

UNITED STATES — EUROPEAN ECONOMIC COMMUNITY ANTIDUMPING LAWS: THE NEED FOR A COMPREHENSIVE APPROACH

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I. INTRODUCTION

The United States and the European Economic Community (EEC)¹ for years have been trying to protect their domestic industries by preventing foreign goods from being "dumped" onto domestic markets. While a precise definition is elusive, dumping generally involves exporting goods below market prices in the exporting country in an effort to weaken competition and promote sales on the foreign market.² Such practice is condemned if it causes injury to the particular industry of the importing country. This Article analyzes and compares the United States and the EEC antidumping laws, addresses the problems of each, and offers proposals for a comprehensive approach to such laws.

In the United States, the Departments of Treasury and Commerce and the International Trade Commission (ITC) implement antidumping duties. Under the Tariff Act of 1930 (Tariff Act),³ as amended by the Trade Agreements Act of 1979 (Trade Agreements Act),⁴ the Secretary of Treasury or Commerce determines whether merchandise is sold in the United States at less than fair value.⁵ If the Secretary renders an affirmative determination, the ITC determines whether an industry has been materially injured.

In the EEC, the Treaty of Rome authorizes the Commission of the European Communities (Commission),⁶ to implement antidumping measures.⁷ These treaty provisions, however, are vague and incomplete.⁸ Thus, in the wake of the Tokyo Round of 1979⁹

¹ The Treaty of Rome, March 25, 1957, 297-98 U.N.T.S. 3 [hereinafter cited as Treaty of Rome], established the European Economic Community (EEC). The EEC is currently composed of Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands and the United Kingdom.

² 3 H. SMITH & P. HERZOG, *THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY* 368 (1985).

³ Tariff Act of 1930, Pub. L. No. 96-39, 93 Stat. 144 (codified as amended at 19 U.S.C. §§ 1671-1677 (1982)).

⁴ Trade Agreements Act of 1979, 19 U.S.C. §§ 1671-1677 (1982). This Act repealed the United States Antidumping Act of 1921, codified at 19 U.S.C. §§ 160-171.

⁵ See *infra* note 14 and accompanying text.

⁶ For the composition and duties of the Commission of European Communities, see the Treaty of Rome, *supra* note 1, arts. 155-63.

⁷ Article 91 regulated dumping between member states during the transitional period of the Treaty, which has ended. Article 113 authorizes the Commission to police dumping originating from non-member countries as a matter of general trade policy. See H. SMITH & P. HERZOG, *supra* note 2, at 371.

⁸ *Id.*

and the GATT Antidumping Code,¹⁰ the EEC Council¹¹ adopted the current EEC antidumping law, Council Regulation 3017/79 (EEC Antidumping Regulation).¹²

II. IMPOSITION OF ANTIDUMPING DUTIES

To impose antidumping duties in the United States, section 731 of the Tariff Act requires that:

(1) the administering authority [determine] that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and

(2) the Commission [determine] that (A) an industry in the United States — (i) is materially injured, or (ii) is threatened with material injury, or (B) the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise¹³

The “administering authority” of subsection (1) and the “Commission” of subsection (2) refer to the Secretary of Treasury or Commerce and the International Trade Commission, respectively.¹⁴ The Tariff Act dumping definition differs from the GATT definition in only two respects.¹⁵ First, the United States definition does not require that the product actually be sold in the United States. The GATT formula does not contain similar language of “likely to be sold,” but instead requires that the product is “introduced into the commerce of another country.”¹⁶ Second, the United States provision uses “fair” value, while the GATT Code uses “normal” value.¹⁷

⁹ The Multilateral Trade Negotiations, sponsored by GATT, commenced in 1973 in Tokyo, Japan and thus are referred to as the “Tokyo Round.”

¹⁰ General Agreement on Tariffs and Trade (GATT), Oct. 30, 1947, 61 Stat. 1, T.I.A.S. No. 1700, 55 U.N.T.S. 187, art. VI.

¹¹ For the composition and duties of the EEC Council, see the Treaty of Rome, *supra* note 1, arts. 145-54.

¹² 22 O.J. EUR. COMM. (No. L 339) 1 (1979).

¹³ 19 U.S.C. § 1673 (1982).

¹⁴ See 19 U.S.C. § 1677(1)-(2) (1982); 19 C.F.R. § 207.2(b) (1953); 19 C.F.R. §§ 353.35-.36 (1985). The function of the Secretary of the Treasury for less than fair value determinations was transferred to the Secretary of Commerce pursuant to Reorg. Plan No. 3 of 1979, § 5(a)(1)(C), 44 Fed. Reg. 69,275, 93 Stat. 1381. See also *Alberta Gas Chemicals, Inc. v. United States*, 515 F. Supp. 780 (Ct. Int'l Trade 1981) (Department of Treasury as administering authority); *Royal Business Machines, Inc. v. United States*, 507 F. Supp. 1077 (Ct. Int'l Trade 1980) (Department of Commerce as administering authority).

¹⁵ See H. SMITH & P. HERZOG, *supra* note 2, at 368-69.

¹⁶ *Id.*

¹⁷ *Id.*

The EEC formulation is substantially similar to both the United States and GATT valuations. The EEC Antidumping Regulation is divided into eighteen articles and does not provide a one paragraph formula. Instead, each article addresses a specific topic. Article 2.2 provides that a product is dumped "if its export price to the Community is less than the normal value of the like product."¹⁸ Article 5.1 provides that "[a]ny natural or legal person . . . acting on behalf of a Community industry which considers itself injured or threatened by dumped or subsidized imports may lodge a written complaint."¹⁹ Article 4.1 states that "[a] determination of injury shall be made only if the dumped or subsidized imports are . . . causing or threatening to cause material injury to an established Community industry or materially retarding the establishment of such an industry."²⁰ These three articles provide the basis of the EEC dumping formula and contain essentially the same elements as the United States formula: imported price less than normal/fair value, material injury or threat thereof to industry or retarding the establishment of industry, and a causal link between the dumped product and injury. In both the EEC and United States formulas, one must determine the meaning of a "normal" or "fair" value and the meaning of "material" injury.

III. FAIR/NORMAL VALUE

A. *Fair Value Under United States Law*

While the Tariff Act does not define "fair value," value has been historically considered "fair" if the purchase price or the exporter's sales price exceeds the foreign market value.²¹ Similarly, the legislative history of the Trade Agreements Act suggests that "fair value" should be determined by comparing the exporter's domestic price with the exporter's third country market price.²² Use of these two formulas would thus bear similar results. For both valuations, the exporter's price to the United States would be compared with the exporter's domestic price.

Section 353.1 of the Code of Federal Regulations similarly pro-

¹⁸ 22 O.J. EUR. COMM. (No. L 339) 2 (1979).

¹⁹ *Id.* at 7.

²⁰ *Id.* at 6.

²¹ Antidumping Act of 1921, *supra* note 4, at § 161.

²² See Trade Agreements Act of 1979, S. REP. NO. 249, 96th Cong., 1st Sess., *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 381, 423 [hereinafter cited as 1979 U.S. CODE CONG. & AD. NEWS].

vides that "fair value . . . is intended to be an estimate of foreign market value."²³ This approach, therefore, requires a determination of the "foreign market value." Similarly, both the Code of Federal Regulations and the Tariff Act provide for foreign market value determinations.

Under section 773 of the Tariff Act, the foreign market value embodies the price, at the time of exportation to the United States, at which such merchandise is sold in the usual wholesale quantities for home consumption.²⁴ If, however, the quantity sold to the United States is so small as to risk an inadequate comparison to other countries, then the export price with other countries will be used.²⁵ The Code of Federal Regulations promulgates these two valuations under sections 353.3 and 353.4, respectively.²⁶ As a consequence, the resulting foreign market value is recognized as the "fair" value.

This foreign market valuation system, however, is ineffective where the merchandise is produced in a nonmarket economy (NME) country.²⁷ In a NME country, the state controls the economy and product price; thus, the "fair value" is not determined by the market economy. In *Bicycles from Czechoslovakia*,²⁸ the Treasury Department first noted dumping from a NME country and established a fair value by referring to the prices of similar merchandise produced in non-Communist market economies. The market economy prices thus served as a surrogate foreign market value.²⁹

This form of surrogate pricing, however, proved inappropriate in *Electric Golf Cars from Poland; Antidumping*.³⁰ This case involved golf carts manufactured in Poland exclusively for export to the United States; Poland exhibited no domestic market nor a third country market. The Treasury Department initially relied upon a Canadian producer for a surrogate foreign market value. When the Canadian producer, the only large-scale producer

²³ 19 C.F.R. § 353.1 (1985).

²⁴ 19 U.S.C. § 1677b(a)(1) (1982).

²⁵ *Id.*

²⁶ 19 C.F.R. § 353.3-4 (1985).

²⁷ For a complete discussion of United States antidumping law with respect to NME countries, see Horlick & Shuman, *Nonmarket Economy Trade and U.S. Antidumping/Countervailing Duty Laws*, 18 INT'L LAW. 807 (1984).

²⁸ *Bicycles from Czechoslovakia*, 25 Fed. Reg. 6657 (1960).

²⁹ *Id.*

³⁰ 40 Fed. Reg. 25,497 (1975); *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384 (D. Del. 1978).

outside the United States, subsequently went out of business, the Treasury suddenly needed a new standard of fair value for these NME products. The Treasury thus developed a "constructed value" whereby Polish materials were valued at prices prevailing in Spain — a country of similar economic development.³¹ The Treasury Department adopted this home-market surrogate approach as a formal regulation in 1978.³²

Although Congress disapproved the Treasury regulation,³³ congressional reenactment of section 205(c) of the Antidumping Act of 1921, implemented in the Trade Agreements Act,³⁴ provided similar results. The Trade Agreements Act substantially reenacted section 205(c) as section 773(c) of the Tariff Act.³⁵ This section provides that state-controlled economy prices shall be determined by either domestic or export prices of a market economy, or by the constructed value of similar merchandise in a market economy.³⁶ Subsection (e) enumerates the method for determining "constructed value."³⁷ Basically, the constructed value includes the sum of the cost of materials and production, general expenses and profit, and the cost of all containers. The constructed or foreign market value, then, is considered the "fair" value.³⁸

As previously noted, both GATT and the EEC use "normal" value rather than "fair" value in antidumping determinations.³⁹ These terms, however, are similar and interchangeable, as indicated by the legislative history of the Trade Agreements Act.⁴⁰ Article 2 of the EEC Antidumping Regulation provides a comprehensive normal value determination procedure.⁴¹

B. Normal Value Under EEC Law

Under article 2.3 of the EEC Antidumping Regulation, the normal value for a product, is the price for a like product⁴² in the

³¹ *Outboard Marine Corp.*, 461 F. Supp. at 384.

³² See *Antidumping Investigation Procedures Under Antidumping Act, 1921*, 43 Fed. Reg. 35,262 (1978). See also Horlick & Shuman, *supra* note 27, at 811.

³³ See Horlick & Shuman, *supra* note 27, at 813.

³⁴ See *supra* note 4.

³⁵ 19 U.S.C. § 1677b(c) (1982).

³⁶ *Id.*

³⁷ *Id.* at § 1677b(e).

³⁸ *Id.*

³⁹ See *supra* text accompanying notes 17-18.

⁴⁰ 1979 U.S. CODE CONG. & AD. NEWS, *supra* note 22, at 425.

⁴¹ 22 O.J. EUR. COMM. (No. L 339) 3 (1979).

⁴² *Id.* at art. 2.12. Article 2.12 defines "like product" as one which is identical to the

domestic market of the exporting country.⁴³ If there are no sales on the domestic market, then the price of the product when exported to a third country shall be used. A constructed value, similar to that used in the United States, may also be utilized.⁴⁴

In addition, article 2 contains special provisions for imports from NME countries. Again, the EEC Antidumping Regulation is almost identical to the United States law. Article 2.5 provides that NME country prices may be determined either by domestic or export prices of a market economy or by constructed value of the like product in a market economy third country.⁴⁵ Unlike United States law,⁴⁶ however, if neither of these valuations provide an adequate basis, under the EEC Antidumping Regulation the price paid or payable to the Community may be used.⁴⁷

C. *Constructed Value*

While both the United States and the EEC laws employ constructed values, the United States law is far more specific about their formulation. Section 773(e)(1) of the Tariff Act provides that the amount for general expenses shall not be less than ten percent of the cost as defined.⁴⁸ The amount for profit shall not be less than eight percent of the sum of such general expenses and cost. Section 773(e)(1) also includes the cost of containers and coverings, while the EEC Antidumping Regulation does not. Although the EEC Antidumping Regulation does not provide similar floor limits for percentage of profits and/or expenses, the EEC Commission recently utilized a fictitious profit of eight percent in the *Japanese Ballbearings*.⁴⁹ No profits were reportedly gained from sales of the product in the home market.

D. *Sales Below Cost of Production*

The United States and the EEC laws have virtually identical provisions addressing the situation where prices in the domestic

product under consideration.

⁴³ *Id.* art. 2.3.

⁴⁴ *Id.*

⁴⁵ *Id.* art. 2.5.

⁴⁶ See *supra* notes 27-38 and accompanying text.

⁴⁷ 22 O.J. EUR. COMM. (No. L 339) 3 (1979), art. 2.5. The product price may be adjusted, if necessary, to include a reasonable profit margin.

⁴⁸ 19 U.S.C. § 1677b(e)(1) (1982).

⁴⁹ Case 113/77, NTN Toyo Bearing v. Council, 1979 E. Comm. Ct. J. Rep. 1185 [1978-79 Transfer Binder] COMMON MKT. REP. (CCH) ¶ 8574.

market of the exporting country are less than the cost of production. Both the United States and the EEC disregard such prices if the sales: "(1) have been made over an extended period of time and in substantial quantities, and (2) are not at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade."⁵⁰ As to alternative valuations, however, the United States and the EEC differ. Under section 773 (b) of the Tariff Act, the administering authority is to employ the constructed value of the merchandise to determine its foreign market value.⁵¹ Under article 2.4 of the EEC Regulation, however, the normal value may be determined on the basis of: (1) the remaining sales on the domestic market made at a price above the production costs; (2) export sales to third countries, based on constructed values; or (3) an adjusted sub-production-cost price which would eliminate loss and provide for a reasonable profit.⁵²

IV. INJURY DETERMINATION

A. *United States*

As previously mentioned, both the United States and EEC laws require a material injury to the importing industry for the imposition of antidumping duties.⁵³ Under section 731 of the Tariff Act,⁵⁴ the ITC is the authority responsible for determining whether a domestic industry has been materially injured or threatened with material injury, or whether the establishment of an industry is materially retarded in the United States.⁵⁵ The crucial tasks, therefore, are determining what constitutes a domestic industry, a material injury, and a threat of material injury.

1. Domestic Industry

Section 771(4)(A) defines industry as "the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product."⁵⁶ Subsection 10 defines "like product" as "a product which is like, or in the absence of like, most

⁵⁰ See 19 U.S.C. § 1677b(b) (1982); 22 O.J. EUR. COMM. (No. L 339) 3 (1979), art. 2.4.

⁵¹ 19 U.S.C. § 1677b(b) (1982).

⁵² 22 O.J. EUR. COMM. (No. L 339) 3 (1979), at art. 2.4.

⁵³ See *supra* text accompanying notes 13, 19, 20.

⁵⁴ 19 U.S.C. § 1673 (1982).

⁵⁵ See *supra* text accompanying note 13.

⁵⁶ 19 U.S.C. § 1677(4)(A) (1982).

similar in characteristics and uses with, the article subject to an investigation”⁵⁷ With such generally defined terms, the ITC holds great discretionary power. One commentator notes that the ITC will examine not only the characteristics and uses of the products, but also such factors as whether the products will compete with one another in the marketplace.⁵⁸ For example, in *Motorcycle Batteries From Taiwan*,⁵⁹ six-volt batteries manufactured in the United States were not considered “like products” for imported Taiwanese six-volt batteries because the two were not commercially interchangeable.⁶⁰

The actual scope of a “domestic industry” must also be determined. In appropriate circumstances, a regional industry may suffice for purposes of the Tariff Act.⁶¹ Under subsection (4)(C), a material injury may be found for a regional industry if: (1) the producers within such market sell all or almost all of their production of the like product in that market; and (2) the demand in that market is not supplied, to any substantial degree, by producers of the product located elsewhere in the United States.⁶² For example, in *Ellis K. Orlowitz Co. v. United States*,⁶³ “industry” did not mandate inclusion of the entire domestic cast-iron soil pipe industry; the regional industry of California proved sufficient.⁶⁴

2. Material Injury

Section 771(7)(A) defines material injury as “harm which is not inconsequential, immaterial, or unimportant.”⁶⁵ In determining whether a material injury has occurred, the ITC considers the volume of imports, the effect of imports on United States prices for like products, and the impact of imports on domestic producers.⁶⁶ No single factor, however, is given decisive effect in determining whether a material injury has occurred.⁶⁷

⁵⁷ 19 U.S.C. § 1677(10) (1982).

⁵⁸ See Victor, *Injury Determinations by the United States International Trade Commission in Antidumping and Countervailing Duty Proceedings*, 16 N.Y.U. J. INT'L L. & POL. 749, 751 (1984).

⁵⁹ *Motorcycle Batteries from Taiwan; Import Investigation*, 47 Fed. Reg. 13,609 (1982).

⁶⁰ *Id.*

⁶¹ 19 U.S.C. § 1677(4)(C) (1982).

⁶² *Id.*

⁶³ *Ellis K. Orlowitz Co. v. United States*, 200 F. Supp. 302 (Cust. Ct. 1961).

⁶⁴ *Id.* at 311.

⁶⁵ 19 U.S.C. § 1677(7)(A) (1982).

⁶⁶ *Id.* at § 1677(7)(B).

⁶⁷ See *Atlantic Sugar, Ltd. v. United States*, 519 F. Supp. 916, 922 (Ct. Int'l Trade 1981).

a. *Volume*

Section 771(7)(C)(i) provides only that the ITC shall consider whether the volume of imports "is significant."⁶⁸ Because of the vagueness of the statute, the ITC again is vested with broad discretionary authority, which the United States Court of International Trade only reluctantly overrides.⁶⁹ In *SCM Corp. v. United States*,⁷⁰ the ITC held, and the Court of International Trade affirmed, that significant market penetration by a product at less than fair market value alone is an insufficient basis for finding injury.⁷¹ The ITC must also consider pertinent economic and financial criteria, including the health of the domestic industry.⁷²

Factors that the ITC considers "significant" will thus vary according to the circumstances of each case. In fact, Congress has suggested that the same volume of imports might have a significant impact on one market and an insignificant impact on another.⁷³ For example, in *Atlantic Sugar, Ltd. v. United States*,⁷⁴ the Court of International Trade approved the ITC's significant injury determination where the maximum volume of sugar imports was only 4.5% of the primary distribution.⁷⁵

b. *Prices*

In evaluating the effect of imports on United States prices, section 771(7)(C)(ii) requires that the ITC consider whether the imports significantly undercut United States prices and whether the effect of the imports significantly depresses prices or prevents price increases.⁷⁶ In *Atlantic Sugar, Ltd.*, evidence that domestic producers were compelled to substantially lower their prices to meet import competition was sufficient to represent price depression to a "significant" degree.⁷⁷ In *SCM Corp.*, however, the ITC rejected the notion that Japanese portable electric typewriters, imported at

⁶⁸ 19 U.S.C. § 1677(7)(C)(i) (1982).

⁶⁹ "[I]t is not the function of the Court in reviewing an injury determination of the Commission under the Antidumping Act to weigh the evidence or to substitute its judgment for that of the Commission." *SCM Corp. v. United States*, 544 F. Supp. 194, 199 (Ct. Int'l Trade 1982).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ See H.R. REP. NO. 317, 96th Cong., 1st Sess. 46 (1979).

⁷⁴ *Atlantic Sugar, Ltd.*, 419 F. Supp. at 916.

⁷⁵ *Id.* at 922.

⁷⁶ 19 U.S.C. § 1677(7)(C)(ii) (1982).

⁷⁷ *Atlantic Sugar, Ltd.*, 519 F. Supp. at 922.

less than fair value, suppressed the United States price for such typewriters.⁷⁸ Although the ITC found that Japanese imports achieved between twenty-one percent and thirty-seven percent of the United States market over four years, the imported typewriters increased in price at a pace similar to office typewriters.⁷⁹

c. *Impact*

In evaluating the impact of imports on the affected industry, section 771(7)(C)(iii) of the Tariff Act requires the ITC to consider, *inter alia*: (1) actual and potential decline in output, sales, market share and profits; (2) factors affecting domestic prices; and (3) actual and potential negative effects on cash flow, inventories, wages and growth.⁸⁰ For consideration of these factors, as in the case of volume and price determinations, the ITC must work on a case-by-case basis. In *Atlantic Sugar, Ltd.*,⁸¹ the Court of International Trade noted that neither trends in economic indicators nor profit or loss statements provide decisive guidance in determining material injury.⁸² In *Atlantic Sugar, Ltd.*, the ITC noted two instances where material injury occurred despite questionable economic indicators.⁸³ First, the ITC found injury due to substantial losses incurred by the producer, even though the producer's losses decreased over time and several other indicators improved.⁸⁴ Second, the ITC found injury due to a decline in economic indicators over the period of investigation, even though the producer realized profits during that time.⁸⁵

In *SCM Corp.*, however, the economic indicators worked against the producer. While the percentage of the market captured by Japanese imports increased over the four-year period, the market share for all imports decreased over the same time.⁸⁶ Consequently, SCM's sales increased dramatically, both relative to imports and in absolute terms.⁸⁷ Thus, both the ITC and the Court of International Trade determined that the sales losses were not significant

⁷⁸ *SCM Corp.*, 544 F. Supp. at 200.

⁷⁹ *Id.*

⁸⁰ 19 U.S.C. § 1677(7)(C)(iii) (1982).

⁸¹ *Atlantic Sugar, Ltd. v. United States*, 553 F. Supp. 1055 (Ct. Int'l Trade 1982).

⁸² *Id.* at 1059.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *SCM Corp.*, 544 F. Supp. at 201.

⁸⁷ *Id.*

enough to justify a material injury.⁸⁸

3. Threat of Material Injury

The Tariff Act does not delimit criteria for assessing a threat of material injury. The legislative history of the Act provides little guidance, stating only that threat of material injury "must be based upon information showing that the threat is real and injury is imminent"⁸⁹ Recent case law thus provides the only direction in determining what constitutes a viable threat of material injury.

In *Armstrong Bros. Tool Co. v. United States*,⁹⁰ the United States Tariff Commission (now the ITC) declared that minimal legislative guidance in this area suggested that Congress intended the Commission to possess wide latitude in determining threat of injury.⁹¹ In his negative determination of injury, the Tariff Commissioner offered that "[f]or there to be likelihood of injury, there must be a realistic connection between a situation that presently exists and what will probably happen should the present situation continue. A trend that indicates future injury must be shown."⁹² In this case, while the operating margins of some domestic producers decreased, the influencing factors were deemed to be purely domestic in origin. The Customs Court thus concluded that Congress intended "injury" to encompass more than *de minimis* injury.⁹³

In *Alberta Gas Chemicals, Inc. v. United States*,⁹⁴ the leading "threat of injury" case, the Court of International Trade reiterated Congress' real threat/imminent injury test.⁹⁵ The court overturned an ITC affirmative determination of threat of injury because the ITC speculated that an increase in the exporter's capacity would increase the likelihood of domestic injury.⁹⁶ The court reasoned that a mere possibility that an injury might occur does not satisfy the "real and imminent" threat test mandated by Congress.⁹⁷

⁸⁸ *Id.*

⁸⁹ 1979 U.S. CODE CONG. & AD. NEWS, *supra* note 22, at 474-75.

⁹⁰ *Armstrong Bros. Tool Co. v. United States*, 483 F. Supp. 312 (Cust. Ct. 1980).

⁹¹ *Id.* at 321.

⁹² *Id.* at 325.

⁹³ *Id.* at 329.

⁹⁴ *Alberta Gas Chemicals, Inc.*, 515 F. Supp. at 780.

⁹⁵ *Id.* at 790.

⁹⁶ *Id.* at 791.

⁹⁷ *Id.*

B. *EEC*

The EEC Antidumping Regulation does not define what constitutes an "injury" or the extent of harm necessary to impose antidumping duties. Article 4.1 of the EEC Antidumping Regulation simply provides that "[a] determination of injury shall be made only if the dumped . . . imports are . . . causing or threatening to cause material injury to an established Community industry or materially retarding the establishment of such an industry."⁹⁸ The history behind the adoption of this language is worth noting.

Under the 1968 EEC Antidumping Regulation,⁹⁹ the Commission required dumping to be the principal source of the injury.¹⁰⁰ At this time, the EEC and the United States differed as to the extent of injury necessary to impose antidumping duties.¹⁰¹ The EEC considered that the dumping injury should be greater than the cumulative injuries to the EEC industry caused by all other factors.¹⁰² The United States, however, considered that a material injury need only be one "which is not inconsequential, immaterial, or unimportant."¹⁰³ Hence, Congress did not include any language of injury relative to other factors when it amended the Tariff Act through the Trade Agreements Act. Consequently, the EEC abrogated any notion of relative injury in the 1979 EEC Antidumping Regulation.¹⁰⁴ Both the United States and the EEC, thus maintain the "material injury" standard for imposing antidumping duties.

While the EEC did not adopt the United States material injury definition, the EEC Antidumping Regulation incorporated the Tariff Act evaluation criteria. For injury determinations, article 4.2 of the EEC Antidumping Regulation requires an evaluation of volume, prices, and impact.¹⁰⁵ The slight variations between the language of the EEC Antidumping Regulation and the United States Tariff Act are insignificant.

Unlike the United States statutes, the EEC Antidumping Regulation contains guidelines for determining threat of material injury. Article 4.3 provides that a viable threat of injury is considered to

⁹⁸ 22 O.J. EUR. COMM. (No. L 339) 6 (1979).

⁹⁹ 11 J.O. COMM. EUR. (No. L 393) 1 (1968).

¹⁰⁰ See Didier, *EEC Antidumping Rules and Practices*, 17 COMMON MKT. L. REV. 349, 359 (1980).

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See *supra* note 65 and accompanying text.

¹⁰⁴ See Didier, *supra* note 100, at 360.

¹⁰⁵ 22 O.J. EUR. COMM. (No. L 339) 6 (1979).

exist only where a particular situation is likely to develop into actual injury.¹⁰⁶ As relevant factors, the Regulation cites:

(a) rate of increase of the dumped or subsidized exports to the Community;

(b) export capacity in the country of origin or export, already in existence or which will be operational in the foreseeable future, and the likelihood that the resulting exports will be to the Community; and

(c) the nature of any subsidy and the trade effects likely to arise therefrom.¹⁰⁷

If *Alberta Gas Chemicals, Inc.* is precedent for threat of injury, then EEC Antidumping Regulation 4.3(b) is at odds with United States law.¹⁰⁸ In *Alberta Gas Chemicals, Inc.*, the United States Court of International Trade explicitly rejected the EEC Antidumping Regulation article 4.3(b) standard for determining threat of injury — potential export capacity. As previously noted, such a possibility does not meet Congress' "real and imminent" test.¹⁰⁹

V. REMEDIES

A. *United States*

1. Antidumping Duties

Section 731 of the Tariff Act requires the ITC, upon finding a material injury caused by dumped imports, to impose an antidumping duty upon such imports.¹¹⁰ The duty should equal the amount by which the foreign market value exceeds the United States price for the imports.¹¹¹ While the Act provides no further guidance, case law requires that the duties imposed be uniformly assessed throughout the United States, wherever the imports enter the market.¹¹²

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ See *supra* notes 94-97 and accompanying text.

¹⁰⁹ See *supra* note 97 and accompanying text.

¹¹⁰ 19 U.S.C. § 1673 (1982).

¹¹¹ *Id.*

¹¹² See *Pasco Terminals, Inc. v. United States*, 477 F. Supp. 201 (Cust. Ct. 1979) (national industry may be injured if injury is experienced in only a portion of its market); *Imbert Imports, Inc. v. United States*, 331 F. Supp. 1400 (Cust. Ct. 1971) (dumping duties apply to every port of entry, not just port where injury caused).

2. Countervailing Duties

As an alternative to imposing antidumping duties, section 701 of the Tariff Act may be relied upon to impose countervailing duties¹¹³ in particular circumstances.¹¹⁴ The circumstances warranting imposition, however, are somewhat different from the circumstances warranting antidumping duties. Countervailing duties may be imposed only where the exporter receives some form of subsidy from the exporter's government.¹¹⁵ This subsidy, of course, often decreases the exporter's price to less than fair value, and results in dumping. The countervailing duty, similar to the antidumping duty, is equal to the amount of the net subsidy.¹¹⁶

3. Escape Clause

Under section 201 of the Trade Act of 1974, temporary action may be taken to arrest imports causing "serious injury" to a United States competing industry.¹¹⁷ To initiate escape clause¹¹⁸ proceedings, an industry representative must petition the ITC for an investigation.¹¹⁹ If the ITC investigation reveals serious injury, it imposes duty or import restrictions necessary to prevent or remedy such injury.¹²⁰ The ITC then submits its findings and recommendations to the President of the United States.¹²¹ If the President rejects the ITC recommendations,¹²² the ITC action may still be upheld if Congress overrides the presidential veto.¹²³

B. EEC

The EEC Antidumping Regulation provides remedies that the Commission may impose for dumped imports.¹²⁴ The remedies include price undertakings, provisional duties, an definitive duties.¹²⁵

¹¹³ For a good discussion of subsidies and countervailing duties, see Jackson, *United States — EEC Trade Relations: Constitutional Problems of Economic Interdependence*, 16 COMMON MKT. L. REV. 453, 465-68 (1979).

¹¹⁴ 19 U.S.C. §§ 1303, 1671 (1982).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at § 2251.

¹¹⁸ See Jackson, *supra* note 113, at 468.

¹¹⁹ 19 U.S.C. § 2251 (1982).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² For permissible presidential actions, see *id.* at § 2252.

¹²³ *Id.* at § 2253.

¹²⁴ 22 O.J. EUR. COMM. (No. L 339) 11 (1979).

¹²⁵ *Id.*

The amount of the duties shall not exceed the dumping margin provisionally estimated or finally established.¹²⁶

1. Price Undertakings

Price undertakings are confidential agreements between the foreign exporter and the Commission to increase the exporter's prices to the EEC sufficiently to offset the injury.¹²⁷ Article 10.1 of the EEC Antidumping Regulation provides, where undertakings are offered which the Commission considers acceptable, that the antidumping proceedings may be terminated without the imposition of provisional or definitive duties.¹²⁸ Where the Commission believes the undertaking is violated, it shall reopen the proceedings and may impose provisional measures.¹²⁹

2. Provisional Duties

Article 11.1 of the EEC Antidumping Regulation provides that the Commission may impose provisional duties where preliminary examination shows evidence of dumping and injury.¹³⁰ The Commission implements provisional action by accepting imports conditionally upon the collection of security for the amount of the provisional duty.¹³¹ Provisional duties have a maximum period of six months' validity, including extension time.¹³² Once this period expires, the security shall be released to the extent the EEC Council has decided definitely not to collect it.¹³³

3. Definitive Duties

Article 12.1 provides that definitive antidumping duties shall be imposed where dumping and injury are established.¹³⁴ The Council, acting under recommendation of the Commission, makes this final determination.¹³⁵ Article 13.4 provides that both provisional

¹²⁶ *Id.*

¹²⁷ See Horlick & Shuman, *supra* note 27, at 815; 22 O.J. EUR. COMM. (No. L 339) 9 (1979), at art. 10.2(b).

¹²⁸ 22 O.J. EUR. COMM. (No. L 339) 9 (1979).

¹²⁹ *Id.* at 10.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

and definitive duties shall not be imposed retroactively.¹³⁶

VI. PROBLEMS/PROPOSALS

A. *Dumping Results Often Unpredictable*

In both United States and EEC antidumping proceedings, results are uncertain and subject to abuse.¹³⁷ In terms of definitions, the United States statutes do not define or provide guidelines for "threat of injury" or "fair value."¹³⁸ Similarly, the EEC Antidumping Regulation does not define "injury" or "material injury."¹³⁹

Secondly, uncertainty abounds in proceedings against NME countries.¹⁴⁰ Commentators note that importers cannot ascertain which country will be selected as a surrogate for the NME and therefore cannot adjust their prices to insure compliance with antidumping laws.¹⁴¹ This selection of a surrogate is also open to abuse because the administering authority could make the selection based on political, rather than economical considerations.¹⁴²

One proposal offered to circumvent the surrogate country problem in the United States is the "Heinz bill."¹⁴³ Under this bill, the Commerce Department would avoid selection of surrogate countries and instead look strictly to United States producers' prices.¹⁴⁴ The base price would be the lowest average price in the United States charged by exporters from any free market economy country.¹⁴⁵ The dumping margin would be the difference between the NME producer's price and the base price.¹⁴⁶ Such a proposal also could be implemented effectively by the EEC Commission.

B. *Currency Convertibility*

Another problem existing in connection with NME countries is the inconvertibility of NME currencies. Without an accurate rate

¹³⁶ *Id.* at 11.

¹³⁷ See Horlick & Shuman, *supra* note 27, at 817.

¹³⁸ See *supra* notes 21-22, 89 and accompanying text.

¹³⁹ See *supra* notes 98-105 and accompanying text.

¹⁴⁰ See *supra* notes 27-32, 45-47 and accompanying text; see also *infra* notes 147-48 and accompanying text.

¹⁴¹ See Horlick & Shuman, *supra* note 27, at 817.

¹⁴² *Id.*

¹⁴³ *Id.* at 832. The conference committee failed to act on the bill, thus it was dropped from the agenda at the end of the 1984 congressional session.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

of exchange, neither domestic producers nor NME producers can determine appropriate import prices.¹⁴⁷ Moreover, if exchange rates are constantly fluctuating, "currency dumping" may occur.¹⁴⁸

For example, suppose the dollar devaluates against a foreign currency from month A to month B. The exporter's prices to the United States suddenly are lower than its domestic prices, resulting in a technical case of dumping. If the exporter raises its export price to the United States, however, it loses its naturally gained competitive edge. Both the EEC Commission and the United States administering authorities place currency dumping under the purview of their respective antidumping provisions.¹⁴⁹

Some commentators have suggested applying a "true" exchange rate to remedy the problem of NME currency rates.¹⁵⁰ Under this proposal, the administering authority would construct a stable exchange rate and publicize its rates. NME exporters thus could apply that rate to their production costs and determine a "fair" export price. Likewise, domestic producers could compare the NME's estimated production costs with the constructed exchange rate to determine possible dumping margins.¹⁵¹

C. *Anticompetition/Antitrust Issue*

While an antidumping/antitrust comparison is beyond the scope of this Article, the inconsistencies between the two policies must be noted. Unlike the antitrust laws, antidumping laws allegedly protect competitors rather than competition.¹⁵² For example, inherent in the "fair" or "normal" price evaluation is the notion of a base or floor price, below which an exporter will incur antidumping charges. Moreover, antidumping laws do not distinguish between truly predatory dumping and pro-competitive forms of dumping, such as price-cutting.¹⁵³ Antitrust policies attack unfair competition while antidumping policies apparently attack "harmful" competition.

¹⁴⁷ *Id.* at 819.

¹⁴⁸ See Didier, *supra* note 100, at 358.

¹⁴⁹ *Id.* at 359.

¹⁵⁰ See Horlick & Shuman, *supra* note 27, at 831.

¹⁵¹ *Id.*

¹⁵² See Victor, *Antidumping and Antitrust: Can the Inconsistencies Be Resolved?*, 15 N.Y.U. J. INT'L L. & POL. 339, 350 (1983).

¹⁵³ *Id.*

VII. CONCLUSION

Some problems and inconsistencies will, to one extent or another, inherently arise in connection with United States and EEC antidumping laws. A comprehensive or unified approach, however, would strengthen the problematic areas. Most importantly, each legislative body could improve its own laws by examining the approach of the other. For example, the conciseness and effectiveness of the EEC Antidumping Regulation is admirable. The entire antidumping regulation is contained in twelve pages. For a comparable knowledge of the United States antidumping law, one must delve through the Antidumping Act of 1921, Tariff Act, Trade Agreements Act, Code of Federal Regulations, and recent case law.

Similarly, each body could borrow from the laws of the other where needed—specifically, in defining such terms as “threat of injury” and “material injury.” Generally, the United States could profit from examining the EEC Antidumping Regulation price undertaking and provisional duties. Likewise, the EEC could benefit from observing the United States escape clause, Heinz bill, and case law.

For common, unresolved problems, the two legislative bodies should consult to reach comprehensive, successful, and compatible results. Such action is needed immediately regarding NME pricing and inconvertible NME currencies. By acting independently, the United States and EEC force exporters, particularly NME exporters, to address different and potentially inconsistent import regulations. For the most part, United States and EEC antidumping laws exhibit marked similarities. However, more efficient and effective trade relations among the United States, EEC, and third countries mandate continued cooperation and exchange.

