GATT: Has the Implementation Process Been Compromised?

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The General Agreement of Tariffs and Trade ("GATT")\(^1\) was established in 1947 to address and to promote the development of international trade. The original GATT treaty has been modified in subsequent "rounds" of negotiations.\(^2\) The Uruguay Round Agreements Act ("URAA") is the result of the latest round con-


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ducted in Uruguay. One important issue addressed in this round was the reduction in trade barriers.

Traditionally, the United States has sought to protect domestic industry from unfair foreign competition by methods which would not discourage free trade with other nations. Mainly, the United States has insulated domestic industries from competition with foreign corporations which export the same or similar goods to America at significantly lower prices. This practice, known as


“dumping,”7 is severely limited in Title 19 of the United States Code.8 These laws are designed to protect the domestic industry from actual or threatened economic injury by implementing an offsetting duty on foreign products to achieve comparable prices with the domestic industry.9

Following the completion of the URAA, Congress passed an Act designed to implement the trade agreements reached in the negotiations.10 This implementation process consists of congressional interpretation of the international agreement and modification of current trade statutes to reflect the accord.11 During the URAA implementation process, however, Congress failed to mirror the agreement, resulting in legislation which failed to accurately reflect the accords. Consequently, while the Uruguay Round of GATT has been hailed as the most extensive round of the trade agreements, Congress may have prevented the reduction of trade barriers.12

7 See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Agreement on Implementation of Article VI of GATT 1994, opened for signature Apr. 15, 1994, art. 2.1, reprinted in H.R. Doc. No. 316, 103d Cong., 2d Sess. 1326 (1994) [hereinafter Final Act] (stating that product introduced into another country will be considered "dumped" if export price is less than price of like product charged to exporting country's consumers); see also Lantz, supra note 6, at 996 (defining "dumping" as "sale of foreign merchandise in the United States at less than fair value (LTFV) or below the cost of production").


9 19 U.S.C. § 1673; see Davis Walker Co. v. Blumenthal, 460 F. Supp. 283, 287 (D.D.C. 1978) (holding that anti-dumping Act was enacted to protect domestic industries from foreign products priced unfairly low); see also Jack Q. Lever, Jr., Unfair Methods of Competition in Import Trade: Actions Before the International Trade Commission, 42 Bus. Law. 1165, 1165 (1986) (noting that purpose of Title 19 was to prohibit unfair competition in import trade).


12 See Thomas J. Dillon Jr., The World Trade Organization: A New Legal Order for World Trade, 6 MICH. J. INT'L L. 349, 350 (1995) (describing Uruguay Round as “most extensive and far reaching negotiations in history of international trade relations”). See generally Office of the United States Trade Representative, Statement As To How The Uruguay Round Serves The Interest Of United States Commerce, (Sept. 27, 1994) (noting that Uru-
This Note will examine the substantive provisions of the URRAA implementing legislation which address the issue of tariffs in the form of duties on foreign goods. Part One will trace the changing standards for substantiating an injury. A substantive injury occurs when a domestic industry sustains an economic loss resulting from unfair trade practices. Part Two will focus on the steel industry as an illustration of the tariff debate. The steel industry effectively demonstrates the ability of an industry to circumvent a trade agreement that they determined would be unfavorable. Part Three will illustrate the apparent disparity between GATT and our implementing legislation. Finally, Part Four will address the turmoil to result from this disparity. This Note will conclude that the failure of Congress to implement the agreements reached in Uruguay will undermine the primary GATT objective, to facilitate free trade through the removal of trade barriers.

I. Threshold Requirements for Protection Under Countervailing Duty Analysis

A countervailing duty is a tariff levied upon a foreign product which has received a subsidy or grant from its country of origin in order to foster their lower selling price. The objective of the duty is to elevate the selling price of a foreign good to within the price range of comparable domestic products. The countervailing duty was designed to offset an unfair competitive advantage enjoyed by a foreign exporter. The United States imposed this duty following the Uruguay Round Agreements will benefit "interests" of United States commerce in virtually every sector of United States economy).


14 See Codevilla, supra note 13, at 448 (discussing impact of price manipulation on domestic market); John R. McIntyre, Dispute and Conflict Resolution in U.S.-Eu Economic Relations: The Antidote of Regulatory Cooperation, 18 FORDHAM INT'L L.J. 1698, 1699 (1995) (discussing industrial policy as being government led and designed to protect special domestic interests).

15 Often a foreign exporter is subsidized by their government which enables the company to charge prices significantly lower then the domestic industry. See Thomas M. Boddez & Michael J. Trebillock, The Case For Liberalizing North America Trade Remedy Laws, 4 MINN. J. GLOBAL TRADE, 1, 17 (1995) (noting subsidies result in comparative advantages to foreign exporter); Alan O. Sykes, Countervailing Duty law: An Economic Perspective, 89 COLUM. L. REV. 199, 210 (1989) (defining subsidies as manipulations designed to favor ex-
ing an allegation that a domestic industry would be injured by the lower selling price of the foreign product.\(^\text{16}\)

Previously, section 1303 of Title 19 of the United States Code, authorized the imposition of a countervailing duty on a foreign company after a domestic industry alleged an injury.\(^\text{17}\) Title 19 did not require the determination of an injury prior to the imposition of a duty.\(^\text{18}\) Injury was presumed if the evidence demonstrated that a foreign country had bestowed a bounty or grant on the item imported into the United States.\(^\text{19}\)

A. Domestic Industry Member Requirement

Prior to the Uruguay Round, one representative could act on behalf of the entire domestic industry in initiating a material injury complaint.\(^\text{20}\) Presently, to initiate a claim of injury, there must be sufficient support by interested parties such as the United States importers and producers of the same product.\(^\text{21}\) The 1979 Tokyo Round of the GATT raised the threshold requirement for injury determination involving members who had a subsidies code.\(^\text{22}\) This agreement required a determination of material injury to the

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\(^{18}\) See Ceramic Regiomontana, S.A. v. United States, 64 F.3d 1579, 1581 (Fed. Cir. 1995) (noting in some circumstances bare allegation of injury was enough to begin process of imposition of countervailing duty on foreign product).


\(^{20}\) See Suramerica de Aleaciones Laminadas, C.A. v. United States, 966 F.2d 660, 667 (Fed. Cir. 1992) (determining petition filed by one interested party was sufficient to begin investigation). No other members of the industry supported the American corporation Southwires' claim of a threat of material injury as a result of Venezuelan imports. Id.


\(^{22}\) The subsidies code provided a list of export subsidies, and attempted to prohibit use of foreign funds to subsidize exports. This was a separate agreement which applied to countries who agreed to observe these codes. See Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, GATT, Apr. 12, 1979, BISD, 26th Supp. 56 (1980), 31 U.S.T. 513.
domestic industry as a result of the price of the imported item. Evidence of material injury, however, applied only to foreign countries who had signed the agreement. Consequently, this heightened protection was only afforded to countries who had accepted international constraints on the prices set for goods exported to the United States. If a foreign country exported only duty free goods, however, the domestic industry was required to show injury regardless of whether the country had signed a trade agreement. This requirement led to a division between those "countries under the Agreement" and those that were not. Thus, the status of the country determined whether the injury test was to be applied, while the amount of the countervailing duty was determined by the subsidy the exporting company received.

During this period, the American domestic industry only had to allege an injury to be granted swift regulatory protection. The protection, a countervailing duty, was imposed upon producers provided they were not from a "country under the Agreement."


24 See David A. Gantz, A Post-Uruguay Round Introduction To International Trade Law In the United States, 12 ARiz. J. INT'L & COMP. L. 7, 50 (1995) (noting while subsidies code provided injury test to parties of agreement, only 24 countries agreed to observe it).


27 The application of subsidies for countries under the agreement was governed by 19 U.S.C § 1677(5) (1988). Subsidies for a country not under the agreement were subject to 19 U.S.C. § 1671(b) (1988).


strate a relationship between the injury or threatened material injury and the imported product.\textsuperscript{37}

Furthermore, the assertion of an injury must be substantiated by relevant evidence before an investigation into the injury will be conducted.\textsuperscript{38} The heightened requirement of proving an injury or threatened injury was originally used to encourage reluctant countries to adopt a trade agreement.\textsuperscript{39}

B. Protection Through the Application of a Duty

Throughout the 1980s, several domestic industries exploited the low threshold requirement by merely alleging a threat or existence of a material injury to obtain swift protection from foreign competition.\textsuperscript{40} In particular, during this period the U.S. steel industry routinely diminished foreign competition through the imposition of countervailing duties.\textsuperscript{41} Ultimately, the claims which had led to the duty were found to be without merit.\textsuperscript{42} While these tariffs were usually rescinded, the delay insured a significant increase in the short term costs of foreign competitors.\textsuperscript{43} Unable to prevent the new agreement from requiring proof of a material in-

\textsuperscript{37} See Final Act, supra note 7, art. 3.5 [hereinafter Anti-Dumping Agreement] (authorizing country to impose duty in response to dumping); see also United States Steel Group v. United States, 873 F. Supp. 673 (Ct. Int'l Trade 1994); William D. DeGrandis, Proving Causation in Antidumping Cases, 20 INT'L LAW. 563, 565 (1986) (same); Luchs, supra note 36, at 766-67 (discussing industry related impact of injury); Perry, supra note 36, at 405 (explaining causation requirement).

\textsuperscript{38} See 19 U.S.C. § 1673(a)(1) (1988) (noting investigation will commence upon meeting § 1673 pre-requisites); Texas Crushed Stone Co. v. United States, 35 F.3d 1535, 1537 (Fed. Cir. 1994) (outlining statutory pre-requisites to investigation).

\textsuperscript{39} See S. REP. No. 249, 96th Cong., 1st Sess. 45 (1979) (offering those who participated greater protection with requirement of actual material injury).

\textsuperscript{40} See Ernesto M. Hizon, The Safeguard Measure Dilemma: The Jekyll and Hyde of Trade Protection, 15 NW. J. INT'L L. & BUS. 105, 133 (1994) (considering ramifications of "low threshold" injury standard); Perry, supra note 36, at 405 (explaining standard applied in determining "threat").

\textsuperscript{41} See Asra Q. Noman & Dana Milbank, Trade Panel Backs Foreign Steel Concerns, WALL ST. J., July 28, 1993, at A3 (noting in last twenty years, steel industry had routinely petitioned and acquired duty protection over imported steel).

\textsuperscript{42} See Peter Scolieri, TraderArbed's Head Blasts Steel's 'Big Six' For Threats Of Suits, AM. METAL MKT., June 25, 1992, at 1 (stating most suits brought by steel industry would be held to be without merit); see also Japanese Perspective on Steel; Excerpt From A Speech From Nippon Steel's Chairman Hiroshi Saito, AM. METAL MKT., Apr. 21, 1994, at 10 (stating Japanese steel industry had lost 10 million dollars due to meritless allegations of injury by United States steel industry); U.S. Producers Hail Steel Import Tariffs, MNU NO J., Jan. 29, 1993, at 73 (following allegation of injury temporary duties imposed on 19 foreign countries ranged from 13% to 109% on estimated two billion dollars worth of foreign steel).

\textsuperscript{43} See Virginia Gannon, EC Steel Collusion is Alleged, AM. METAL MKT., Aug. 6, 1992, at 2 (citing European Economic Commission assertion that "all measures directed at stabilizing European Steel prices, such as production quotas and price floors, have been eliminated.").
jury, the steel industry focused on the implementation process. The industry was able to lobby successfully Congress to create a lower standard of injury. Hence, the steel industry provides an excellent example of a domestic industry's attempt to overcome the new heightened requirements under the Uruguay round.

C. Captive Production's Role In Volume Determination

To determine injury, the International Trade Commission ("ITC"), a governmental agency created to monitor international trade, examines the volume of the dumped goods and the subsequent effect on the domestic producers. In considering volume, an inquiry must involve absolute terms which are relative to the production or to the consumption of the importing country. Often, companies will create a product which will be used both for sale and internal use. Products produced for internal use are referred to as captive production.


45 See Michiyo Nakamoto, American Steel Tariffs: Japanese fear Protectionism may be on the Rise in Washington- Tokyo may be More Assertive in Future, Fin. Times, Jan. 29, 1993, at 5 (reporting Ministry of International Trade and Industry (Miti) issued statements expressing regret at rulings and called on U.S. authorities to make important judgments in reaching final ruling).

46 See 19 U.S.C. § 1677(7)(B) (1988) (directing International Trade Commission ("ITC") to consider volume of product and effect on domestic industry); Anti-Dumping Agreement, supra note 37; see also Final Act, supra note 7, art. 3.1. A determination of an injury will be found when the volume of the dumped product is so significant in relation to the domestically produced like product that the effect of the lower prices of the imported goods will cause a suppression or depression on prices of domestic products. Id. See generally Degrandis, supra note 37, at 565 (explaining causation requirement).

47 See Final Act, supra note 7, art. 3.2 (requiring absolute terms to determine increase in dumped products).

While the determination of injury requires an assessment of the relation of the volume of imported products to that of domestic products, the GATT agreement does not appear to distinguish between domestic items produced for sale and those items produced for internal consumption. The implementing legislation of Title 19 has created a new focus in the determination of whether an injury has been sustained. The major issue now is whether, in determination of volume, the investigation should consider a product which is to be consumed internally as a "like product." 

The issue of captive production was not directly addressed in any of the final acts of GATT 1994. Furthermore, the agreement specifically defines the domestic industry to be the producers of the "like product" with no distinction between marketed or captive consumed products.

Despite the apparent lack of an express directive by GATT, the URAA, which was designed solely to implement the GATT agreements in the United States, modified an existing statute to include the issue of captive production. In this modification, Congress directed the ITC to exclude captively produced items in their determination of an actual or threatened material injury to a domestic industry. The congressional modification was a landmark departure from the consistent federal case law, which had


50 See Final Act, supra note 7, art. 3.6 (classifying all domestic production as like product); Michael Y. Chung, U.S. Antidumping Laws: A Look at the New Legislation, 20 N.C. J. INT'L L. COM. REG. 495, 511 (1995) (distinguishing market and domestic production).

51 See Chung, supra note 50, at 507. The like product is compared with the product which is to be put forth in the merchant market. Id. Section 222 of the Uruguay Round Agreement Act modified the treatment of the captive production even though even though Article 3 (relating to injury) and Article 4 (governing domestic industry) remained unchanged. Id.; see also H.R. Rep. No. 5110, 103d Cong., 2d Sess., sec. 222, pt. 2, (amending 19 U.S.C. § 1677(7)(C) (inserting captive production clause).

52 See generally Final Act, supra note 7 (lacking any reference to issue of captive production).

53 See Final Act, supra note 7, art. 4. "[T]hose producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the products. . ." Id. art. 4.1; see also 19 U.S.C. § 1677(4)(A) (1988) (defining domestic industry as producers of like product).

54 See 19 U.S.C. § 1677(7)(C) (1988 & Supp. V 1993) (directing ITC to focus primarily on merchant market when domestic producers use significant amounts of domestic product for captive production); see also Rosenthal & Cannon, supra note 48, at 433 (instructing Commission on how to treat captive production); Schlitt, supra note 48, at 405 (discussing change to include captive production).

repeatedly denied the exclusion of captive production figures for injury determination. It would appear that Congress bowed to intense lobbying efforts by the United States steel industry, an economic sector which had been ravaged by an increase in the volume of lower priced foreign goods.

II. THE STEEL INDUSTRY

A. The Steel Industry's Argument For Captive Production

In the past, the steel industry had attempted to achieve captive production determination by challenging the decisions by the International Trade Association ("ITA"). The industry consistently challenged the ITA policy of counting all domestic product regardless of its end use. The steel industry unsuccessfully argued that the ITA's method of volume determination inflated the domestic product count, thereby minimizing the impact of lower priced subsidized foreign products. These numbers when later submitted to the ITC ultimately led to a determination that the industry had not suffered an injury. The ITA's refusal to modify their method of calculating volume, however, was ratified by both congressional mandate and by subsequent case law.

56 See Alberta Gas Chems. Ltd. v. DuPont Co., 826 F. 2d 1235, 1245 (3rd Cir. 1987) (counting captive production as part of overall market supply); United States v. Aluminum Co. of Am., 148 F.2d 416, 424 (2d Cir. 1945) (including captive production in market share because defendants had choice of whether to use or sell captive production); In re International Tel. & Tel. Corp., 104 F.T.C. 280, 410-11 (1984) (including captive production). But see Grumman Corp. v. LTV Corp., 665 F.2d 10, 14 (2d Cir. 1981) (excluding captive production due to manufacturers limited capacity).

57 See RALPH H. FOLSOM ET AL., INTERNATIONAL BUSINESS TRANSACTIONS 378 (2d ed. 1991) (noting International Trade Association (ITA) is a division of Department of Commerce and is responsible for implementation of antidumping duties); see also United States Steel Group v. United States, 873 F. Supp. 673, 681-82 (Ct. Int'l Trade 1994) (arguing for classification and exclusion of captive produced items). The classification of a certain number of products as captive production would lead to the exclusion of them in volume count. This lower domestic count would magnify the market share of the foreign producers, thus enabling the industry to successfully assert a claim of injury.

58 United States Steel Group, 873 F. Supp. at 682 (rejecting exclusion of captive production).


60 See Grumman Corp. v. LTV Corp., 665 F.2d 10, 11 (2d Cir. 1981) (holding production for captive use was excluded in calculating market share).
In *United States Steel Group v. United States*, the America's top five steel producers brought an action against the ITC after an adverse ruling regarding foreign imports. The United States Steel Group ("Steel Group") asserted that foreign steel producers had sold steel in the United States at prices lower than in their corresponding home markets. The Steel Group challenged both the commission's findings and the manner in which the commission derived its conclusion. After reviewing various factors which also included inventory, wages, and other economic factors, the commission determined the suspect imports did not have a causal effect on market conditions within the steel industry.

The Steel Group argued that the Commission's findings were erroneous since the ITC had not excluded hot-rolled steel as captive production which was the custom according to agency methodology. The Steel Group asserted that to determine the infiltration and effect of foreign imports, the agency should have

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61 United States Steel Group, 873 F.Supp. at 673.
62 United States Steel Group v. United States, 873 F. Supp. 673, 687 (Ct. Int'l Trade 1994); see also Patrick D. Chisholm, Chalk Up One for Protectionists, WALL ST. J., Nov. 22, 1995, at A10. "The ITC is a six member panel that judges whether U.S. companies involved in antidumping and countervailing duty disputes are being injured from 'unfair' imports of foreign goods". Id. The Commission is "made up of three democrats and three republicans . . ." Id.
63 Id. at 679.
64 Id. at 698; see Dana Milbank, Big Steelmakers Agree to Pursue Dumping Claim, WALL ST. J., May 8, 1992, at B3. "Europeans are selling hot-rolled sheet steel for $342 to $363 in their home markets but for $300 in the U.S. . . . [T]he Japanese sell hot-rolled and cold-rolled sheet steel at home for $518 and $631 respectively, but in the U.S. they sell it for $405 and $495." Id.
65 United States Steel Group, 873 F. Supp. at 679. "The Commission found by a vote of 5-1 that imports from Brazil, Germany, France, Korea, and Japan did not cause or threaten material injury." Id.
66 Id. at 680. The determination of a material injury consists of the International Trade Commission reviewing the volume of imports, effect on domestic price and production, inventory, employment, wages, and other relevant economic factors. Id.
68 United States Steel Group, 873 F. Supp. at 680 "Petitioners insist that the Commission should have applied a semi-finished product analysis to the hot-rolled captive production, thus treating such hot-rolled product as 'work-in-progress' . . ." Id.
69 Id. at 681-82. Petitioners argue that the Commission's approach is contrary to methodology. "[a]pplied in prior determinations for the steel industry, in which captive production was excluded. [H]ot-rolled captive production has been counted multiple times across the steel investigations, in cold-rolled, corrosion resistant and plate production data, in addition to the hot-rolled industry analysis." Id.
separated the analysis of the industry figures by cold-rolled steel and hot-rolled steel.\textsuperscript{70}

Next, the Steel Group argued the ITC erred by not “cumulating”\textsuperscript{71} Korean steel imports with other foreign imports to determine the penetration of foreign steel competitors.\textsuperscript{72} The court determined the Steel Groups’ allegations were meritless and the ITC’s determination was sustained.\textsuperscript{73} The court rejected the Steel Groups’ “late argument” and reasoned that classifying hot-rolled steel as a captive production would obscure the clear-dividing line necessary for steel industry analysis.\textsuperscript{74}

This case illustrates the difficulty in meeting the proof of injury requirement from foreign competition without the application of volume determination.\textsuperscript{75} Since volume increases magnify the impact of the lower priced foreign item, volume determination in conjunction with lower foreign prices may be the best indicator of potential injury.\textsuperscript{76}

The URAA was designed to lower the barriers of trade through the proof of injury requirement.\textsuperscript{77} It is submitted that the steel

\textsuperscript{70} United States Steel Group, 873 F. Supp. at 683-84. The group claimed since hot-rolled steel would later be integrated into downstream products, counting the hot-rolled steel in industry figures would result in a double count. \textit{Id.}

\textsuperscript{71} For a definition of cumulation see, 19 U.S.C. § 1677(7XcXiv)(I) (1988 & Supp 1993) (stating Commission shall cumulatively assess volume and effect of imports from two or more countries producing like products subject to investigation if such imports compete with products of domestic industry).

\textsuperscript{72} See United States Steel Group v. United States, 873 F. Supp. 673, 685 (Ct. Int'l Trade 1994) (agreeing with Commissions decision not to culminate since competition from other imports was lacking). The majority of Commissioners found the Korean imports service niche products which were not available from domestic or foreign competitors. Furthermore, the ITC also found the penetration of Korean volume of market share did not approach a significant level. See \textit{id.} at 684 (noting volume of competitive imports was so small that injury could not have resulted solely from them injury).

\textsuperscript{73} United States Steel Group, 873 F. Supp. at 680 (finding Commission did not err in determining Dutch and Netherlands import volume was too low to support finding of threat).

\textsuperscript{74} \textit{Id.} at 683 (deciding steel group had sufficient opportunity to argue issue regarding classification of hot-rolled steel earlier in complaint); \textit{id.} at 684 (noting there would be no clear manner to distinguish hot-rolled steel for in-house downstream products); Cambridge Lee Indus., Inc. v. United States, 13 C.I.T. 1052, 1054, 728 F. Supp. 748, 750 (1989) (holding that there existed lack of sufficiently clear dividing line to separate domestic product into different like products).


\textsuperscript{76} See United States Steel Group, 873 F. Supp. at 685 (holding that while lost sales on part of domestic producer due to imports may be hard to confirm, evaluation of volume may be best evidence to demonstrate injury).

\textsuperscript{77} See \textit{supra} note 4 and accompanying text (discussing how agreements attempted to reduce trade barriers); see also \textit{supra} note 44 and accompanying text (revealing how these goals were eluded).
industry circumvented the effect of the higher threshold requirement, through the elimination of domestic captive production in volume calculation.

B. Like Product in Volume Determination

The final texts of the Uruguay Round GATT agreement includes a definition of "like product." It interprets a like product as either an identical product or one that "closely resembles" the product in question. When a member of a domestic industry asserts a dumping charge against a foreign competitor, Title 19 firmly establishes separate and distinct roles for the ITA and the ITC in determining the injury.

If the ITA determines that the product is the same or similar, then the ITA must decide if it is being sold by the exporter at less than fair value ("LTFV"). The ITA must determine that a "class or kind" of merchandise is being sold in the United States at less than fair value in order to impose a countervailing duty.

Only after the ITA has made a determination of unfairness in the marketplace will the ITC inquire as to whether the United States' domestic industry is being injured. The ITC is permitted

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78 See Final Act, supra note 7, art. 2.2 (identification of like product was also referred to in final text as "produit similaire"); see also GATT 1947, supra note 1, art. VI(4), 61 Stat. 24, pt.5 (1948) (defining like product); Exportadores de Flores v. United States, 693 F. Supp. 1165, 1167 (Ct. Intl'g Trade 1988) (finding identification of like product necessary to determine which industry will be examined for injury or threat of injury).

79 See Final Act, supra note 7, art. 2.2 (stating "like product shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration."); see also Exportadores de Flores, 693 F. Supp. at 1168-69 (noting "like product" should not be narrowly construed thereby enabling similar product with minor distinguishing qualities to evade positive determination nor interpreting overbroadly to achieve particular result). But see Torrington Co. v. United States, 747 F. Supp. 744, 752-53 (Ct. Intl'g Trade 1990) (finding that Commission directives regarding similarities between two products not positive, holding performance of product must be considered).


81 See Badger-Powhatan Div. of Figgie Lantern v. United States, 608 F. Supp. 653, 656 (Ct. Intl'g Trade 1985) (stating antidumping applicable only if ITA determines that same class or kind is being sold at less than fair value ("LTFV") and domestic industry is systematically injured or threatened).


83 See Holmer & Bello, supra note 82, at 1016 (discussing implication of 19 U.S.C. § 1673). The determination by the International Trade Commission (ITC) must result in
to exercise their discretion to decide if the imports of the same "class or kind" are the ones causing the material injury. The ITC, however, has left the determination of like product to the ITA and has consistently refused to overrule the ITA's findings.

In *Kern-Liebers USA, Inc., v. United States*, Kern-Liebers challenged the commission's withdrawal of a preliminary determination that the American steel industry had been materially injured by foreign imports. In a preliminary determination, the ITC found a material injury to the industry from certain countries. In its final ruling, however, the ITC found that there was no injury. The Commission based its conclusion upon the determination that the volume of the lower priced Italian and Belgium goods was not enough to cause injury.

The impact of the Commission's negative injury ruling precipitated a dramatic decline in the financial strength of the United States steel industry. The American steel producers alleged that either the United States domestic industry being injured, threatened with injury, or that the industry is being materially retarded by reason of imports of that merchandise. Id. See *United Engineering & Forging v. United States*, 779 F. Supp. 1375, 1391 (Ct. Int'l Trade 1991) (holding ITC has a "wide latitude" in deciding whether products defined by ITA are actually causing injury).


See *Kern-Liebers USA, Inc. v. United States*, No. 95-9 slip op. at 1 (Ct. Int'l Trade Jan. 27, 1995). *Id.* at 1. The Commission, found reasonable indication that an industry in the United States was materially injured by reason of allegedly subsidized and/or LTFV imports of cold-rolled steel products from Argentina, Austria, Belgium, Brazil, Canada, France, Germany, Italy, Japan, Korea, the Netherlands and Spain. *Id.*

In June 1992, Kern-Liebers, a member of the steel industry, filed a claim of injury with the ITA concerning the sale of cold-rolled steel imported by U.S. from twenty-one countries. *Id.* at 1.

*See Certain Steel Prods., 57 Fed. Reg. 57,739-85, 57,799-806 (1992) (which found countervailing duties could be imposed on Austria, Belgium, Brazil, France, Germany, Italy, Korea and Spain); see also 58 Fed. Reg. 37,217-238, 37,374 (1993). The final determination which reflected the preliminary finding was made on July 1993. *Id.*

*Kern-Liebers*, No. 95-9, at 1.

*Kern-Liebers USA, Inc. v. United States*, No. 95-9 slip op. at 1, 6 (Ct. Int'l Trade Jan. 27, 1995) (noting that low volume and market share of lower priced imports made impact on domestic industry negligible).

*See Battered Steel Group Leads Dow Retreat of 2.24 Points, L.A. TIMES, July 28, 1993, at D3. "The market seesawed throughout the morning, only embarking downward once shares of the steel producers headed lower. The Commission would not back charges that U.S. Steel producers have been injured by dumping from some foreign producers. Bethlehem Steel, a Dow component, shed 3 7/8 to 14 7/8." *Id.*
the like product analysis was unfair, as the analysis under Title 19 failed to distinguish different grades of steel.\textsuperscript{93} Both Kern-Liebers and The United States Steel Group decisions reveal the complexity and significance of like product determination. The Commission's final rulings, however, were based upon the ITA's finding and reflected a traditional reluctance to fragment product definitions where substantially similar products are available.\textsuperscript{94}

Consequently, the court rejected Kern-Liebers contention that cold-rolled steel warranted separate "like product" classification.\textsuperscript{95} This ruling followed the Commission's earlier determination in United States Steel Group\textsuperscript{96} which categorized hot rolled steel as a like product regardless of its ultimate use.\textsuperscript{97} In U.S. Steel Group, the domestic producer argued that the ultimate use of the product made it unique and, therefore, it should not be counted as "like product" when determining volume.\textsuperscript{98} This argument was rejected by the Commission which characterized the hot-rolled steel as a "like product" regardless of its final nature.\textsuperscript{99}

The negative injury determinations by the Commission caused the steel industry to realize that judicial actions would not provide the necessary protection against foreign imports.\textsuperscript{100} It is submitted that the steel industry advanced the introduction of captive


\textsuperscript{94} Kern-Liebers, No. 95-9, at 4 (holding characterization of specialized steel products by distinct metallurgy, end uses, and customer perceptions, would undermine necessary "clear dividing lines" between potential separate products).

\textsuperscript{95} See id. at 3 (stating the steel was developed to meet new federal mandated vehicle specification for seatbelt retractors). The court noted that while the unique end use of a product may be considered, it is not determinative. Id. For a discussion of unique end use, see also Drew Winter, It's a material world at this year's SAE show; Society of Automotive Engineers; Materials & Manufacturing, WARD'S AUTO WORLD, Mar. 1992 (distinguishing new material by ease of processing, good abrasion, and creep resistance designed to meet the new federal standards of manufactured cars).

\textsuperscript{96} 873 F. Supp. 673 (Ct. Int'l Trade 1994).

\textsuperscript{97} Id. at 681 (refusing to recognize distinction based solely on end use).

\textsuperscript{98} Id. at 682.

\textsuperscript{99} Id at 694. For a discussion of impact of this determination, see Finance Panel Passes Proposal Implementing Uruguay Round, 11 Intl Trade Rep. (BNA) No. 31, at 1696 (stating that under current ITC rules one run of steel can be counted three times as domestic product and under Rockefeller Amendment how this inconsistency will be corrected).

\textsuperscript{100} See Kern-Liebers U.S.A. v. United States, No. 95-9 slip op. at 1 (Ct. Int'l Trade Jan. 27, 1995); Algoma Steel Corp. v. United States, 687 F. Supp. 633 (Ct. Int'l Trade 1988) (holding that value determinations made in anti-dumping cases must be based upon proof of actual costs at prices not estimates, approximations and averages); see also United States Steel Group, 873 F. Supp. at 673 (determining whether material injury has occurred because of price at less than fair value (LTVF) or subsidized imports under investigation, requires International Trade Commission (ITC) to consider dollar value of imports, their
production into the implementing legislation solely as a protective measure. It would also appear that in acquiescing to the steel industry, Congress ignored the inevitable challenge by foreign producers who perceive this as an unfair trade practice.

III. THE INEVITABLE CONFLICT BETWEEN THE URAA AND THE UNITED STATES’ IMPLEMENTING LEGISLATION

The issue of captive production reflected in the antidumping legislation will prove to be one of the most contentious areas of legislation in the implementation of GATT. The majority of steel producers have urged the administration to maintain the antidumping trade laws to protect the United States steel industry.¹⁰¹ In contrast, healthy domestic industries that engage in global trade have feared retaliation by the imposition of duties on items exported to foreign countries from United States industries.¹⁰² Opponents of the antidumping legislation have labeled the statutory language as "protectionism" that is working against the reduction of trade barriers between countries.¹⁰³

The argument has also been made that the exclusion of captively produced steel in the determination of total volume could

101 See Tim W. Ferguson, Business World: Trade Policy's "Chokepoint", WALL ST. J., April 11, 1995, at A21 (charging "Old Steel" with attempting to create new barriers to trade even as GATT was lowering them); see, e.g., Robert W. McGee, The Case to Repeal the Antidumping Laws, 13 J. INT'L L. BUS. 491, 523 (1993) (noting that U.S. steel producers have filed 48 antidumping petitions alleging serious and material injury); see also Patrick D. Chisholm, Chalk Up One for Protectionists, WALL ST. J., Nov. 23, 1995 (noting domestic steel industry as primary beneficiary of anti-dumping trade laws); Frank Haflich, Supporters Fear Hijinks in WTO Reconciliation, AM. METAL MKT., Oct. 2, 1995, at 6A (noting implementing legislation could increase protectionism); Bill Schmitt, Steel Users Take Aim At GATT Bill, AM. METAL MKT., July 1, 1994, at 1 (noting steel industry's attempts to "toughen" GATT amendments relating to anti-dumping and countervailing duties); 138 CONG. REC. S12, 357 (1992) (statement of Sen. Rockefeller (Aug. 11, 1992)) (stating some believe U.S. citizens should reject GATT and current law should remain unchanged).


result in an exaggeration when determining the volume ratio.\textsuperscript{104} While this distortion of volume will facilitate a positive injury determination for the domestic producers, it will unfairly penalize foreign steel producers.\textsuperscript{105} The most damaging allegation, however, is that the captive production amendments in the URAA are actually in direct conflict with the GATT accords.\textsuperscript{106}

The steel industry saw the Uruguay Round negotiations as an opportunity to influence the legislature to implement impending statutory modifications.\textsuperscript{107} As a result of an amendment introduced by Senator Jay Rockefeller,\textsuperscript{108} the ITC was required to recognize captive production in their determination of domestic volume, and focus primarily on the merchant market in instances where the captive production is significant.\textsuperscript{109} This amendment, adopted in the URAA implementing legislation, has been heralded by the steel industry as a fair method of volume determination.\textsuperscript{110}

It is submitted that Congressional divergence from the original accords reached in Uruguay will result in maintaining the trade barriers which foreign producers negotiated to eliminate. It is expected that foreign producers, injured by what appears to be United States flagrant disregard of the agreement, will challenge an injury determination which imposes a countervailing duty.

\textsuperscript{104} See David Prizinsky, \textit{GATT Steel Measures Irk Local Metal Stampers}, \textit{Crain's Cleveland Bus.}, Nov. 21, 1994, at 17 (stating that foreign importers will be hurt by reduction of total domestic volume count).

\textsuperscript{105} \textit{Id.} at 17 (explaining how captive production amendments to URAA will prevent ITC from including certain steel products from domestic production calculations); see also Bill Schmitt, \textit{Did U.S. Mill Win or Lose with GATT}, \textit{Iron Age New Steel}, Jan. 1995, at 33 (asserting that bill will increase likelihood of affirmative injury findings).

\textsuperscript{106} See Nigel Holloway, \textit{Devil's in the Details}, \textit{Far E. Econ. Rev.}, Aug. 18, 1994, at 42 (asserting that captive output of domestic production included in URAA legislation is direct contradiction of GATT accord).


\textsuperscript{108} Senator Rockefeller of West Virginia was instrumental in the steel industry's ability to influence the legislature. See Letter from Jay Rockefeller, United States Senator, \textit{Steelmakers vs. Unfair Trade}, \textit{Wall St. J.}, April 29, 1992, at 19A (stating his support for American steel makers and their progress in world market).

\textsuperscript{109} See 19 U.S.C. 1677 (7) (c)(iv) (1988) (providing that Commission shall evaluate captive production and if necessary focus primarily on merchant market to determine volume).

IV. THE DISPUTE RESOLUTION PROCESS

The inevitable conflict will occur when captive production is eliminated, resulting in a determination of an injury which otherwise would not have been found. The challenge will be brought by the foreign country whose industry has been assessed a duty. The implementation of GATT 1947 encouraged the resolution of disputes between countries through dispute settlement procedures proposed by the International Trade Organization ("ITO"). The proposal was rendered ineffective, however, when the United States Senate expressed reluctance to submit to ITO authority. Following the elimination of the ITO, the GATT dispute resolution process was relegated to forum status, where members could attempt an amicable resolution of their differences. In the Uruguay Round negotiations, the United States placed strong emphasis on the development of an efficient governing body to resolve trade disputes and, accordingly, established the World Trade Organization ("WTO"). The Marrakesh Protocol established the rules necessary for WTO members to implement the provisions

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112 The International Trade Organization was approved in 1948, but U.S. opposition derailed the proposal. See Judith Bello & Alan Holmer, U.S. Trade Law and Policy Series No. 24: Dispute Resolution in the New World Trade Organization: Concerns and Net Benefits, 28 Int'l. L. 1095, 1096 (1994) (stating in response to U.S. Senate reaction ITO was abandoned, leaving GATT as surviving agreement of original).

113 Id. at 1096 (stating belief that both U.S. government and private sector will discern, dissect, and debate developments in application of new procedures).

114 See Agreement Establishing The Multilateral Trade Organization, opened for signature Dec. 15, 1993, 33 I.L.M. 13 [hereinafter WTO]. The agreement sought to establish an effective governing body to facilitate world trade. Id.; see also Helene Cooper, World Trade Organization Created By GATT Isn't The Lion Of Its Foes Or The Lamb Of Its Backers, WALL ST. J., July 14, 1994, at A11 (noting proponents view WTO as effective instrument giving GATT procedural powers to enforce agreements).

reached in GATT. The United States has agreed to manage its trade laws in accordance with GATT and WTO requirements.

The United States' agreement to abide by the rules of the WTO was crucial to the establishment of its authority. While the United States has agreed to honor the provisions of GATT, United States courts will apply the laws developed by Congress in interpreting the agreement. Thus, a United States court presiding over a trade dispute must follow congressional mandates even if they appear to be in direct conflict with the GATT accords.

A trade conflict usually involves a disparity between the interpretation of the provision and its implementing statute. Although courts will interpret an ambiguous statute in a manner consistent with GATT, unambiguous statutes will be applied as constructed. Hence, a United States trade law in direct opposi-

118 See supra note 114 and accompanying text (discussing the importance of U.S. participation); John H. Jackson, World Trade and the Law of GATT 50-51 (1969) (noting GATT 1947 created International Trade Organization (ITO) with similar elements found in WTO, but lacking United States approval, ITO was relegated to forum where differences could be discussed).
120 H.R. 5110, 103d Cong., 2d Sess., § 102(a)(1) (1994) (mandating no provision in Uruguay Round shall have effect if inconsistent with any law of the United States).
122 See Daewoo Electronics Co., v. International Union of Elect., Technical, Salaried and Machine-Workers AFL-CIO, 6 F.3d. 1511, 1513 n.1 (Fed.Cir. 1993), cert. denied, 114 S. Ct. 2672 (1994) (showing great deference to agency interpretation of statute). "Where goods identical to the imported goods are sold in the home market of the exporting country, a margin of dumping is determined by comparing the foreign market value ("FMV") to the United States price("USP"). The absolute dumping margin for a sale is the amount, if any, by which the FMV exceeds the USP." Id.
tion to the trade agreement will foster appeals by foreign importers to the WTO alleging violations of GATT by United States Courts.\textsuperscript{123}

The first response by the WTO to an alleged violation will be a recommendation that the countries in disagreement engage in consultations to resolve their dispute.\textsuperscript{124} If unsuccessful, the WTO will create a panel of three trade lawyers to evaluate the merit of the claim.\textsuperscript{125} If the panel determines that a United States trade law is in conflict with the rules of GATT, the United States will be subject to severe trade sanctions.\textsuperscript{126}

Since the WTO has not confronted an imposed duty based upon the exclusion of captive production, the resolution process in this area remains untested. Furthermore, whether the United States will submit to WTO trade sanctions is also uncertain.

**Conclusion**

The Uruguay accord, obtained after seven years of global negotiations, sought to lower trade barriers through the establishment of a substantive material injury requirement. The United States steel industry, which perceived the agreement as an economic threat, successfully lobbied for a congressional modification to the implementing legislation. While the disparity between GATT and the United States implementing legislation assuaged the fears of the steel industries, countries penalized by the discrepancy will petition for review.

\textsuperscript{123} See Bill Schmitt, *Did U.S. Mills Win or Lose with GATT?*, IRON AGE NEW STEEL, Jan. 1995, at 33 (stating “The WTO could give the United States . . . tough times because (of) some dumping provisions attached to the GATT bill”).

\textsuperscript{124} See Michael K. Young, Symposium, *Uruguay Round—GATT/WTO Dispute Resolution In The Uruguay Round: Lawyers Triumph Over Diplomats*, 29 INT’L LAW. 389, 394 (1995) (stating parties involved in trade disputes should exhaust possible judicial remedies through parent country prior to commencing an action before WTO panel and with ability to form panel as part of dispute resolution process); see also Robert Kuttner, *Bringing Balance to U.S. - Japan Trade*, INT’L HERALD TRIB., May 13, 1995, at 1 (stating WTO is not true court since panels cannot impose penalties and are not required to follow rules of due process).

\textsuperscript{125} See WTO, *supra* note 114, at Annex II, art. 8.5 (directing WTO panel to consist of three individuals); *Id.* art. 8.4 (assigning Secretariat duty to maintain roster of panelist); \textit{see also} Rosine Plank, *An Unofficial Description of how a GATT panel Works and Does Not*, 4 INT’L ARB. 53, 66 (1987) (allowing party to object to panel nominee based on belief of bias).

Before the Uruguay Round, the steel industry routinely sought the elimination of captive production in volume determination through the United States courts. Unsuccessful and fearful of the economic consequences of a heightened injury requirement, the steel industry sought congressional intervention. In response to the political pressure, Congress introduced the elimination of captive production in material injury analysis. The steel industry's successful interjection of captive production into the URAA legislation has set the international stage for a future conflict.

The ITC received a mandate, in the form of URAA implementing legislation, to exclude captive production in volume count used to determine injury. Since the ITC must enforce unambiguous implementing legislation, a foreign country challenging the imposition of a duty will not prevail in a United States court. Ultimately, a complaint will be brought to the WTO by an efficient foreign producer, alleging the inability to surmount an American protectionist wall created by the new volume count.

The basis of free trade is premised on the belief that open markets will only be realized through the reduction of trade barriers. Multilateral world organizations must ensure that provisions of GATT, agreed upon after several years of negotiations, are implemented and followed by individual countries. The fair application of these provisions will lead to the reduction of trade barriers between countries and permit free trade to be realized.

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