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## Let's Dump the 1916 Antidumping Act: Why the 1994 GATT Provides Better Price Protection for U.S. Industries

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# NOTES

## Let's Dump the 1916 Antidumping Act: Why the 1994 GATT Provides Better Price Protection for U.S. Industries

### ABSTRACT

*The U.S. Congress is currently considering a vote to repeal the 1916 Antidumping Act. The 1916 Antidumping Act makes the importation of foreign goods that were sold below market prices illegal if the foreign company had the "intent [to] destroy or injure an industry in the United States." Few claims have been adjudicated under the 1916 Act since its passage, and no plaintiff has won a case based solely on the 1916 Antidumping Act. Commentators reason that the strict intent requirement or the availability of remedies in other antitrust statutes has contributed to this phenomenon. Recently, there has been debate in the international trade community regarding the Act's compatibility with multinational trade treaties of which the United States is a signatory. The World Trade Organization found the 1916 Act inconsistent with antidumping provisions in 1994 GATT, and its Appellate Body upheld those decisions.*

*This Note discusses the history of the antidumping legislation and enforcement, the current international controversy surrounding the laws of the United States, and the costs and benefits of using international dispute resolution procedures to counteract foreign dumping in the United States if the 1916 Act is repealed.*

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## I. INTRODUCTION

On March 4, 2003, Rep. James F. Sensenbrenner, Jr., chairman of the House of Representatives Committee on the Judiciary, introduced in the 108th Congress H.R. 1073,<sup>1</sup> a bill to repeal the 1916 Antidumping Act as enacted in Section 801 of the Act of September 8,

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1. To Repeal Section 801 of the Revenue Act of 1916, H.R. 1073, 108th Cong. (2003) [hereinafter Repeal Act]. A related bill was introduced by Senator Bill Grassley, chairman of the Senate Committee on Finance. To Repeal Section 801 of the Revenue Act of 1916, S. 1155, 108th Cong. (2003). In 2001, Representative Bill Thomas, chairman of the House of Representatives Committee on Ways and Means introduced H.R. 3557, which also repealed Section 801 of the Revenue Act of 1916, however this bill was never voted on by Congress. To Repeal the Antidumping Provisions Contained in the Act of September 8, 1916, H.R. 3557, 107th Cong. (2001).

1916.<sup>2</sup> The 1916 Antidumping Act makes the importation of foreign goods that were sold below market prices illegal if the foreign company had the "intent [to] destroy or injure an industry in the United States."<sup>3</sup> The conduct is a misdemeanor punishable by up to a one-year imprisonment and no greater than a \$5,000 fine.<sup>4</sup> The Act also creates a private right of action for companies who believe they were victims of "dumping" by a foreign company and provides treble damages and "the cost of the suit, including attorney's fee."<sup>5</sup>

Few claims have been adjudicated under the 1916 Antidumping Act since its passage over eighty-five years ago. Commentators have suggested that the reason no plaintiff has ever won on straight 1916 Antidumping Act grounds is either the strict intent requirement read into the act by the small number of courts which have ruled on the subject, or that there are antitrust statutes that provide more appropriate relief in these situations.<sup>6</sup>

While adjudication of this Act has been light,<sup>7</sup> there has recently been much debate in the international trade community regarding its compatibility with multinational trade treaties of which the United States is a signatory. This concern for the Act's power has increased since a federal court in Utah held that the 1916 Antidumping Act, which had been used unsuccessfully by U.S. companies to sue foreign companies on antitrust grounds, could be used to tackle antidumping complaints.<sup>8</sup> The European Community (EC) and Japan filed separate World Trade Organization (WTO) complaints after Wheeling-Pittsburgh Steel Corporation settled a suit against Dufreco Steel alleging it had violated the 1916 Antidumping Act.<sup>9</sup> Both the EC and Japan argued that the 1916 Antidumping Act is inconsistent with the antidumping provisions set forth in trade agreements of

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2. Revenue Act of 1916, ch. 463, § 801, 39 Stat. 756, 798-99 (1916) (codified at 15 U.S.C. § 72 (2002)) [hereinafter 1916 Antidumping Act].

3. *Id.*

4. *Id.*

5. *Id.*

6. See generally Note, *Rethinking the 1916 Antidumping Act*, 110 HARV. L. REV. 1555 (1997).

7. As of 1997, there were only fifteen reported civil actions in the eighty-plus year history of the Act. *Geneva Steel v. Ranger Steel*, 980 F. Supp. 1209, 1214 (C.D. Utah 1997).

8. *Steel Importer Settles with Wheeling-Pittsburgh in 1916 Case*, INSIDE U.S. TRADE, Feb. 26, 1999, at 10. The court denied Ranger Steel's (a German corporation) motion to dismiss because it found that a violation of the act could occur even when there were no allegations of predatory pricing or antitrust injury. *Geneva Steel*, 980 F. Supp. at 1224.

9. *Steel Importer Settles with Wheeling-Pittsburgh in 1916 Case*, INSIDE U.S. TRADE, Feb. 26, 1999, at 10-11.

which the United States is a party.<sup>10</sup> They also argued that the preliminary ruling in the *Geneva Steel* case allows for U.S. companies to blackmail foreign competition and force them to negotiate a settlement for fear of partaking in drawn-out and costly litigation.<sup>11</sup>

The WTO panels found the acts inconsistent with international trade agreements.<sup>12</sup> The WTO Appellate Body upheld the decision.<sup>13</sup> They recommended that the Dispute Settlement Body request that the 1916 Antidumping Act be brought into conformity with the treaties.<sup>14</sup> Legislative action intending to do this resulted over a year later when Ways and Means Chairman Bill Thomas introduced H.R. 3557 and then again in 2003 with the introduction of H.R. 1073 and S. 1155.<sup>15</sup>

If passed, H.R. 1073 would disallow judgments made pursuant to the 1916 Act that are inconsistent with the Act's repeal.<sup>16</sup> Had H.R. 3557 been passed in 2001, it would have ensured U.S. compliance with the treaties in existence when the WTO agreements were reached. For a variety of reasons, this bill was not brought to vote after being referred to the House of Representatives Committee on the Judiciary.

Though little litigation has occurred since the introduction of H.R. 3557, one case is of interest for this discussion. Goss Graphic Systems (Goss), a U.S. manufacturer and supplier of "newspaper presses, newspaper press additions and other printing press systems for newspaper, advertising, and commercial printing and publishing markets," sued MAN Roland Druckmaschinen Aktiengesellschaft (MAN Roland) alleging violations of the Antidumping Act of 1916.<sup>17</sup> Goss claimed that MAN Roland was importing their foreign-made presses and other equipment into U.S. markets and selling them at prices far below those in Germany, the company's principal place of business.<sup>18</sup> The defendants, MAN Roland, its associates, and their U.S. subsidiaries, filed a motion to dismiss based on the elements of the violation as well as on jurisdictional issues.<sup>19</sup> The motion was

10. United States–Anti-Dumping Act of 1916, Report of the Appellate Body, WT/DS136/AB/R, Aug. 28, 2000, at ¶ 2.

11. INSIDE U.S. TRADE, *supra* note 9, at 10.

12. United States–Anti-Dumping Act of 1916, Report of the Appellate Body, *supra* note 10, ¶¶ 4-6.

13. *Id.* ¶¶ 155-56.

14. *Id.* ¶ 156.

15. H.R. 3557, 107th Cong. (2001); H.R. 1073, 108th Cong. (2003); S. 1155, 108th Cong. (2003).

16. H.R. 1073 § 1(a).

17. Goss Graphic Sys. v. MAN Roland Druckmaschinen Aktiengesellschaft, 139 F. Supp. 2d 1040, 1042-43 (N.D. Iowa 2001).

18. *Id.* at 1042.

19. *Id.*

denied by the district court and discovery has proceeded. A motion for summary judgment was also denied in 2003.<sup>20</sup>

This Note discusses the history of antidumping legislation and enforcement, the current international controversy surrounding the laws of the United States, and observations concerning the positive and negative features of using international dispute resolution procedures to counteract foreign dumping in the United States if the 1916 Act is repealed. Section II of this Note discusses the legislative history and passage of the 1916 Antidumping Act, including a brief discussion of later antidumping legislation. Section II also includes a discussion of the limited judicial interpretation of the Act. Section III focuses on the WTO dispute regarding the compatibility of the 1916 Antidumping Act with other international agreements regarding dumping including GATT and the WTO Agreement. Section IV articulates the positive and negative aspects of repealing the 1916 Antidumping Act and advocates international dispute resolution through the WTO as the best remedy for dumping.

## II. 1916 ANTIDUMPING ACT LEGISLATION AND JUDICIAL INTERPRETATION

Since its passage, the 1916 Antidumping Act has not been the subject of many lawsuits.<sup>21</sup> In fact, one district court found that until the 1970s, the 1916 Act was only mentioned in one reported decision, and even that case did not reach judgment on the merits.<sup>22</sup> There also been little scholarship on the Act written prior to 1980.<sup>23</sup> Cases prior to the holding by the Eastern District of Pennsylvania in *Zenith Radio Corp. v. Matsushita Electric Co.* held only that the 1916 Antidumping Act did essentially the same things as 15 U.S.C. § 15, which authorizes treble damage actions for violations of antitrust laws.<sup>24</sup> The court in *Zenith*, in which a U.S. electronics manufacturer sued several Japanese electronics manufacturers, undertook an

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20. *Goss Int'l Corp. v. Tokyo Kikai Seisakusho, Ltd.*, 294 F. Supp. 2d 1027, 1044 (N.D. Iowa 2003).

21. As late as 1974, commentators had noted that no plaintiff had been successful in proving a violation of the 1916 Act, although four U.S. companies had filed charges. See Matthew J. Marks, *United States Antidumping Laws—A Government Overview*, 43 ANTITRUST L.J. 580, 581 (1974).

22. *Zenith Radio Corp. v. Matsushita Elec. Ind. Co.*, 494 F. Supp. 1190, 1212 (E.D. Pa. 1980).

23. *Id.* During the court's analysis of the Act, they found only a single reference in an antitrust treatise to the 1916 Antidumping Act.

24. *Id.*

extensive study of the Act's legislative and social history. It was the first court to do so in the history of the Act.<sup>25</sup>

### A. Legislative History of the Act

"Dumping" is defined in the United States as "the sale of commodities in a foreign market at a price which is lower than the price or value of comparable commodities in the country of their origin."<sup>26</sup> The 1916 Act was intended to prohibit international price discrimination that would have injurious effects on U.S. companies.<sup>27</sup> The Act requires a comparison of the price at which the products are sold in U.S. markets with 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 the production."<sup>28</sup> Any product which is found to be sold at "substantially less than the market value," after additional expenses such as freight charges and import duties are included, violates the act.<sup>29</sup> Additionally, to prove violation, the defendant company must have the "intent of injuring an industry in the United States."<sup>30</sup> The interpretation of this latter element has most concerned courts, especially the *Zenith* court and the judges in *Geneva Steel v. Ranger Steel*.<sup>31</sup> Some commentators believe that the failure of the Act to define intent has rendered its provisions inoperable.<sup>32</sup>

The 1916 Act has several similarities to both U.S. antitrust statutes and U.S. customs statutes.<sup>33</sup> The most obvious parallel to antitrust statutes is the treble damage award provided to plaintiffs who can prove violations of the 1916 Act.<sup>34</sup> In addition, Section 2 of the Clayton Act prohibits price discrimination between different

25. *Id.*

26. *Id.* at 1194.

27. *Id.* at 1213. Republicans, the key proponents of the legislation, feared that European manufacturers, whose goods had been stockpiled in Europe during World War I because of shipping diversions for noncommercial purposes, would flood the markets at below-competitive prices and destroy domestic manufacturers. Marks, *supra* note 21, at 581.

28. 1916 Antidumping Act, 15 U.S.C. § 72.

29. *Id.*

30. *Id.*

31. *Zenith Radio Corp. v. Matsushita Elec. Ind. Co.*, 494 F. Supp. 1190, 1212 (E.D. Pa. 1980); *Geneva Steel v. Ranger Steel*, 980 F. Supp. 1209, 1215-16 (C.D. Utah 1997).

32. Marks, *supra* note 21, at 582.

33. *Zenith Radio Corp.*, 494 F. Supp. at 1213-17.

34. 1916 Antidumping Act, 15 U.S.C. § 72 (2002); Clayton Act, Oct. 15, 1914, Ch. 323, 38 Stat. 730 (1914) (codified at 15 U.S.C. §§ 12-27) [hereinafter Clayton Act].

purchasers of a product in a domestic context.<sup>35</sup> Early courts that addressed the 1916 Antidumping Act also noted that the standing provisions of the Act and of Section 2 of the Clayton Act were similar.<sup>36</sup> Similarities to customs statutes can be seen in the 1916 Act's "actual market value or wholesale price" requirement,<sup>37</sup> which has special significance in the Tariff Act of 1913.<sup>38</sup> Congress directed that the customs duties be assessed upon "the actual market value or wholesale price thereof, at time of exportation to the United States, in principal markets of the country from whence exported."<sup>39</sup> Courts have found the 1916 Act and the 1913 Tariff Act to be essentially identical in this area.<sup>40</sup>

The political and social environment of the early twentieth century is essential to understanding the Act.<sup>41</sup> The 1916 Antidumping Act was enacted during the end of Woodrow Wilson's first presidential term.<sup>42</sup> Democrats controlled both houses of Congress, and they firmly opposed anticompetitive practices.<sup>43</sup> With the majority of Congress believing that judicial construction of the Sherman Act had stripped it of its ability to deter anticompetitive conduct,<sup>44</sup> Congress struck back by enacting the Federal Trade Commission Act in 1914.<sup>45</sup> Shortly after that, Congress passed the Clayton Act.<sup>46</sup> Democrats shared a distaste for high tariff duties and subsequently passed the Tariff Act of 1913.<sup>47</sup> The Tariff Act had a small antidumping provision, but it did not create a private right of action for companies who believed they were victims of foreign dumping.<sup>48</sup> Though antidumping duties were the only remedy sanctioned by the Tariff Act of 1913, there was no requirement to show intent or injury to prove a violation.<sup>49</sup> World War I had the effect of providing extreme protection to U.S. industries because

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35. Clayton Act, 15 U.S.C. § 13(a). The Clayton Act is not triggered by international dumping.

36. *Bywater v. Matsushita Elec. Indus. Co.*, 1971 Trade Cas. P73, 759 (S.D.N.Y. 1971); *Schwimmer v. Sony Corp. of America*, 1979-81 Trade Cas. P62, 632 (E.D.N.Y. 1979).

37. 1916 Antidumping Act, 15 U.S.C. § 72.

38. 38 Stat. 189 (1913) [hereinafter Tariff Act of 1913] (Tariff Act, Oct. 3, 1913, ch. 16, 385 Stat. 114).

39. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1209, 1215 (E.D. Pa. 1980).

40. *Zenith Radio Corp.*, 494 F. Supp. at 1213.

41. *Id.*

42. *Id.* at 1217.

43. *Id.*

44. *Id.*

45. 15 U.S.C. § 41 (1914).

46. Clayton Act, 15 U.S.C. § 13 (1914).

47. *Zenith Radio Corp.*, 494 F. Supp. at 1218.

48. *Id.*

49. *Id.*

European products could not be imported, let alone in great quantity and at below-cost prices.<sup>50</sup> However, the U.S. government was fearful of the European competition to come with the end of the war.<sup>51</sup> Although the Executive Branch was concerned about an influx of foreign products, it was careful to note that any remedy should not restrain normal competition involved in international trade.<sup>52</sup>

Floor debate on the Revenue Act shows that the Democrats in Congress in 1916 also did not intend to restrict the promotion of free trade that had been the center of earlier tariff legislation, and were only interested in supporting an antidumping bill that used tariffs solely as a revenue-raising scheme.<sup>53</sup> The Democrats enacted the Clayton Act in 1914, prohibiting price discrimination among domestic producers, as one of the key contributors to monopoly.<sup>54</sup> However, the Act did not apply to international commerce, and the Democrats struggled to find a balance between their interest in subduing potential monopolies and their zeal for free trade.<sup>55</sup> The Tariff Act of 1913, which included an antidumping provision, was struck down by the Senate Finance Committee which feared that Republicans might use the provision to increase tariffs.<sup>56</sup> A proposal by the Secretary of Commerce Redfield, which recommended that Congress pass legislation parallel to the Clayton Act for international competition, is now seen as the precursor to the Antidumping Act of 1916.<sup>57</sup>

The 1916 Antidumping Act was not substantially changed from introduction to passage and enactment.<sup>58</sup> The Act was placed under Title VIII—Unfair Competition in the Revenue Act—a nod to the

50. *Zenith Radio Corp.*, 494 F. Supp. at 1219.

51. *Id.* The court states that it was "anticipated that the European industries, in a effort to revive themselves, would resort to unfair and predatory methods of competition." Some commentators have surmised that Americans were most fearful of the European chemical cartels, who could and wanted to produce and export chemicals from Europe at predatory prices which were substantially below those that domestic manufacturers charged. Harvey M Applebaum, *The Antidumping Laws—Impact on the Competitive Process*, 43 ANTITRUST L.J. 590, 591 (1974).

52. *Zenith Radio Corp.*, 494 F. Supp. at 1219. Secretary of Commerce William Redfield proposed many legislative remedies in his 1915 Annual Report. He is credited with proposing the enactment of stricter antidumping laws which was the precursor to the 1916 Antidumping Act. *Id.*

53. *Id.* at 1222.

54. Clayton Act, 15 U.S.C. § 13(a).

55. *Zenith Radio Corp.*, 494 F. Supp. at 1217. "Democrats believed that the protective tariffs then in force insulated domestic trusts from legitimate foreign competition." *Id.* at 1218.

56. *Id.* at 1219.

57. *Id.* at 1220. The *Zenith* court hypothesized this connection as they were unable to find any historical evidence pointing to this proposition. *Id.*

58. *Id.* at 1221.

antitrust issues that the legislature hoped it would curb.<sup>59</sup> This location suited both members of the executive branch<sup>60</sup> as well as those of the legislature because they largely shared the belief that any antidumping provisions were supplemental to the Clayton Act, which did not have an international reach for price discrimination.<sup>61</sup> There was little debate surrounding the Antidumping Act, although tariff provisions of the Revenue Act received much consideration, according to the legislative history.<sup>62</sup> Floor debates showed that congressmen believed a major impetus of the bill was to insulate United States manufacturers from the influx of goods from European markets after World War I was over.<sup>63</sup> However, the sponsor of the Revenue Act stated that the antidumping provision of the act only required the same pricing restrictions of foreign importers as those imposed on U.S. companies.<sup>64</sup> In addition, the Wilson Administration made an effort not to emphasize the tariff provisions of the Antidumping Act and instead focused on the Act's ability to restrict unfair competition from foreigners.<sup>65</sup> Most courts, including the one that decided *Zenith Radio Corp.*, have favored the interpretation of the Act that causes it to be parallel to other antitrust legislation.<sup>66</sup> However, this analogy is not entirely fitting: the 1916 Antidumping Act does not require the same level proof of intent as other antitrust statutes because there is no requirement in the Act that plaintiffs show the foreign corporation had *predatory* intent.<sup>67</sup>

### B. *New Antidumping Legislation—The Government Steps In*

By 1919, the U.S. Tariff Commission argued that the elements of the 1916 Act, particularly the intent element, made it almost impossible to enforce its penal provisions.<sup>68</sup> The Commission

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59. *Zenith Radio Corp.*, 494 F. Supp. at 1221. Secretary of Commerce Redfield stated that the antidumping provisions was "not intended to retard 'that normal ebb and flow of legitimate commerce between our land and all others which will provide for our people the security against exaction which is insured by reasonable competition.'" *Id.* at 1223 n.44.

60. *Id.* at 1222.

61. *Id.*; see Clayton Act, 15 U.S.C. § 13.

62. *Zenith Radio Corp.*, 494 F. Supp. at 1221-22.

63. *Id.* Legislators of both parties shared the belief that foreign manufacturers would turn to any type of action possible to stay in business after the war ended. *Id.*

64. *Id.* at 1222.

65. *Id.* at 1223. In a letter to the *New York Times*, Attorney General Samuel J. Graham extolled the virtues of the antidumping provision of the Revenue Act, but made sure to say that its purpose was to prohibit unfair competition, not to raise revenue. *Id.* at 1223 n.44.

66. *Id.*

67. *Id.* at 1201.

68. Marks, *supra* note 21, at 582; Applebaum, *supra* note 51, at 591.

proposed that administrative remedies would allow the United States to protect domestic industry better than a criminal or civil statute whose elements were vague and very difficult to prove.<sup>69</sup> Congress enacted the Antidumping Act of 1921<sup>70</sup> in response to growing financial distress that U.S. companies sustained because of increased importation from international competitors.<sup>71</sup> This Act was premised on the assumption that price discrimination between foreign and domestic markets is per se disruptive of trade and should be punished by tariffs.<sup>72</sup>

The 1921 Act required the government to investigate alleged cases of dumping and stated that a violation occurred when: (1) goods were sold at less than their "fair value"<sup>73</sup> in the United States and (2) a domestic industry was disadvantaged by this practice.<sup>74</sup> According to the 1921 Act, the Secretary of the Treasury must find that a good is being sold at less than fair market value, and, in addition, the International Trade Commission must have found an injury to domestic industry.<sup>75</sup> To avoid the enforcement issues that plagued the Antidumping Act of 1916, intent was not an element in the 1921 Act.<sup>76</sup> The Act did not include criminal penalties, and there was no private right of action granted to domestic competitors injured by the dumping.<sup>77</sup>

The 1921 Act also differs from the 1916 Act in the language used to define the price differential that must be shown to prove dumping.<sup>78</sup> Under the 1916 Act, the plaintiff has to show the "actual market value or wholesale price of such articles," whereas the 1921 Act required the "fair value" of the article to be compared to the "foreign market value" or the "constructed value."<sup>79</sup> The 1921 statute defined these terms and "fair value" was defined in the customs

69. Marks, *supra* note 21, at 582 (noting the difficulty posed by the 1916 Act of taking effective action against offenders).

70. Antidumping Act of 1921, Pub. L. No. 67-10, 42 Stat. 11, 13 (1921) (codified as amended 19 U.S.C. § 162 (1970)) (repealed by Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144) [hereinafter Antidumping Act of 1921].

71. The Tariff Commission (now the International Trade Commission) supported a new initiative to tackle foreign dumping and Congress relied heavily on their findings when drafting the Antidumping Act of 1921. Applebaum, *supra* note 51, at 591-92 (citing U.S. TARIFF COMM'N REPORT: DUMPING AND UNFAIR COMPETITION (1919)).

72. Marks, *supra* note 21, at 582.

73. "Fair value" for purposes of the Antidumping Act of 1921 meant the "home market price of identical or similar merchandise." *Id.* at 582-83.

74. *Id.* at 583.

75. Antidumping Act of 1921, 19 U.S.C. § 162 (1970).

76. *Id.*

77. Zenith Radio Corp. v. Matsushita Elec. Ind. Co., 494 F. Supp. 1190, 1224 (E.D. Pa. 1980).

78. *Id.* at 1225.

79. *Id.*

regulations.<sup>80</sup> The two statutes, although dealing with the same behavior, were interpreted as complementary and typically those companies that file 1916 cases also petition the International Trade Commission for a finding of illegal dumping and an imposition of tariffs upon the offending imports.<sup>81</sup>

Many allegations of dumping violations were made in the years immediately following the passage of the 1921 Act, however, after World War II, the government adopted a more liberal trade policy and worked to lessen tariffs for imports, reducing the number of prosecutions under the Act.<sup>82</sup> The government brought more dumping cases in the 1970s due to the increase in the foreign imports market, which began in the 1960s and was left largely unchecked until the next decade.<sup>83</sup>

The Antidumping Act of 1921 was amended several times, most drastically by the passage of the Trade Act of 1974.<sup>84</sup> These amendments created an open disclosure policy, time limits for investigations, transcribed hearings, and new administrative procedure requirements.<sup>85</sup> The 1921 Act was repealed by the Trade Agreement Act of 1979,<sup>86</sup> however its provisions have been incorporated into other code sections.<sup>87</sup>

### C. Early Case Law Interpreting the Act

The Anti-Dumping Act of 1916 has not been used much in its long life.<sup>88</sup> Tariffs as high as forty percent usually kept international

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80. *Id.*

81. *See Geneva Steel Co. v. Ranger Steel Supply Corp.*, 980 F. Supp. 1209, 1212 (D. Utah 1997) (explaining that steel producers additionally petitioned the International Trade Commission for a finding of illegal dumping of steel from three countries).

82. Marks, *supra* note 21, at 583.

83. *Id.* at 583-84. At the beginning of his presidency, Richard Nixon adhered to the liberal trade policies put in place by his Democratic predecessors. By early 1970s, his policies had changed and his administration attempted to revive the 1921 Act by creating a new set of regulatory procedures such as manpower increases. This expansion led to an increase two-fold in the number of cases brought by the Treasury Department from 1968 to 1973. *Id.* at 584.

84. Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1974).

85. Marks, *supra* note 21, at 584-85.

86. Trade Agreements Act of 1979, Pub. L. No. 96-39, Title I § 106(a), 93 Stat. 193.

87. *See* 19 U.S.C. § 1673 (2002). There were some post-Uruguay Round changes to the antidumping law that morphed from the Antidumping Act of 1921, however these changes do not affect the application of the 1916 Act to dumping violations as they are primarily changes to the petition provisions. *See Raj Bhala, Rethinking Antidumping Law*, 29 GEO. WASH. J. INT'L L. & ECON. 1, 24-55 (1995) (summarizing pre-Uruguay Round law).

88. *See* discussion *supra* note 7 and accompanying text.

competitors from pricing below domestic manufacturers.<sup>89</sup> However, after the Uruguay Round agreements went into effect, the tariffs plunged dramatically with most industrial countries only charging an average duty of 3.9 percent on imports.<sup>90</sup> Anti-dumping orders issued under the provisions of the Antidumping Act of 1916, which were minimal by any standard prior to 1980, increased two-fold in that decade and, in conjunction with the rise in orders being issued by the U.S. Department of Commerce and the International Trade Commission, there was also a spike in the number of lawsuits brought in U.S. courts under the Antidumping Act of 1916.<sup>91</sup>

*Zenith Radio Corporation v. Matsushita Electric Ind. Co.*, decided by the District Court for the Eastern District of Pennsylvania, sheds light on the purpose and legislative history of the Act.<sup>92</sup> While the Act was interpreted prior to *Zenith* in three reported cases,<sup>93</sup> none of these cases had delved into the legislative and social history of the act. Both *Bywater v. Matsushita Electric Co.* and *Schimmer v. Sony Corp. of America* were dismissed because the plaintiffs lacked standing to sue.<sup>94</sup> Standing is a recurring theme in 1916 Act litigation and courts have not been entirely consistent in their application of the doctrine.<sup>95</sup> In the other action, *Outboard Marine Corp. v. Pezetel*, the court held that the 1916 Act did not apply to cases where the product in question was not manufactured for sale in another country but was only manufactured for importation to the United States.<sup>96</sup> The courts in these cases dismissed the antidumping claims without exploring the statute.

89. Bhala, *supra* note 87, at 3.

90. *Id.*

91. *Id.* at 3-4.

92. *Zenith Radio Corp. v. Matsushita Elec. Ind. Co.*, 494 F. Supp. 1190, 1190 (E.D. Pa. 1980).

93. *Bywater v. Matsushita Elec. Indus. Co.*, 1971 Trade Cas. P73, 759; *Schwimmer v. Sony Corp. of America*, 1979-81 Trade Cas. P62, 632; *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384, 384 (D. Del. 1978).

94. *Bywater*, 1971 Trade Cas. P73, at 759; *Schimmer*, 1979-81 Trade Cas. P62, at 632. Both courts found the provision in the 1916 Act which authorizes treble damages substantially the same as antitrust treble damage statutory provisions, and held that standing for the 1916 Act was the same as standing in antitrust suits.

95. After *Zenith* was decided, the District Court for the Southern District of New York held that where there were no domestic producers for a given market, another international importer could sue for alleged injury under the 1916 Act. See *Isra Fruit, Ltd. v. Agrexco Agric. Export Co.*, 631 F. Supp. 984, 988-89 (S.D.N.Y. 1986).

96. *Outboard Marine v. Pezetel*, 461 F. Supp. 384, 408-09 (1978). In this case, the plaintiff, a domestic manufacturer of electric golf carts sued a Polish manufacturer under the Sherman Act, the Tariff Act, and the Antidumping Act of 1916. The court dismissed the Antidumping Act claim. *Id.* Another review of a plaintiff's standing to sue in antidumping cases occurred in *Western Concrete Structures Co. v. Mitsui & Co.*, 760 F.2d 1013, 1019-20 (9th Cir. 1985). The court held that the 1916 Act only protected domestic manufacturers of the dumped good, and therefore competitors of the

The *Zenith* antidumping litigation is part of a monstrous antitrust lawsuit filed by U.S. electronics manufacturers against foreign manufacturers.<sup>97</sup> The conspiracy alleged by the plaintiffs was massive—purportedly spanning thirty years and involving over one hundred firms.<sup>98</sup> *Zenith Radio Corp. v. Matsushita Electric Industrial Co.* was the district court opinion which dealt directly with several defendants' motions to dismiss the plaintiffs' 1916 Antidumping Act claims and is arguably the most comprehensive review of the legislation to date.<sup>99</sup> The court premised its opinion on a reading of the legislative, social, and political history of the 1916 Act<sup>100</sup> as well as on the Act's relation to the 1921 Antidumping Act,<sup>101</sup> antitrust statutes,<sup>102</sup> and customs statutes.<sup>103</sup>

The *Zenith* court concluded that the 1916 Act was enacted due to the efforts of a Democratic-controlled Congress which was "vigorously opposed to anticompetitive and monopolistic practices."<sup>104</sup> Based on the political and legal history of the time, the court found that the statute was geared more toward antitrust law than protectionist customs law.<sup>105</sup> The court also held that interpretation of the law should closely parallel any existing antitrust law applicable to domestic commerce, particularly Section 2 of the Clayton Act, since both laws deal with price discrimination.<sup>106</sup>

#### D. Interpretation of the Elements of the Antidumping Act of 1916

The meaning of elements of the 1916 Act was hotly contested in the *Zenith* case, and because the Act had not been adequately interpreted in its sixty-plus years in existence, the court made several findings regarding the definitions of words used in the statute. Language that was statutorily defined to value the merchandise ("such or similar merchandise") for comparison was defined broadly

purchasers of the dumped good, such as the plaintiff, did not have standing to sue under this Act. *Id.*

97. The litigation includes several cases. Only *Zenith Radio Corp.*, 494 F. Supp. at 1190, and *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d 1069 (3d Cir. 1980) are discussed in this Note.

98. *In re Japanese Elec. Prods. Antitrust Litig.*, 631 F.2d at 1074.

99. *Zenith Radio Corp.*, 494 F. Supp. at 1195.

100. *Id.* at 1217-23.

101. *Id.* at 1223-26.

102. *Id.* at 1213-15.

103. *Id.* at 1215-17.

104. *Zenith Radio Corp.*, 494 F. Supp. at 1217. The Democratic Party platform in 1912 denounced private monopoly and "demand[ed] the enactment of such additional legislation as may be necessary to make it impossible for a private monopoly to exist in the United States." *Id.*

105. *Id.* at 1220.

106. *Id.* at 1223.

for purposes of the 1921 Act, however its definition and subsequent revisions were not included in the 1916 Act.<sup>107</sup> Although Congress amended the 1921 Act in 1958 to allow the Secretary of the Treasury broad discretion to compare prices of products if it could not find exactly the same merchandise being sold in a market outside the United States, the broadening amendments were not specifically applied to the 1916 Act and therefore cannot be used to find 1916 Act violations.<sup>108</sup>

The *Zenith* court held that statutory construction of "such articles" did not lend itself to a strict interpretation of the comparison language: meaning that even if an identical product was not found, a comparison could still be made to find what the fair value of the product should be.<sup>109</sup> Using statutory construction, prior customs decisions, and dictionary meanings of words to shape their holding,<sup>110</sup> the court found that the precise degree of similarity which the 1916 Act required for comparison could be derived from looking to Section 2 of the Clayton Act and the appraisal provisions of the Tariff Act of 1913.<sup>111</sup> Interpretation of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act,<sup>112</sup> found that "if there are substantial physical differences affecting consumer use, preference, or marketability, such products are not of 'like grade and quality' regardless of manufacturing costs."<sup>113</sup> The Tariff Act standard the court relied on is as follows: "if goods are made of approximately the same materials, are commercially interchangeable, are adapted to substantially the same uses, and are so used, ordinarily, they are similar."<sup>114</sup> Despite the interpretation advocated by the foreign defendants, the court's ruling provided that "such or similar merchandise" actually did not make it necessary for the foreign

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107. *Id.* at 1225-26.

108. *Id.*

109. *Zenith Radio Corp.*, 494 F. Supp. at 1226.

110. *Id.* The court gave five reasons for rejecting the defendants contention that only identical products could be compared, (1) the customs decisions relied upon by the defendant did not support this contention, (2) defendants' construction of the phrase required a departure from the ordinary meaning of "such", (3) the customs decisions that the defendants rely on for a definition of the word "such" does not support the same construction in 1916 cases, (4) the defendants' construction of "such" would exempt non-identical goods from price discrimination laws that would not ordinarily be exempted in domestic laws and (5) the defendants' construction was contrary to customs appraisal standards of contemporary law. *Id.*

111. *Id.* at 1226-27.

112. Robinson-Patman Act, 15 U.S.C. § 13 (1936).

113. *Zenith Radio Corp.*, 494 F. Supp. at 1227 (quoting the standard found in *Checker Motors Corp. v. Chrysler Corp.*, 283 F. Supp. 876 (S.D.N.Y. 1968), *aff'd*, 405 F.2d 319 (2d Cir. 1969), *cert. denied*, 394 U.S. 999 (1969)).

114. *Id.* (quoting the standard from *United States v. Irving Massin & Bros.*, 16 Ct. Cust. App. 19, 25 (1928)).

comparative merchandise to be identical to that which was allegedly being dumped in U.S. markets.<sup>115</sup> “The court interpreted the phrase ‘such articles’ in the 1916 Act to refer to the articles imported into the United States.”<sup>116</sup> It was held that the price of the article could be compared to similar articles sold in the home country because, by using the words “actual market value,” Congress had incorporated into the Act a system of customs appraisal which authorized appraisers to look at the value of goods which were similar but not identical to the good being appraised.<sup>117</sup>

Similar materials had to be of “like grade or quality,” and the court spent a portion of its opinion determining exactly how similar the comparison article had to be for the purpose of appraising the good.<sup>118</sup> Trying to stay true to the price discrimination laws to which it compared the 1916 Act, the court held that an overbroad determination of what could be considered “like grade or quality” would turn the legislation into a protectionist statute.<sup>119</sup> The 1916 Act, like any other price discrimination law, had the tendency in its enforcement to encourage “price rigidity.”<sup>120</sup> Subsequently, any reference to “like grade and quality” in the 1916 Act had to be construed in the same way as the phrase was interpreted in any Robinson-Patman litigation or legislative history.<sup>121</sup> Finally, since other courts interpreting this phrase in the context of price discrimination litigation had held that, whether the differences were slight or substantial, this was not a question that could be answered at the summary judgment stage.<sup>122</sup>

Interpretation of “intent to injure” was addressed most comprehensively in the *Geneva Steel Company v. Ranger Steel Supply Corporation* decision.<sup>123</sup> There, the court held that *Geneva Steel* would meet the intent to injure element if it could show that Ranger Steel Supply, a U.S. subsidiary of Thyssen AG (the largest steel supplier in the world at the time of the dispute), had one of the following five intentions when importing steel at prices below the

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115. *Id.* at 1228. The court noted that the defendants had not cited any legislative history in their brief to lead the court to believe that Congress intended “such” to mean “identical”. In addition, the line of cases the defendants pointed the court to did not make reference to the foreign goods in their meaning of “such”, nor are the applicable customs cases which term “such” to mean “identical” prior to the passage of the 1916 Act. *See id.*

116. *Id.* at 1230.

117. *Zenith Radio Corp.*, 494 F. Supp. at 1231.

118. *Id.* at 1230-31.

119. *Id.* at 1231.

120. *Id.*

121. *Id.* at 1233.

122. *Id.*

123. *Geneva Steel Co. v. Ranger Steel Supply Corp.*, 980 F. Supp. 1209, 1215 (D. Utah 1997).

actual market value of the articles in the country of production: (1) the intent to destroy a U.S. industry, (2) the intent to injure a U.S. industry, (3) the intent to prevent the establishment of a U.S. industry, (4) the intent to restrain trade and commerce in the subject market, or (5) the intent to monopolize trade and commerce in the subject market.<sup>124</sup> The court reasoned that all but the last two intentions were actually protectionist in nature, while intent to restrain trade and intent to monopolize were more akin to antitrust prohibitions and sought to protect competition generally.<sup>125</sup>

The court's decision provided that *Geneva Steel* would be entitled to damages even if they did not prove "predatory intent" or satisfy the specific requirements of predatory intent, thereby separating the 1916 antidumping laws from antitrust law by rejecting the antitrust intent standard.<sup>126</sup> Consequently, the 1916 Antidumping Act had a protectionist reach beyond traditional antitrust and price-discrimination pleading requirements.<sup>127</sup> The court held that the plain words of the statute protect the United States against unfair dumping, "whether the dumper possessed predatory intent or not."<sup>128</sup> The only intent required by the act is to "injure" a domestic U.S. industry.<sup>129</sup> The *Geneva Steel* court disagreed with the *Zenith* court in the interpretation that the 1916 Act had any more significance as a protectionist statute than other antitrust statutes: the *Geneva Steel* court believed it was more than "an international extension of domestic 'unfair competition' laws."<sup>130</sup> Significantly, although the *Geneva Steel* court did not believe it necessary, because they held the plain language of the statute was clear, they also found that the brief legislative history of the 1916 act supported the contention that the 1916 Act *was* a protectionist statute.<sup>131</sup>

*Wheeling-Pittsburgh Steel Corporation v. Mitsui & Company*, the most recent case prior to the introduction of H.R. 3557, affirmed the reasoning set forth in *Geneva Steel* regarding the plaintiff's burden of proof of the defendant's intent to injure in 1916 Act cases.<sup>132</sup> The defendants in *Wheeling-Pittsburgh*, a group of importers of Japanese and Russian hot-rolled steel, made a motion to dismiss Wheeling-Pittsburgh's complaint that their sales of hot-rolled steel below prices

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124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 1217.

128. *Geneva Steel Co.*, 980 F. Supp. at 1217.

129. *Id.*

130. *Id.* at 1219.

131. *Id.* at 1221.

132. *Wheeling-Pittsburgh Steel Corp. v. Mitsui & Co.*, 35 F. Supp. 2d 597, 604 (S.D. Ohio 1999).

charged in Japan and Russia violated the 1916 Act.<sup>133</sup> The defendants stated that the Act should be interpreted to require proof that the defendants had "predatory intent" in selling products.<sup>134</sup> Mitsui & Company advocated defining predatory intent as "intent to later gain market control and then recoup dumping losses by raising prices."<sup>135</sup> Although *Geneva Steel* had been decided a mere two years earlier, the defendants in *Wheeling-Pittsburgh* tried to convince an Ohio district court that the 1916 Act was only an extension of U.S. antitrust law and should be construed similarly by courts, meaning intent must be *predatory* to find a validation.<sup>136</sup>

In addressing this issue, the court reviewed the language of the 1916 Act in contrast to the Clayton and Robinson-Patman Acts.<sup>137</sup> It found that the Clayton and Robinson-Patman Acts prohibited "a seller of goods from price discrimination as to products of similar grade and quality. The motive of the seller, by the terms of the statute, is inconsequential."<sup>138</sup> As the court found little instruction in the statutes' text, it turned to Supreme Court interpretation. In *Brooke Group Limited v. Brown & Williamson Tobacco Corp.*,<sup>139</sup> the Supreme Court set forth a unified standard for the plaintiff's burden of proof under the Sherman, Clayton, or Robinson-Patman Acts for claims alleging predatory pricing.<sup>140</sup> Among other elements, the Court held that the plaintiff must show that the defendant expected its "cut-throat prices would reasonably lead to its market dominance, to the point that it could later raise prices and recoup its losses incurred by selling at a predatory price."<sup>141</sup> In *Wheeling-Pittsburgh*, the defendants claimed that the plaintiff should be required to show on the face of the complaint that there was predatory intent and a reasonable prospect of market dominance.<sup>142</sup>

The *Wheeling-Pittsburgh* court rejected the defendants' argument for several reasons, affirming the *Geneva Steel* court's holding that predatory intent was not intended to be one of the elements of proof of violation of the 1916 Act. First, it was determined that there is no constitutional mandate that Congress "impose the same standards of conduct on the importers of goods as it does on

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133. *Id.* at 599.

134. *Id.*

135. *Id.* This definition is similar to the one used in U.S. antitrust laws. See Sherman Act, 15 U.S.C. § 1 and Clayton Act as amended by Robinson-Patman Act, 15 U.S.C. §§ 12, 13.

136. *Wheeling-Pittsburgh Steel Corp.*, 35 F. Supp. 2d at 600.

137. *Id.* at 601.

138. *Id.*

139. *Id.* at 602.

140. *Id.*

141. *Id.*

142. *Wheeling-Pittsburgh Steel Corp.*, 35 F. Supp. 2d at 602.

domestic producers of goods.”<sup>143</sup> Because there were no specific provisions regarding predatory pricing in the domestic statutes, the judicial imposition of a heightened standard for these offenses was necessary, in the view of the *Wheeling-Pittsburgh* court, to promote the primary goal of increasing competition.<sup>144</sup> In addition, the ruling provided that the additional element required by the 1916 Act, proof of intent to injure or destroy domestic industry, which was conspicuously absent from the domestic statutes, negated any need for “interstitial jurisprudence on behalf of the federal courts.”<sup>145</sup> The opinion also provided that “predatory pricing” meant something different than the pricing contemplated to cause injury in the 1916 Act, and that it was within Congress’ privileges to distinguish harm caused by domestic competitors with harm caused by importers.<sup>146</sup>

After a review of the major decisions which have interpreted the 1916 Antidumping Act, the state of the Act’s interpretation at the time of the international dispute between the European Communities, Japan, and the United States in 1999 required proof of the following elements: (1) importation of a good at (2) a substantially lower price than the actual market value or wholesale price of such articles at the time of exportation in the principal markets of the country of production or other foreign countries to which the good is exported when (3) the intent is to destroy or injure a domestic U.S. industry, prevent its establishment, or restrain or monopolize trade in the United States.<sup>147</sup> “Such materials” should be interpreted as it is in domestic antitrust statutes,<sup>148</sup> and “intent” should not be interpreted to require a showing of “predatory intent,” and the interpretation of the element should allow for Congress to treat domestic and foreign competitors differently if it so desires.<sup>149</sup> In the eighty-five years of 1916 Antidumping Act jurisprudence, the U.S.

143. *Id.*

144. *Id.* at 603. The court believed that domestic antitrust statutes required additional proof of predatory intent, subsequent market dominance, and price recoupment because, among domestic competitors, it was necessary to distinguish between aggressive price-cutting, which was good for both competition and consumers, and anti-competitive price-cutting which would, in the long run, be bad for competition and consumers by decreasing the number of competitors. *See id.*

145. *Id.* The court did note in dicta that if *Wheeling-Pittsburgh* had plead an intent to restrain or monopolize trade or commerce (the fourth and fifth types of harm described in the Antidumping Act of 1916) that it would be possible that analysis of these harms should follow that which was set forth in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). *Wheeling-Pittsburgh Steel Corp.*, 35 F. Supp. 2d at 603.

146. *Id.* at 604.

147. *Id.* at 600.

148. *See supra* notes 108-16 and accompanying text.

149. *See supra* notes 121-44 and accompanying text.

federal courts have essentially interpreted the elements of the offense to create a hybrid of antitrust and protectionist legislation.

### III. THE INTERNATIONAL APPROACH—ARTICLE IV OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

#### A. *The Agreement*

The 1947 General Agreement on Tariffs and Trade (1947 GATT), signed by most industrialized nations, included a provision accepting the validity of members' antidumping provisions even though its purpose was to prevent "competing protectionist trade policies from undermining world economic welfare."<sup>150</sup> The original 1947 GATT Agreement did lead to a general decrease in tariff rates.<sup>151</sup> However, early anti-dumping provisions in Article VI of the 1947 GATT failed to provide adequate guidance and were therefore largely ineffective.<sup>152</sup> After provisions in the Kennedy Round Code and the Tokyo Round Code (subsequent GATT revisions) were found to be too general, the members of the WTO signed the Uruguay Round Code, and it is the current antidumping agreement used by member countries to protect domestic industry.<sup>153</sup>

The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (1994 GATT) creates substantive and procedural requirements that must be followed in order for a country to impose anti-dumping measures on goods from another country.<sup>154</sup> Substantively, the Agreement requires that a member country, before imposing anti-dumping measures, must

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150. Dianne M. Keppler, Note: *The Geneva Steel Co. Decision Raises Concerns in Geneva: Why the 1916 Antidumping Act Violates the WTO Antidumping Agreement*, 32 GEO. WASH. J. INT'L L. & ECON. 293, 302 (1999) (citing the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT 1947]).

151. Previous Agreements, ADP: Dumping in the GATT/WTO, available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/eol/e/wto04/wto4\\_4.htm](http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto04/wto4_4.htm) (last visited Mar. 17, 2004).

152. *Id.* "The first such Code, the Agreement on Anti-Dumping Practices, entered into force in 1967 as a result of the Kennedy Round." *Id.* The United States failed to sign this agreement so its effects were not significant. *Id.*

153. *Id.*

154. General Agreement on Tariffs and Trade—The Uruguay Round: Agreement Establishing the World Trade Organization, Dec. 15, 1993, 33 I.L.M. 13 (1994) [hereinafter 1994 GATT]; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Dec. 15, 1993, Hein's No. KAV 3778 [hereinafter AD Agreement]; Summary of Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, available at [http://www.wto.org/English/tratop\\_e/adp\\_e/antidum2\\_e.htm](http://www.wto.org/English/tratop_e/adp_e/antidum2_e.htm) (last visited Mar. 17, 2004).

prove that there are dumped goods, that there has been a material injury to domestic industry, and that there is a causal link between the dumped imports and the injury.<sup>155</sup> The Agreement provides detailed rules regarding the determination of injury and the definition of industry, the two fundamental elements in determining a dumping violation.<sup>156</sup> Procedurally, the Agreement creates requirements that will “ensure transparency of proceedings, a full opportunity for parties to defend their interests, and adequate explanations by investigating authorities of their determinations.”<sup>157</sup> Specifically, there are special provisions which detail the protocol for initiating and conducting investigations, imposing provisional measures, making settlement agreements between countries (called price undertakings), imposing and collecting duties for dumping violations, and the duration and review of anti-dumping measures.<sup>158</sup> The Agreement also provides for a WTO Committee on Anti-Dumping Practices and creates requirements by which members must provide information regarding any preliminary and final actions taken on anti-dumping as well as current and new anti-dumping laws implemented in their countries.<sup>159</sup> Finally, there is a special standard of review created by the Agreement to be applied by panels in deciding anti-dumping disputes that provides guidance in determining matters of fact as well as questions of interpretation.<sup>160</sup>

### B. *The Dispute*

Although the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (AD Agreement) provides in Article 1 that antidumping measures will only be applied by signatories in a manner consistent with the Agreement, U.S. trade representatives have indicated in remarks that the 1916 Antidumping Act was “grandfathered” under the Uruguay Round Agreements.<sup>161</sup> However, after the *Wheeling-Pittsburgh* decision in 1999 (and quite possibly as a response to it), both the European Community (EC) and Japan filed claims with the WTO Dispute Settlement Board (DSB) maintaining that the 1916 Act is

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155. Summary of Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, *available at* [http://www.wto.org/English/tratop\\_e/adp\\_e/antidum2\\_e.htm](http://www.wto.org/English/tratop_e/adp_e/antidum2_e.htm) (last visited Mar. 17, 2004).

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. Keppler, *supra* note 150, at 303-04 (quoting the statement from then-U.S. Trade Representative Charlene Barshefsky before the Subcommittee on Commerce of the House Committee on Appropriations).

inconsistent with the United States' obligations under the 1994 GATT, the AD Agreement, and the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement).<sup>162</sup> Both members complained that the 1916 Act violates the above-mentioned international agreements because "under certain conditions, civil actions and criminal proceedings [are allowed] to be brought against importers who have sold foreign-produced goods in the United States at prices which are 'substantially less' than the prices at which the same products are sold in a relevant foreign market."<sup>163</sup>

Generally, the international agreements allow government-imposed remedies in the form of duties or tariffs when it is found, through a prescribed formulaic approach, that a foreign company has sold imported goods at sub-competitive prices.<sup>164</sup> However, these agreements do not permit individual companies who claim they have been harmed by a foreign competitor to find a remedy in the member's domestic courts that involves a monetary restitution to that company.<sup>165</sup>

Both the EC and Japan claim that the 1916 Act conflicts with Articles III:4, VI:1, and VI:2 of the 1994 GATT, Articles 1, 2, 3, 4, and 5 of the AD Agreement, and Article XVI:4 of the WTO Agreement.<sup>166</sup> Additionally, Japan believes that the 1916 Act also violates Articles 9, 11, 18.1, and 18.4 of the AD Agreement.<sup>167</sup> The 1994 GATT and AD Agreement articles correlate directly to specific antidumping obligations among members, however Article XVI:4 of the WTO Agreement is more general, requiring that "[e]ach Member . . . ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements."<sup>168</sup>

A Dispute Resolution Panel was convened for each member's claim, however it was agreed that because the claims were of such a similar nature, the composition of the panels would consist of the same three persons.<sup>169</sup> The panels returned almost identical findings

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162. United States–Anti-Dumping Act of 1916, Report of the Appellate Body, *supra* note 10, ¶¶ 1-3.

163. *Id.* ¶ 2.

164. See 1994 GATT, *supra* note 154, art. VI, sec. 2; AD Agreement, *supra* note 154, art. 2.

165. See *id.*

166. United States–Anti-Dumping Act of 1916, Report of the Appellate Body, *supra* note 10, ¶ 3.

167. *Id.*

168. See Agreement Establishing the World Trade Organization, Dec. 15, 1993, 33 I.L.M. 13 (1994), art. 16.4; 1994 GATT, *supra* note 154, art. VI; AD Agreement, *supra* note 154, art. 2.

169. United States–Anti-Dumping Act of 1916, Report of the Appellate Body, *supra* note 10, ¶ 1. The Report of the Appellate Body incorporates the arguments of the United States, the European Community, and Japan, as well as both panels' initial

concluding that the 1916 Act did violate certain Articles of the 1994 GATT, the AD Agreement, and the WTO Agreement.<sup>170</sup> The remedy suggested by the panels was that the Dispute Settlement Body “request the United States to bring the 1916 Act into conformity with its obligations under the WTO Agreement.”<sup>171</sup> In May of 2000, the United States appealed issues of law covered in both panel reports, and the Appellate Body was convened to hear oral arguments and compose a ruling.<sup>172</sup> Interestingly, India and Mexico also each filed a third participant’s submission.<sup>173</sup>

The United States challenged the panel’s rulings both procedurally and substantively. Procedurally, the United States argued that the Panel did not possess jurisdiction over both the 1994 GATT and AD Agreement claims.<sup>174</sup> First, both the EC and Japan had invoked the jurisdiction of the panels under an article in the AD Agreement (Article 17.4) which requires the complaining party challenge either an antidumping duty that had been imposed, a price undertaking, or a provisional measure put in place by a member.<sup>175</sup> However, neither the EC nor Japan was challenging one of these measures in its complaint. Therefore, the United States argued that the panel did not have jurisdiction over either member’s claims.<sup>176</sup> Furthermore, the United States argued that the AD Agreement and 1994 GATT were part of an “inseparable package of rights and obligations” and because the panel did not have jurisdiction over the EC and Japanese claims under the AD Agreement, it did not have jurisdiction over the 1994 GATT claims.<sup>177</sup>

The EC responded that the U.S. objection to jurisdiction was both untimely filed and unfounded in law and precedent.<sup>178</sup> The proper time to file a jurisdictional objection was “before the interim review stage of the panel proceedings” as interim reviews are only to review decisions made by the panel, and not to rule on new arguments.<sup>179</sup> Additionally, the EC argued that Article 17.4 of the AD Agreement (which speaks directly to specific anti-dumping measure challenges) does not generally shelter legislation from scrutiny for

findings, therefore a citation is included only for the Appellate Body Report, not each individual panel report or party filing.

170. *Id.*

171. *Id.* (citing the panel reports for both of the preceding cases).

172. *Id.* ¶ 7.

173. *Id.*

174. *Id.* ¶ 9.

175. United States–Anti-Dumping Act of 1916, Report of the Appellate Body, *supra* note 10, ¶ 9.

176. *Id.* ¶ 10.

177. *Id.* ¶ 11.

178. *Id.* ¶ 23.

179. *Id.*

continuity with WTO provisions.<sup>180</sup> All legislation must fit within the boundaries of the WTO agreements.<sup>181</sup>

Japan used a different tactic when arguing its jurisdictional challenge, claiming that any GATT/WTO member has the general right to challenge another member's facially inconsistent legislation.<sup>182</sup> This position was consistent with that of the EC in that although Article 17.4 creates special rules to challenge specific antidumping actions taken by members, any general rights of the members are not overridden.<sup>183</sup>

The United States also challenged the panels' rulings on the 1916 Act as mandatory or discretionary legislation, the latter of which would allow an interpretation of the Act that would permit the United States be consistent with its WTO obligations.<sup>184</sup> The United States argued that this distinction was still relevant, despite the fact that the Japanese panel found that Article 18.4 of the AD Agreement rendered it "irrelevant."<sup>185</sup> Finally, the United States argued that the panels had erred in requiring the United States to prove that the distinction between mandatory and discretionary legislation was applicable in this case.<sup>186</sup> The burden of proof that a member's law conflicts with a WTO provision, the United States maintained, is with the complaining party who must subsequently prove that the law "mandates a violation of the relevant provision."<sup>187</sup> For these procedural reasons, the United States requested the Appellate Body vacate the panels' findings and recommendation.

With regard to the mandatory versus discretionary distinction, the EC contested the existence of such a principle and argued that even if the Appellate Body disagreed, the distinction of having discretionary legislation would not shield the U.S. from review in dispute settlement proceedings.<sup>188</sup> The Japanese argued that the language of the 1916 Act was clearly mandatory because it required an imposition of fines and criminal penalties if the elements of the

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180. *Id.* ¶ 24.

181. United States–Anti-Dumping Act of 1916, Report of the Appellate Body, *supra* note 10, ¶ 24.

182. *Id.* ¶ 32.

183. *Id.*

184. *Id.* ¶ 12.

185. *Id.* ¶ 13. Article 18.4 of the AD Agreement is the provision which requires members to take all necessary steps to ensure the conformity of its laws and administrative procedures with the provisions of the Agreement. *See* AD Agreement, *supra* note 154, art. 18.4.

186. United States–Anti-Dumping Act of 1916, Report of the Appellate Body, *supra* note 10, ¶ 14.

187. *Id.*

188. *Id.* ¶ 25. The European Community made reference to another panel report in *United States–Sections 301-310 of the Trade Acts of 1974 (United States–Section 301)*, available at <http://www.wto.org/WT/DS152/R> (last visited Mar. 17, 2004).

statute were met.<sup>189</sup> Additionally, Japan believed that if there were to be a distinction made between mandatory and discretionary legislation, the burden of proof should be placed on the United States (using the distinction as a defense) to prove that the 1916 Act was discretionary.<sup>190</sup>

Substantively, the United States challenged the panels' findings that the 1916 Act actually fell within the scope of Article VI of the 1994 GATT as interpreted by the AD Agreement.<sup>191</sup> The United States argued that members' laws would only fall into the scope of Article VI if two criteria were satisfied.<sup>192</sup> "First, the law must impose a particular type of border adjustment measure . . . . Second, the duties [a typical border measure] . . . must specifically target 'dumping' within the meaning of Article VI:1."<sup>193</sup> By this reasoning, member countries are not prohibited from using measures other than those that fit the criteria listed above. The United States argued that because the 1916 Act was an internal act that created a private right of action and did not impose a tariff in conflict with the AD Agreement, it was not a border adjustment and was therefore not within the scope of Article VI.<sup>194</sup> The United States characterized the 1916 Act in this dispute as an antitrust law, rather than an antidumping or customs law, so as to persuade the WTO that it did not conflict with any of its international trade obligations.<sup>195</sup>

The EC responded by citing textual evidence that the WTO had created a "specific discipline" for members to follow when dealing with dumping.<sup>196</sup> Article VI applied to both laws that impose duties on importers found to be dumping and those that do not impose duties but provide a private cause of action or other remedy to punish and deter dumping.<sup>197</sup> Japan believed that the 1916 Act fell within the scope of Article VI because the application of Article VI was based on the type of conduct the members' law addressed, not the remedies

189. United States—Anti-Dumping Act of 1916, Report of the Appellate Body, *supra* note 10, ¶ 33.

190. *Id.*

191. *Id.* ¶ 15.

192. *Id.* ¶ 16.

193. *Id.* ¶ 18.

194. *Id.* ¶ 20.

195. See United States—Anti-Dumping Act of 1916, Report of the Appellate Body, *supra* note 10, ¶ 20 (stating that third-party participant India's observation is that the 1916 Act is an antidumping law rather than an antitrust law).

196. *Id.*

197. *Id.* As interpreted by the European Community, Article 18.1 of the AD Agreement "made clear that a 'specific action' against dumping may only be taken in accordance with Article VI [of 1994 GATT], but this did not prevent the application of safeguard measures or countervailing duties" as long as they were in conformity with the rest of the 1994 GATT Agreement. *Id.* ¶ 28.

applied.<sup>198</sup> The 1916 Act targeted dumping, therefore, by Japan's reasoning, it must conform to the provisions of Article VI and the AD Agreement.<sup>199</sup> Both the EC and Japan argued that if the Appellate Body agreed with the U.S. reasoning, any member could circumvent the WTO anti-dumping procedures (and therefore eviscerate the purpose of the special discipline to handle dumping) and requirements by creating anti-dumping laws that did not impose a duty but required the payment of fines or imprisonment instead.<sup>200</sup>

The United States also urged that the 1916 Act did not "target dumping" as required in the criteria to bring it within the scope of Article VI.<sup>201</sup> It actually targeted "predatory pricing" of which the key indicator was predatory intent, not the act of "dumping," thereby actually creating additional elements that would need to be satisfied before the imposition of penalties.<sup>202</sup> The Japanese contended that a member's imposition of additional elements such as intent, even if used to make the imposition of anti-dumping measures more difficult, could not place the 1916 Act outside the scope of Article VI.<sup>203</sup>

Finally, the United States argued that the panels' interpretations of Article VI:2 of the 1994 GATT and Article 1 and 18.7:1 of the AD Agreement, a member country may take specific actions against dumping, other than imposing tariffs, so long as the actions are within the scope of 1994 GATT.<sup>204</sup> The EC agreed that specific actions against dumping could be taken by member countries. However, the EC provided that:

[W]hen an antidumping law, which falls within the scope of application of Article VI of the GATT 1994 and the [AD Agreement], allows the imposition of sanctions other than duties, . . . provides for imposition of measures on the basis of criteria which do not fulfill the substantive requirements of the discipline [established by Article VI] . . . [and is] pursuant to procedures which do not respect [Article VI's] procedural requirements, such measures . . . constitute breaches of the discipline.<sup>205</sup>

The EC's contention was that the 1916 Act violated the discipline set forth by Article VI in all three ways.<sup>206</sup> Japan, taking a different approach, explained their position that antidumping duties, imposed by a member country against an importer, were the only permissible

198. *Id.* ¶ 34.

199. *Id.* ¶ 35.

200. *Id.*

201. United States–Anti-Dumping Act of 1916, Report of the Appellate Body, *supra* note 10, ¶ 16.

202. *Id.* ¶ 20.

203. *Id.* ¶ 37.

204. *Id.* ¶ 17.

205. *Id.* ¶ 31.

206. *Id.*

remedy to counteract dumping and that this construction of Article VI was explicit and unambiguous.<sup>207</sup> Both third-party participants, India and Mexico, believed that the 1916 Act must conform to Article VI of the 1994 GATT because it specifically deals with dumping.<sup>208</sup>

Alternative arguments were provided by both the EC and Japan as conditional appeals.<sup>209</sup> If the Appellate Body were to find that the scope of Article VI did not encompass the 1916 Act, the EC and Japan requested that the Appellate Body find that the 1916 Act violated Article III:4 and Article XI of the 1994 GATT.<sup>210</sup> The United States disagreed that the Appellate Body even had the jurisdiction to consider this alternative argument.<sup>211</sup> The U.S. argument for this element of the appeal centered around the fact that neither the EC nor Japan had included these provisions in their initial request for a dispute settlement panel review, and therefore there were no factual or legal findings made to be reviewed.<sup>212</sup>

The second alternative argument made by the EC and Japan involved a request that if the Appellate Body should find in favor of the United States that the 1916 Act was "non-mandatory," then the EC and Japan asked the Appellate Body to find that the Act violated Article XVI:4 of the WTO Agreement.<sup>213</sup> The United States did not make a substantive rebuttal for this request, but did suggest the Appellate Body should only conclude that the 1916 Act violates Article XVI:4 to the extent it violated Article VI of the 1994 GATT.<sup>214</sup>

### C. The Appellate Body Findings and Aftermath

The Appellate Body affirmed most of the findings of both of the European Communities and Japanese panels regarding the U.S. jurisdictional objections and its objections to the substantive legal findings sending a clear signal to the United States that it wished it would bring its antidumping remedies into compliance with its WTO obligations.<sup>215</sup> The Appellate Body agreed that the interim review was not the appropriate time to bring up jurisdictional objections for the first time because those objections should be raised as early in the

207. United States—Anti-Dumping Act of 1916, Report of the Appellate Body, *supra* note 10, ¶ 37. Japan cited Article 18.1 and footnote 24 of the AD Agreement as authority for this proposition. *Id.*

208. *Id.* ¶¶ 46-49.

209. *Id.* ¶¶ 40-41.

210. *Id.* ¶ 40.

211. *Id.* ¶ 44.

212. United States—Anti-Dumping Act of 1916, Report of the Appellate Body, *supra* note 10, ¶ 44.

213. *Id.* ¶ 41.

214. *Id.* ¶ 45.

215. *See id.* ¶¶ 50-155.

dispute resolution process as possible to allow for due process considerations.<sup>216</sup> However, because the Appellate Body did not agree with the EC that objections to jurisdiction are simply “procedural objections,” the U.S. objection to jurisdiction was still considered timely.<sup>217</sup>

With regard to the right of the panels to hear the claims against the 1916 Act, the Appellate Body found that there must be a legal basis to hear the claim of inconsistency under both the 1994 GATT and the AD Agreement.<sup>218</sup> Under Articles XXII and XXIII of the 1994 GATT, which serve as the basis for dispute settlements, a member is allowed to bring a claim against another member when it believes that the benefits accruing to it under the agreement are being “nullified or impaired, or [if it believes] that the achievement of any objective of the 1994 GATT is being impeded, as a result of the failure of that other [m]ember to carry out its obligations under that Agreement.”<sup>219</sup> Prior to the WTO Agreement, the Appellate Body acknowledged, 1947 GATT recognized the right of a member country to challenge another member’s legislation independent of an application of that legislation.<sup>220</sup> Therefore, a legal basis was found under 1994 GATT to bring a claim against members whose conformity with WTO obligations is questionable.<sup>221</sup> Under the AD Agreement, the Body found that Article 17 creates a legal basis for disputes.<sup>222</sup> Neither Article 17.1 nor 17.2, the articles that provide for dispute settlement arising under the AD Agreement, were found to distinguish between legislative disputes and disputes about the implementation of legislation.<sup>223</sup> Article 17.4 of the AD Agreement is a “special or additional dispute settlement rule” regarding the implementation of definitive antidumping duties by a member, however the Body held that there was no prior Appellate Body holding that would suggest that Article 17.4 precluded review of general claims against a member’s legislation.<sup>224</sup> The Appellate Body found that this reasoning was supported by Article 18.4 because this

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216. *Id.* ¶ 54.

217. *Id.*

218. United States–Anti-Dumping Act of 1916, Report of the Appellate Body, *supra* note 10, ¶ 56.

219. *Id.* ¶ 59.

220. *Id.* ¶ 60. The Appellate Body also noted that since the WTO Agreement was put in force, dispute settlement bodies had listened to claims which challenged the conformity of another member’s laws without challenging an application of that law. *Id.*

221. *Id.* ¶ 59.

222. *Id.* ¶ 64.

223. United States–Anti-Dumping Act of 1916, Report of the Appellate Body, *supra* note 10, ¶¶ 63, 65; *see* AD Agreement, *supra* note 154, arts. 17.1–17.2.

224. United States–Anti-Dumping Act of 1916, Report of the Appellate Body, *supra* note 10, ¶ 72.

article imposed an affirmative obligation on members to make their laws consistent with the AD Agreement.<sup>225</sup> If a member could not bring a claim against another member's legislation alone, this would diminish the effectiveness of this article.<sup>226</sup>

The Appellate Body upheld both panels' findings that the 1916 Act was mandatory legislation and was therefore subject to review by the WTO dispute settlement bodies.<sup>227</sup> Neither the panels, nor the Appellate Body could find discretion in the executive branch of government under the 1916 Act, which is necessary to characterize the law as discretionary.<sup>228</sup> The Body found that the U.S. government had no discretion with respect to the civil action authorized by the 1916 Act, because the sole discretion to bring this action was with domestic producers.<sup>229</sup> The Body also held that the discretion of the U.S. Department of Justice to initiate criminal proceedings does not make the 1916 Act discretionary in the way it would fall outside the jurisdiction of the dispute settlement panels.<sup>230</sup> With regard to the U.S. challenge to the panels' characterization of the burden of proof in mandatory/discretionary legislation cases, the Appellate Body agreed with the panels that after the complaining member produced prima facie evidence that a member's laws did not comply with WTO agreements, the burden of proof shifted to that member to prove that their law was discretionary and could be interpreted to conform with their WTO obligations.<sup>231</sup>

The Appellate Body also upheld both panels' substantive findings. The Body found that Article VI:2 of the 1994 GATT gave members permission to establish antidumping duties.<sup>232</sup> However, this permission did not mean that they had the choice to either use duties or another type of measure to counteract dumping; it meant that they could simply choose to require duties to be paid, or they could choose not to require duties.<sup>233</sup> With regard to the AD Agreement, the Body held that Article 18.1 governed a "specific action against dumping" taken by one of the members.<sup>234</sup> At a minimum, a

225. *Id.* ¶ 78.

226. *Id.*

227. *Id.* ¶¶ 84-102.

228. *Id.* ¶¶ 89-93. The Body mentioned in a footnote that characterization as discretionary may not save a member's law from violating its WTO obligations. *See id.* at 26 n.59 (citing Panel Report, *United States—Section 301*, adopted Jan. 27, 2000, available at <http://www.wto.org/WT/DS152/R>).

229. *United States—Anti-Dumping Act of 1916*, Report of the Appellate Body, *supra* note 10, ¶ 90.

230. *Id.* ¶ 91.

231. *Id.* ¶ 97.

232. *Id.* ¶ 116.

233. *Id.* The Appellate Body also found Article VI:2 gave members the choice to impose duties at the equal to the dumping margin or impose a lower tariff. *Id.*

234. *Id.* ¶ 122.

“specific action against dumping” is taken if the elements of “dumping” listed in Article VI of the 1994 GATT are satisfied.<sup>235</sup> The 1916 Act requires the satisfaction of elements of the Article VI dumping elements, and, therefore, the Appellate Body held that the criminal and civil penalties imposed by the Act were “specific action against dumping” and, thus, Article VI applies to the 1916 Act.<sup>236</sup> Article 18.1 prohibits “specific actions against dumping” that are not in accordance with the provisions of the 1994 GATT, and the Body found that Article VI was applicable to any action “taken in response to situations presenting the constituent elements of ‘dumping.’”<sup>237</sup> Although the 1916 Act has the additional element of intent, the Appellate Body still believed that it was a specific action against dumping, and, because the only remedies allowed by Article VI are definitive antidumping duties, provisional measures, and price undertakings, it was inconsistent with the U.S. WTO obligations.<sup>238</sup> As the Appellate Body upheld both panels’ findings on this regard, it did not rule on the conditional appeals of the EC and Japan.<sup>239</sup> The Appellate Body recommended that the dispute settlement body request the United States bring the 1916 Act into compliance with Article VI of the 1994 GATT.<sup>240</sup>

The repercussions of this Appellate Body ruling were felt immediately in the United States. House of Representatives Committee on Ways and Means Chairman Bill Thomas introduced H.R. 3557 which, as previously mentioned, would have repealed the 1916 Act.<sup>241</sup> H.R. 1073 and S. 1155, introduced in the 108th Congressional Session, will hopefully be voted on by both houses this year. U.S. delegates to the WTO have made periodic reports to the DSB regarding the progress of the United States in complying with its WTO obligations.<sup>242</sup> Specifically, U.S. reports stated that an Act to repeal the 1916 Act was proposed, it was being reviewed by committees in both houses of Congress and would be voted on as soon as a full review was made.<sup>243</sup>

Judicially, the *Goss* litigation, which was the only major case invoking the Antidumping Act of 1916 after the WTO Appellate Body

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235. United States–Anti-Dumping Act of 1916, Report of the Appellate Body, *supra* note 10, ¶ 122.

236. *Id.* ¶ 130.

237. *Id.* ¶ 126.

238. *Id.* ¶ 132.

239. *Id.* ¶ 155(g).

240. *Id.* ¶ 156.

241. See Repeal Act, H.R. 1073, 108th Cong. (2003).

242. United States–Anti-Dumping Act of 1916: Status Report by the United States, WT/DS/14/Add/12-WT/DS162/17/Add.12 (Feb. 6, 2003).

243. *Id.*

decision, was stalled at the district court level.<sup>244</sup> The district court stayed a final decision on the matter pending the repeal of the 1916 Act, which would make this portion of Goss's complaint moot.<sup>245</sup> When H.R. 3557 was not passed, Tokyo Kikai Seisakusho moved for summary judgment.<sup>246</sup> The court denied the motion, holding that material issues of fact existed as to whether the product comparisons were close enough to prove the required 1916 anti-dumping elements.<sup>247</sup>

#### IV. INTERNATIONAL DISPUTE RESOLUTION AS THE SOLE REMEDY FOR DUMPING

To comply with its trade obligations and avoid additional disputes with its trade partners, the United States must comply with the Appellate Body's decision as well as the Dispute Settlement Panel's request that 1916 Act be brought into compliance with Article VI of the 1994 GATT and the AD Agreement. While the repeal of the 1916 Act curbs U.S. power to control foreign dumping through its own methodology, the procedures and remedies required by the WTO provide better protection against foreign dumping for U.S. manufacturers than the judicial uncertainty of the Antidumping Act.

##### *A. Discrepancies between the WTO Dumping Dispute Methodology and the 1916 Act*

Although an overall assessment will finally show the WTO procedures and remedies to be a better choice, there are several fundamental differences between the WTO's Article VI of the 1994 GATT and the AD Agreement and the U.S. 1916 Antidumping Act that make the WTO antidumping provisions potentially less palatable to U.S. companies. The methods and calculus of determining whether dumping occurred are dissimilar in the two processes. In particular, each methodology includes different elements that must be satisfied by the complaining party.<sup>248</sup> The WTO remedies do not involve reparations to the producer who claims and proves harm because of

244. See generally *Goss Graphics Sys. v. MAN Roland Drucksmaschinen Aktiengesellschaft*, 139 F. Supp. 2d 1040 (N.D. Iowa 2001). See also discussion *supra* text accompanying note 17.

245. *Id.*

246. *Goss Int'l Corp. v. Tokyo Kikai Seisakusho, Ltd.*, 294 F. Supp. 2d 1027, 1030 (N.D. Iowa 2003).

247. *Id.* at 1039.

248. See AD Agreement, *supra* note 154, art. 3; 1916 Antidumping Act, 15 U.S.C. § 72 (2002).

dumping, nor does it authorize payment to the industry in which the dumping occurred. No specific penalties are authorized, and there is no authorization for punitive damages of any kind. In addition, because of the WTO classification of countries at varying stages of economic development, countries with a lower development classification may be protected from having any dumping duties levied on their manufacturers and exporters. Furthermore, international settlements under the WTO are not binding and may be reviewed and repealed.

The WTO method requires that a country apply to be permitted to initiate its own antidumping investigation and to prove that the majority of the domestic participants in the industry believe dumping is occurring. Article 5 of the AD Agreement requires that "an investigation to determine the existence, degree and effect of any alleged dumping [be] initiated upon a written application by or on behalf of the domestic industry."<sup>249</sup> The application must include specific evidence of dumping, proof of injury as defined in Article VI of the 1994 GATT, and a causal link between the dumped imports and the injury alleged.<sup>250</sup> An investigation by the complaining country is not allowed if the WTO authorities determine that there is not enough support for the application.<sup>251</sup> "Enough support" to initiate the investigation requires domestic producers of the complaining country who produce at least "fifty percent of the total production of the like product" to express their support for the application.<sup>252</sup> This time-consuming and complicated application process is not required when a company brings suit under the 1916 Act, and the addition of this step will clearly add time to an already lengthened process.<sup>253</sup> Additionally, the application process will increase dumping harm to domestic industry as it creates a hurdle that may be insurmountable by industries populated by both large and small producers or industries that are fragmented by geography as the complaining producer may not be able to garner enough support from fellow producers to reach the level required by the WTO authorities to allow an investigation to be opened.

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249. Keppler, *supra* note 148, at 304 (quoting AD Agreement, *supra* note 154, art. 5.1).

250. AD Agreement, *supra* note 154, art. 5.2.

251. *Id.* art. 5.4.

252. *Id.*

253. The only similar procedure to the WTO application requirement in U.S. law is the ability of the defendant to file a motion to dismiss. The two procedures are similar because only the complaining party's evidence is used to make the decision whether to allow the case or investigation to go forward, however the U.S. system has statutory procedures and judicial precedent for judges to rely on when they are ruling on a motion to dismiss.

The heightened pleading and burden of proof requirements of the WTO antidumping procedures will also be prohibitive for U.S. companies. While the 1916 Act requires the complaining party prove that the alleged dumper intended to injure a domestic U.S. industry, prevent its establishment, or restrain or monopolize trade in the United States, under the AD Agreement the complaining country will have to prove that there was a material injury or threat of material injury to a U.S. industry and that there was a causal link between the dumping and the injury.<sup>254</sup> To further complicate matters, the AD Agreement does not define what constitutes a "material" injury.<sup>255</sup> The only guidance given by the WTO is that the authorities will review "(i) the volume of dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (ii) the consequent impact of the dumped imports on domestic producers of the like product."<sup>256</sup> No weight is given to either of these factors,<sup>257</sup> leaving the interpretation of their meaning up to members. Similarly, the only guidance given to members trying to prove that there was a threat to material injury is that the evaluation (which includes a review of the rate of increase of dumped imports, the capacity of the exporter, the likely effect of prices of dumped imports, and inventories) will be based solely on facts, and will not include mere allegations.<sup>258</sup>

The remedies provided by Article VI of the 1994 GATT and the AD Agreement do not provide the ability for harmed domestic producers individually or collectively as an industry to recoup the losses they suffered from dumping. The only remedies provided by the AD Agreement are provisional measures, price undertakings, and actual antidumping duties.<sup>259</sup> There is no mention of punitive damages for those exporters found dumping on members' soil, and any antidumping duty must be for the full margin or less, not more than the actual harm done.<sup>260</sup> This is in stark contrast to the 1916 Act imposition of treble damages.<sup>261</sup> The WTO is clearly not passing judgment on whether dumping is fair or unfair competition, as they are neither rewarding nor truly penalizing parties in either of the member countries. However, by not imposing punitive damages on offenders, the WTO antidumping provisions are not truly deterrence

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254. See 1916 Antidumping Act, 15 U.S.C. § 72 (2002); AD Agreement, *supra* note 154, art. 3.

255. ADP: Injury, available at [http://www.wto.org/English/thewto\\_e/whatis\\_e/eol/e/wto04/wto4\\_14.htm](http://www.wto.org/English/thewto_e/whatis_e/eol/e/wto04/wto4_14.htm) (last visited Mar. 17, 2004).

256. *Id.*

257. *Id.*

258. *Id.*

259. AD Agreement, *supra* note 154, arts. 7-9.

260. *Id.* art. 9.1.

261. See discussion *supra* text accompanying note 34.

mechanisms either. In fact, the AD Agreement's heightened initial requirements to allow the commencement of an investigation and the abbreviated remedies act as a deterrent to member countries in bringing antidumping complaints.

Two final characteristics of the WTO antidumping provisions are dubious. If manufacturers in a developing country are found to have committed dumping violations against an industry in a developed country, the AD Agreement provides that special accommodations should be made by that developed country when considering the application of antidumping duties.<sup>262</sup> The AD Agreement requests that developed countries consider "constructive remedies" before applying antidumping duties on manufacturers in developing countries found to have dumped their goods in violation of the Agreement.<sup>263</sup> This provision creates the unpalatable notion that manufacturers in underdeveloped or developing countries dumping goods and hurting the industry of industrialized, developed nations is more understandable and acceptable than manufacturers in other developed nations doing the same. The result is the equation of a manufacturer's abilities to compete in international trade to the abilities of the country where it is domiciled, an unequivocal comparison at best. This concept is also in opposition to the typical U.S. procedure of imparting the same punishment on all corporate offenders, not just those who can survive the punishment. In addition, the penalties imposed by the members are reviewed by WTO authorities, can be terminated at any time, and shall be terminated at the latest five years after the duty has been imposed unless the complaining member proves their necessity again.<sup>264</sup> Any review forces the complaining party to produce all of the information required in the initial complaint.<sup>265</sup> This increases the expense and uncertainty for producers and member countries who are victims of dumping and further deters complaints from being brought to the WTO.

### *B. International Dispute Settlement Procedures Provide the Best Remedy against International Dumping*

Despite the negative aspects of Article VI and the AD Agreement, the positive features of the WTO dispute settlement procedures make it a more effective choice to deter dumping in the

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262. Procedural Requirements of the Agreement on Implementation of Article VI of the 1994 GATT, available at [http://www.wto.org/English/tratop\\_e/adp\\_e/antidum2\\_e.htm](http://www.wto.org/English/tratop_e/adp_e/antidum2_e.htm) (discussing AD Agreement, *supra* note 154, art. 15).

263. AD Agreement, *supra* note 154, art. 15.

264. *Id.* art. 11.

265. *Id.*

United States. Because of its government-centered reparation system, it protects competition and promotes international trade instead of protecting domestic competitors, as they do not receive a direct payment for dumping violations under the WTO system. In addition, the WTO methodology has actually led to punishment of dumping offenders, as opposed to the 1916 Act, which in nearly one hundred years has not produced a single conviction.<sup>266</sup> The elements a complaining member needs to prove do not include the nebulous "intent" element included in the 1916 Act. Most importantly, international dispute resolution separates antidumping investigations and remedies from U.S. antitrust legislation and jurisprudence, a distinction that has troubled U.S. courts for decades, and a result that will legitimize the U.S. actions against trade partners who dump goods into domestic industry.

The Antidumping Act of 1916, because it provides treble damages to the complaining party, provides an advantage to U.S. manufacturers because they reap the benefits of the punitive portion of the damages awarded if they can prove the elements of dumping. The fact that the Act only affects international trade partners and is administered to provide payment to the injured domestic party makes the law appear protectionist in nature. By providing for duties to be imposed as a remedy against dumping, the AD Agreement and Article VI of the 1994 GATT place international trading partners on an essentially equal level. The WTO method promotes competition instead of assisting competitors because it does not "reward" a particular manufacturer for its inability to compete on an international level with three times the injury sustained. Economically, this is a more desirable system because it does not promote the maintenance of firms whose business model is below that which is beneficial to stay in business.

Unlike the 1916 Act, the WTO antidumping provisions have been successfully implemented to counteract dumping in its member countries. Because of the complainants' inability to prove the intent requirement or the "like product" requirement in the 1916 Act, no U.S. company has been successful in convicting and receiving damages from a foreign business for its dumping practices using this statute.<sup>267</sup> Very few cases have been brought under the 1916 Act throughout the twentieth century. Furthermore, Congress recognized the necessity of duties to control foreign importers dumping goods into U.S. markets by enacting the Antidumping Act of 1921 and subsequent Trade Agreement Acts.<sup>268</sup> In contrast, members of the

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266. See *Rethinking the 1916 Antidumping Act*, *supra* note 6.

267. See *id.*

268. See *supra* text accompanying notes 68-87.

WTO have requested over one hundred antidumping investigations in recent history pursuant to Article VI of the 1994 GATT, many of which were requested by the United States.<sup>269</sup> While the number of investigations handled by the WTO is substantial, the incidental effect of this environment may be more beneficial to the United States. In addition to providing a global forum to resolve antidumping disputes, the WTO provides international awareness to member countries of those members whose domestic manufacturers are involved in many disputes, as well as a list of countries who strictly invoke their rights to request antidumping investigations.

The WTO elements, while stringent, provide several advantages for U.S. producers. First, the 1916 Act element of intent is not required under Article VI of the 1994 GATT or the AD Agreement.<sup>270</sup> As this element has caused particular discourse among U.S. judges and members of the bar, its absence should be a relief for U.S. producers. Also, the fact that the U.S. government must request an investigation from the WTO dispute settlement body and provide proof of dumping eases the financial and time requirements that individual manufacturers may have struggled with under the 1916 Act. Resources and information can be compiled and shared in relative confidence between domestic competitors without the incurrance of additional fees. Moreover, the burden of proving the "like product" and appropriate price elements, which are the similar in both methodologies, can be more easily accomplished by the government collecting and assessing economic data, than by a single firm.

Finally, using the WTO antidumping remedies provides an opportunity to separate antidumping and antitrust disputes and remedies. Throughout the history of the 1916 Act, jurists have struggled with Congress' intent in passing it.<sup>271</sup> Because of the nature of the damages imposed and some legislative and judicial comments that it is an extension of the Sherman and Clayton Acts, there is some support for its interpretation as an antitrust statute.<sup>272</sup> However, as it deals exclusively with international trade, its purpose as a trade and tariff provision must also be considered. These two characterizations are at odds with one another because the purpose of antitrust legislation is vigorously to promote and defend competition, however trade regulations may sacrifice some elements of competition to promote international relations and good will. By repealing the

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269. See *Anti-dumping*, available at [http://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_e.htm](http://www.wto.org/english/tratop_e/adp_e/adp_e.htm) (last visited Mar. 17, 2004).

270. See 1916 Antidumping Act, 15 U.S.C. § 72 (2002).

271. See *supra* text accompanying note 92.

272. See *generally* *Zenith Radio Corp. v. Matsushita Elec. Ind. Co.*, 494 F. Supp. 1190 (E.D. Pa. 1960).

1916 Act and using WTO international dispute resolution as the exclusive remedy for foreign dumping, confusion over the legislative purpose, and subsequently its judicial interpretation is removed, leading to the treatment of U.S. industry uniformly across jurisdictions. For these reasons, U.S. manufacturers should welcome the repeal of the 1916 Antidumping Act.

## V. CONCLUSION

Throughout its history, the 1916 Antidumping Act has lain almost entirely dormant, with only a few cases interpreting its complex elements. There is scant legislative history and no subsequent amendments or additions to the Act to shed light on the Congressional purpose behind it and distinguish it as either an antitrust or trade statute. Recently, U.S. trade partners have challenged its validity, and it has been deemed to violate the international trade obligations made by the United States under 1994 GATT. Based on this series of events, House of Representatives Bill H.R. 3557 has been introduced to repeal the 1916 Antidumping Act. To the detriment of U.S. producers, repeal of the 1916 Antidumping Act will eliminate private party reparations and do away with treble damage awards. However, as there has been minimal adjudication under this law and no convictions or damages paid as a result of its violation, a more effective remedy is necessary. Article VI of the 1994 GATT and the AD Agreement provide a solution that U.S. manufacturers should find acceptable and will be agreeable to our international trade partners.

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