., United States—Imports of Certain Automotive Spring Assemblies, GATT Doc. L/5333 (1983) (discrimination of Canada not arbitrary or unjustifiable where exclusion is directed against imports from all foreign sources), reprinted in BISD, supra note 1, at 107, 125 para. 55 (30th Supp. 1984); United States—Prohibition of Imports of Tuna and Tuna Products From Canada, GATT Doc. L/5198 (1982) (discrimination of Canada not arbitrary or unjustifiable where similar action had been taken against four other countries), reprinted in BISD, supra note 1, at 91, 108 para. 4.8 (29th Supp. 1983).

345 GATT, supra note 1, art. XX(d); see, e.g., United States—Imports of Certain Automatic...
this exception, a general exclusion of a product that infringes a domestic patent is permissible because the exclusion is necessary to secure compliance with the contracting party's patent laws.\textsuperscript{346} This exclusion is permissible if the substantive patent law of the contracting party complies with GATT,\textsuperscript{347} even though the general exclusion order arguably violates article XI.\textsuperscript{348} The general exclusion procedure is allowed as a means of securing compliance with the patent laws.\textsuperscript{349}

For a private right of action against dumping to be permissible under article XX(d), therefore, the laws with which compliance is sought themselves must be consistent with GATT. This requirement would apply to all of the substantive provisions of any new private right of action.\textsuperscript{350} However, the substantive aspects of the proposed private right of action raise grave concerns of inconsistency with GATT.\textsuperscript{351} If the discrepancies between the laws governing domestic products and the proposals affecting foreign products are not reconciled, any recourse to article XX(d) would be unjustified.\textsuperscript{352}

Nevertheless, assuming that a private right of action against dumping parallels a domestic remedy such as the Robinson-Patman Act, whether the measures that would be invoked for protection under article XX(d) are "arbitrary or unjustifiable discrimination" or are a "disguised restriction on international trade" still must be determined.\textsuperscript{353} The term "measures," as it is used in article XX, has been interpreted quite broadly to include enforcement mechanisms,\textsuperscript{354} administrative proce-s}


\textsuperscript{349} See text accompanying notes 264-77 supra.

\textsuperscript{350} See id.

\textsuperscript{351} See text accompanying notes 148-57 supra.


\textsuperscript{353} GATT, supra note 1, art. XX.

\textsuperscript{354} See United States—Section 337 of the Tariff Act of 1930, GATT Doc. L/6439 (1989) (general exclusion orders are "necessary" measures), reprinted in BISD, supra note 1, at 345, 394-95 paras. 5.30-.32 (36th Supp. 1990); United States—Imports of Certain Automotive
dures, and other such practices. Therefore, many aspects of the proposed remedy would constitute "measures" within the meaning of article XX, including direct access to federal court; procedures allowing for choice of forums; double proceedings; and other enforcement mechanisms such as injunctions or exclusion orders.

The historical treatment of the "disguised restriction" requirement indicates that a private right of action would pass this criterion successfully. This requirement does not inquire whether the measure itself is a disguised restriction, but rather whether the application of the measure would be a disguised restriction on trade. Thus, those Dispute Panels that have commented on this requirement have focused on whether the measure is a trade measure, whether the measure is published in government documents, or whether the measure is subject to procedural safeguards. Under these standards, the proposed private right of action against dumping hardly would be a veiled restriction. The action has been proclaimed as a trade measure universally. It would be subject to the normal procedural safeguards in federal courts and in the USITC. And the results of any such proceedings would be published in government documents. In short, there is no persuasive argument that a private right of action would be a disguised restriction on trade.

Whether such a measure would be a means of "arbitrary or unjustified discrimination" still needs to be considered. Those Dispute Panels faced with this issue have tended to inquire into whether the relevant


360 See id. (before exclusion order could issue, both validity of patent and its infringement by foreign manufacturer had to be established).
trade restrictions have been applied against all offending countries uniformly. Thus, an exclusion order against Canadian products that infringe upon a valid United States patent is not arbitrary or unjustified if the order is directed at products from all other foreign sources that infringe valid patents as well. Likewise, a United States prohibition on Canadian tuna products is not evidence of arbitrary or unjustified discrimination when a similar action is taken against like imports from other countries.

It is uncertain whether the proposed private right of action against dumping would be applied arbitrarily. Domestic competitors using any powers vested in them may abuse their positions to gain an unfair competitive advantage. Allowing direct access to federal courts could occasion frivolous lawsuits and unnecessarily burden defendants with unmeritorious cases. Likewise, a plaintiff could use the option of simultaneous proceedings as a calculated strategy to burden its most despised competitors with costly litigation. These measures also could be used to discriminate arbitrarily or unjustifiably against certain foreign competitors. Therefore, to avoid or to reduce the potential for abuse, some governmental screening or certification procedures may be needed to prevent arbitrary or unjustified actions. Without this prophylactic, direct access to federal courts and the option of double proceedings may constitute arbitrary and unjustified measures that would preclude protection under article XX.

Although arguably in violation of articles III and XI, injunctive relief, for purposes of article XX(d), would fall into the category of general exclusions defined by the Dispute Panel. Therefore, an injunction would not be an arbitrary or unjustified measure as long as similar injunctions are issued against other offending parties.

Assuming, then, that a private right of action would satisfy these elements of the article XX(d) test, it also must meet the “necessary to secure compliance” element. Under that criterion, a measure is con-

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364 Rep. Guarini has proposed a bill that prevents a private right of action from being pursued until an antidumping order has been obtained as evidence that dumping laws have been violated. See H.R. 4800, 99th Cong., 2d Sess. § 138 (1986); 1986 Hearing, supra note 12, at 185 (statement of Rep. Guarini).
365 See notes 354-55 supra.
366 This element is arguably the most important. Both Dispute Panel reports that have extensively addressed article XX(d) have devoted an inordinate amount of time to the necessity defense. See United States—Section 337 of the Tariff Act of 1930, GATT Doc. L/6439 (1989), reprinted in BISD, supra note 1, at 345, 392-95 paras. 5.25-.35 (36th Supp. 1990);
considered to be unnecessary when a satisfactory alternative remedy exists. By this formulation, the GATT Dispute Panel envisions an approach using "least trade-restrictive" alternatives. Given a choice between competing measures, a contracting party is obligated first to select that measure that is consistent with GATT; if no such measure exists, the contracting party is bound to select the measure that "entails the least degree of inconsistency with other GATT provisions."

The practices of other contracting parties may be examined to determine if a procedure is "necessary" under article XX(d). If this examination is done, it becomes apparent that a scheme which would provide direct access to federal court and to monetary damages cannot be considered "necessary" under article XX(d). No other contracting party currently provides this type of remedy. Instead, other countries continue to rely on traditional antidumping duty orders to protect their domestic industries. Moreover, this alternative scheme is not "necessary" since another relatively effective and less trade-restrictive means of enforcing American antidumping laws already exists—namely, the existing system

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369 Id. Unfortunately, the Dispute Panel did not discuss what a contracting party should do when the competing alternatives are not equally effective. For example, the question is open as to whether measure A, which is substantially less effective but more consistent with GATT, must be chosen over measure B, which is more effective but less consistent with GATT. Stated differently, when could a contracting party "reasonably be expected to employ" a more consistent alternative? The logical conclusion would be to first have an "effectiveness threshold." See id. ("If a contracting party could reasonably secure that level of enforcement in a manner that is not inconsistent with other GATT provisions, it would be required to do so."). Once this is achieved, the contracting party is obligated to select among those measures considered "effective" the measure that is most consistent or, barring that, the least violative alternative.

370 See id. (United States patent enforcement scheme under § 337 not necessary, since many countries have no separate import enforcement scheme but instead grant their civil courts jurisdiction over imported products), reprinted in BISD, supra note 1, at 345, 393 para. 5.28 (36th Supp. 1990).

371 See 1983 Hearing, supra note 21, at 51 (testimony of Joel Davidow, Partner, Mudge Rose Guthrie Alexander & Ferdon) (no other country punishes dumping with damages). But see Steele, supra note 232, at 274-76 (recent amendments to Australian Trade Practices Act may provide private law remedy to individual parties in antidumping cases where anticompetitive or predatory purposes exist).

372 See United States—Section 337 of the Tariff Act of 1930, GATT Doc. L/6439 (1989) (section 337 scheme not necessary since many countries grant their civil courts jurisdiction over foreign patent infringers), reprinted in BISD, supra note 1, at 345, 393 para. 5.28 (36th Supp. 1990).
of levying a duty equal to the margin of dumping. Likewise, simultaneous proceedings are not necessary to secure compliance with the antidumping laws given that all other contracting parties provide for only one avenue of relief.

For similar reasons, private injunctive relief in the form of a general exclusion order against dumping is not “necessary” under article XX(d). While it is true that the Dispute Panel has found certain in rem and general exclusion orders necessary within article XX(d)’s exception, those disputes involved patent infringement claims and can be distinguished from sanctions against dumped imports. With dumping, the defect in the product is generally its price, coupled with an injury to a domestic industry. In contrast, the defect in merchandise that infringes a patent is connected intrinsically to the very substance of the article itself. The defect in a product that infringes a patent cannot be cured without changing the physical characteristics of the product, while the defect in a dumped product can be cured easily by raising the price. Therefore, means other than injunctions or exclusion orders can remedy the importation of a dumped product effectively. One obvious remedy is a duty to offset the price difference. Another is monetary damages to compensate for any injury sustained. As a last resort, an injunction against only those products imported at less than fair market value could be issued if damages were inadequate. A general exclusion order against products may not be needed, and, even if needed, other effective alternatives that are more consistent with GATT exist.

In a similar manner, it is difficult to show that a “discovery injunc-

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373 See text accompanying notes 96-108 supra.
376 See 1987 Hearings, supra note 21, at 933 (Report of Antitrust Section of ABA on S. 1655) (nothing intrinsically unlawful about importation of particular product at below market price; alleged dumper can cure conduct instantaneously by raising United States price or lowering home price); 1986 Hearing, supra note 12, at 166 (report of Antitrust Section of ABA on S. 1655) (same).
377 See 1987 Hearings, supra note 21, at 933 (report of Antitrust Section of ABA on S. 1655) (sale of product carrying false trademark designation intrinsically unlawful); 1986 Hearing, supra note 12, at 166 (report of Antitrust Section of ABA on S. 1655) (same).
378 See 1987 Hearings, supra note 21, at 933 (report of Antitrust Section of ABA on S. 1655); 1986 Hearing, supra note 12, at 166 (report of Antitrust Section of ABA on S. 1655) (same).
379 See 1987 Hearings, supra note 21, at 934 (report of Antitrust Section of ABA on S. 1655).
380 See text accompanying notes 368-69 supra.
tion"\textsuperscript{381} is "necessary" given that other satisfactory and less trade restrictive alternatives exist. The Federal Rules of Civil Procedure provide ample means to enforce discovery obligations.\textsuperscript{382} These sanctions can be used against foreign parties,\textsuperscript{383} and there is no valid reason to conclude that an antidumping case cannot be litigated effectively with the same rules of procedure.\textsuperscript{384}

Although article XX(d) appears at first to be an effective means of curing GATT infirmities, it ultimately is unavailable. It therefore fails to protect the measures that would be deployed in the proposed bills. Even if the substantive law would be consistent with GATT, the measures could lead to arbitrary or unjustified discrimination. Moreover, they would not be necessary to secure compliance with the antidumping laws. In short, the proposed private right of action fails to clear the article XX(d) hurdle as well.

**CONCLUSION**

In its attempt to find a panacea to cure the ills of United States antidumping laws, several congressional measures have been proposed to respond to the current international economic environment. One such proposal is a private right of action against foreign dumping. Although initially attractive, such a remedy would not be faithful to our international obligations under the General Agreement on Tariffs and Trade. Any attempt to clothe such proposals with the protective garment of "preexisting legislation" of GATT’s Provisional Protocol would be in vain. As proposed, a private right of action with injunctive relief clearly would violate article XI’s restriction on import prohibitions. It would not ensure that imported products are treated as favorably as domestic products under article III. And even if the substantive laws of the proposed private right of action could be drafted to parallel the Robinson-Patman Act, the procedural discrimination that would result from disparate administrative mechanisms would violate article III. Finally, the proposed private right of action would not fall within the general exception of article XX(d).

Given that all the proposed private rights of action would be in vio-

\textsuperscript{381} See text accompanying note 162 supra.
\textsuperscript{382} Available court sanctions include: refusal to allow claims or defenses; stay, dismissal, or rendering of default judgment; contempt orders; and payment of reasonable expenses caused by failure to comply. See Fed. R. Civ. P. 37(b)(2).
\textsuperscript{383} See, e.g., Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 709 (1982) (imposition of sanctions under Rule 37(b)(2) against foreign defendants for failure to provide necessary information to determine personal jurisdiction upheld).
\textsuperscript{384} See 1987 Hearings, supra note 21, at 934 n.9 (report of Antitrust Section of ABA on S. 1655); 1986 Hearing, supra note 12, at 166 n.9 (same).
lation of the General Agreement, the issue of alleviating the problems that exist in the United States's current antidumping scheme remains. If a private right of action is not consistent with GATT, are there "less trade-restrictive" alternatives that could deter dumping or compensate domestic industries injured by dumping?

One approach would question the basic premises underlying the antidumping laws. Under this approach, many of the so-called "problems" with existing antidumping laws evidence a concern not for promoting competition, but for protecting competitive advantage. Thus, it could be argued that the proper operation of international free markets encourages antidumping laws to play a limited role to curb anticompetitive behavior. By questioning antidumping laws generally, this approach also fundamentally challenges the assertion that there are "problems" with the current scheme that require strengthening of our antidumping laws.

But assuming the soundness of the underlying policies, the best way to respond to the current inadequacies in United States dumping laws is through multilateral negotiations. To address the case of massive imports of dumped goods over a short period of time, the Antidumping Code could be modified to permit a quicker imposition of provisional duties. The contracting parties also could modify the current limited right of retroactive relief, allowing for the imposition of retroactive remedies to the point at which an antidumping violation first occurred. More controversially, special provisions, imposing a "penalty duty" in addition to a duty equal to the margin of dumping, could be established to guard against particularly egregious forms of recidivist or

385 See text accompanying notes 65-81 supra.
387 See Canadian GATT Antidumping Code Proposals Include Public Interest Over-Ride Provision, 7 Int'l Trade Rep. (BNA) 17, 17 (Jan. 3, 1990) (Canadian government argues for provision for public interest override of dumping rules). At the Uruguay Round, Canada included this recommendation as part of its proposed revisions of the Antidumping Code. See id.
388 See note 140 supra.
389 See Fourth Annual Judicial Conference, 112 F.R.D. 439, 546 (1986) (statement of Charlene Barshefsky, Partner, Steptoe & Johnson). Currently, the Antidumping Code of 1979 permits retroactive relief for up to 90 days prior to the date of application of provisional measures and not the first discovery date of a dumping violation. See Antidumping Code of 1979, supra note 90, art. 11.
predatory dumping.390

Unilaterally, the United States could take, and has taken, several steps to reduce its current problems while remaining faithful to its international obligations under GATT. The most promising of these steps would be the implementation of a program of “undertakings” in which foreign exporters would undertake to revise prices to eliminate the dumping margin, the injury, or, more drastically, to cease exports.391 Undertakings have been used by the European Community from the outset, and a high proportion of European Community antidumping cases are concluded by undertakings.392 Secondly, the United States could amend its laws to designate that monies received from the imposition of a final affirmative duty order be deposited into a “special compensation account” payable to the injured parties who successfully pursue administrative actions against a foreign manufacturer.393 Thirdly, Congress could pass legislation permitting injured domestic industries to submit remuneration claims to the federal government for any injury received as a result of foreign dumping.394 Finally, recent legislation passed as part of the Omnibus Trade and Competitiveness Act of 1988395 may have enhanced the deterrent effect of United States antidumping laws,396 thus

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390 This option was proposed by some delegates during the original drafting of the antidumping provisions. See Preparatory Comm. of the International Conference on Trade and Employment, Technical Sub-Comm. at 12, U.N. Doc. E/PC/T/C.II/54 (1946) (punitive antidumping duties should be allowed in case of aggravated or sporadic dumping); Drafting Comm. of the Preparatory Comm. of the United Nations Conference on Trade and Employment, Draft Report of the Technical Sub-Comm. at 18, U.N. Doc. E/PC/T/C.6/55 (1947) (same); J. Jackson, World Trade, supra note 2, at 405 (same). Similarly, other delegates felt a duty could exceed the margin of dumping in certain instances. See Preparatory Comm. of the International Conference on Trade and Employment, Technical Sub-Comm. at 13, U.N. Doc. E/PC/T/C.II/54 (1946) (proposing antidumping duty be “at least the rate of” margin of dumping). Presumably, the proceeds of a punitive remedy could compensate the injured domestic industry.

391 See Bellis, supra note 232, at 52.

392 See id.


394 See Steele, supra note 232, at 277 (discussing Australian assistance applications program for industries structurally damaged by dumping).


396 Changes as a result of this Act include the strengthening of the “critical circumstances” provisions of United States antidumping laws, 19 U.S.C. § 1673b(e)(1) (1988), the addition of
In sum, any action taken by the United States to strengthen antidumping laws should be done with a view toward careful compliance with GATT. Careful compliance with GATT, however, is not the conclusion one draws from a prudential analysis of a private right of action against dumping.

new "short life cycle" provisions, id. § 1673h, and "anticircumvention" laws. Id. § 1677j. For a summary of these changes, see T. Vakerics, D. Wilson, K. Weigel, supra note 105, at 21-36.
### APPENDIX

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397 See note 148 and accompanying text supra.
398 See note 151 and accompanying text supra.
399 See note 152 and accompanying text supra.
400 See note 153 and accompanying text supra.
401 Court has discretion to assess additional punitive damages.
402 See notes 154-55 and accompanying text supra.
403 See notes 156-57 and accompanying text supra.
404 See notes 159-60, 310 and accompanying text supra.
405 See note 159 supra; note 309 and accompanying text supra.
406 See note 160 and accompanying text supra.
407 See note 161 and accompanying text supra.
408 See note 162 and accompanying text supra.
409 See note 166 and accompanying text supra.
410 See notes 163-65 and accompanying text supra.
411 See note 166 and accompanying text supra.
412 Is more of a “GATT Savings” clause. See note 166 supra.
413 See note 393 and accompanying text supra.
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414 Court has discretion to assess additional punitive damages.