THE CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000: "RELIEF" FOR THE U.S. STEEL INDUSTRY; TROUBLE FOR THE UNITED STATES IN THE WTO

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1. INTRODUCTION

For years, companies seeking antidumping or countervailing duty orders from the U.S. government have been strikingly successful because U.S. antidumping authorities are "able to apply trade-reducing 'remedies' almost at will." Since their inception in 1916, U.S. antidumping and countervailing duty ("AD/CVD") laws have been among the most controversial of any economic legislation. Critics argue that the U.S. laws are poor trade policy, that they confer an unfair advantage on U.S. industries, and that they are outright illegal. Whether these arguments are right or wrong, they are being made ever more strongly since the entry into force of the Continued Dumping and Subsidy Offset Act of 2000 ("CDSOA," or "the new Act"), a recent amendment to the Tariff Act of 1930 ("Tariff Act"). According to CDSOA, the proceeds resulting from antidumping and countervailing duty investigations, which previously were paid into the U.S. Treasury, are now paid

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1 BRIAN HINDLEY & PARTRICK A. MESSERLIN, ANTIDUMPING INDUSTRIAL POLICY: LEGALIZED PROTECTIONISM IN THE WTO AND WHAT TO DO ABOUT IT 52 (1996).


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directly to the domestic companies who initiated those proceedings.  

Section 2 of this Comment explains briefly the mechanisms of, and principles behind, U.S. AD/CVD laws—both individually and in conjunction with applicable provisions of the General Agreement on Tariffs and Trade ("GATT") and the World Trade Organization ("WTO") agreements implementing GATT. Section 2 also explains the basic provisions of CDSOA. Section 3 discusses some substantive and procedural weaknesses in the U.S. AD/CVD laws. Finally, Section 4 examines the question whether CDSOA is consistent with U.S. and international AD/CVD laws, concluding that it is not.

2. BACKGROUND OF U.S. AND INTERNATIONAL AD/CVD LAWS

2.1. Pre-CDSOA U.S. Antidumping and Countervailing Duty Laws

The purpose of the U.S. AD/CVD laws is "the restoration of conditions of fair trade." The following is a brief discussion of the ways in which the U.S. laws supposedly identify and address disturbances in "conditions of fair trade."

2.1.1. Mechanics of the U.S. AD/CVD Laws

The primary provisions in U.S. AD/CVD laws relating to dumping and countervailable subsidies are contained in the Tariff Act. The Tariff Act provides for the imposition of an antidumping duty when two conditions are found to exist: First, it must be

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8 The Tariff Act is not the only law that provides relief from dumping. Other provisions include the Antidumping Act of 1916, which imposes "criminal and civil penalties for the sale of imported articles at a price substantially less than the actual market value. . . ." COMMITTEE ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES, 105TH CONG., OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES, WMCP 105-4. at 65 (Comm. Print 1997) [hereinafter WMCP 105-4]; and the Omnibus Trade and Competitiveness Act of 1988 ("OTCA"), which allows the U.S. Trade Representative to initiate an action in a foreign country. See id. at 161. However, the OTCA is not relevant here, and while the 1916 Act still is in effect, only one private suit has ever been brought under it. See Finger, supra note 2, at 18-19.
found that "a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value."9 Second, it must be found that (1) an industry in the United States is either materially injured, or is threatened with such an injury; or (2) the establishment of a U.S. industry is materially retarded by imports or sales of that merchandise.10 Similar conditions must be found before a countervailing duty may be imposed.11 In either case, the determination regarding the first condition generally is made by the U.S. Department of Commerce ("DOC"), and the determination regarding the second condition is made by the U.S. International Trade Commission ("ITC").12

2.1.1.1. Margin of Dumping/Subsidization13

Upon the initiation of an antidumping investigation or a countervailing duty investigation, the DOC and the ITC make preliminary determinations as to whether dumping or subsidization has occurred and whether injury has occurred.14 Provided that these determinations are affirmative, and that certain procedural requirements are met, the investigation proceeds15 and final determinations are made as to the margin by which the imported goods

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10 Id. § 1673(2). The determination whether injury has resulted is the target of much of the criticism leveled against the U.S. laws. See infra, Section 3.2.
11 First, it must be determined that "the government of a country or any public entity within the territory of a country is providing . . . a countervailable subsidy." 19 U.S.C.A § 1671(a)(1) (West 1999). Unlike an investigation into alleged dumping, however, in an inquiry into an allegedly countervailable subsidy a showing that a U.S. industry is injured or threatened with injury is required only where the merchandise is imported from a Subsidies Agreement country. See id. § 1673(2). A Subsidies Agreement country is a WTO member country or a country with which the United States has relations of the kind defined in 19 U.S.C.A. § 1671(b).
12 The DOC and the ITC have promulgated extensive regulations regarding, for example, classification of products as "like products" and the determination whether sales by a foreign exporter are below fair value. See Antidumping and Countervailing Duties, 19 C.F.R. § 351 (2001).
13 Unless specifically noted, the discussion of the administration of dumping subsidies and the imposition of countervailing duties will be discussed together.
15 Note, however, that the Secretary of Commerce [hereinafter the Secretary] may cause the termination of an investigation if he determines that termination is in the "public interest." See id. § 1671c(a)(2)(A); 19 C.F.R. § 351.207(b) (2001).
are being subsidized or dumped.\textsuperscript{16} The final "dumping margin" or "subsidy margin" is the basis for the amount of the antidumping duty or countervailing duty issued.\textsuperscript{17}

The dumping margin is determined by comparing the export price of the goods with their "normal value."\textsuperscript{18} Conceptually, in terms of the Congressional purpose quoted above,\textsuperscript{19} "normal value" represents the lowest price at which the foreign producer could export the goods to the United States without disturbing "conditions of fair trade."\textsuperscript{20} Naturally, the most objective and least complex way to ascertain normal value would be to select a concrete figure that exists in the real world. Accordingly, the normal value is determined, if possible, based on the price at which the foreign producer sells the goods in question in that producer's home market.\textsuperscript{21} Alternatively, if the producer does not sell the goods in its home market, normal value can be determined from the price of the producer's goods in some other market to which the producer exports.\textsuperscript{22}

A more complex process becomes necessary, however, when neither a home-market value nor a third-market value can be used.\textsuperscript{23} Regulations promulgated by the DOC allow for a "constructed value" to be used in certain specific circumstances, including where:

- neither the home market nor a third country market is viable; sales below the cost of production are disregarded;
- sales outside the ordinary course of trade, or sales the

\textsuperscript{17} See WMCP 105-4, supra note 8, at 67.
\textsuperscript{18} See id.
\textsuperscript{19} See supra note 7 and accompanying text.
\textsuperscript{20} In making a determination whether, and to what extent, dumping/subsidization has occurred, the Secretary must disregard \textit{de minimis} infringements, which are defined as countervailable subsidies where "the aggregate of the net countervailable subsidies is less than 1 percent [or dumping margins where the aggregate is less than 2 percent] ad valorem or the equivalent specific rate for the subject merchandise." 19 U.S.C.A. §§ 1671b(b)(4)(A), 1673b(b)(3) (West 1999).
\textsuperscript{22} See id. § 351.404.
\textsuperscript{23} See id. §§ 351.404-351.405. Even if the goods are sold in the home market or in a third market, the price of the goods in that market will not be used if sales in both markets are insufficient to form a basis for comparison.
prices of which are otherwise unrepresentative, are disregarded; sales used to establish a fictitious market are disregarded; no contemporaneous sales of comparable merchandise are available.\textsuperscript{24}

In addition to these relatively specific circumstances, the regulations allow the use of a constructed value "in other circumstances where the Secretary determines that home market or third country prices are inappropriate."\textsuperscript{25} The Secretary makes such a determination quite frequently (for example, where the product sold in the foreign producer's home market is not "sufficiently-similar" to the product allegedly being dumped by that producer in the United States).\textsuperscript{26}

\subsection*{2.1.1.2. Injury}

Assuming that dumping or a countervailable subsidy is taking place, an antidumping duty or a countervailing duty will not be imposed absent a finding of material\textsuperscript{27} injury, or threat thereof.\textsuperscript{28} In addition, the Tariff Act requires (ostensibly at least) that the harm being suffered by the domestic industry is being \textit{caused by} the dumping or countervailable subsidy.\textsuperscript{29} Determining whether the dumping or subsidy is causing the harm being suffered involves a weighing of numerous factors, from market share and revenues to wages and the ability of the allegedly affected companies to raise capital.\textsuperscript{30}

\begin{itemize}
\item \textsuperscript{24} Id. § 351.405(a).
\item \textsuperscript{25} Id.
\item \textsuperscript{26} See Brink Lindsey, \textit{The U.S. Antidumping Law: Rhetoric Versus Reality}, J. OF WORLD TRADE, Feb. 2000, at 1, 6 n.13.
\item According to Department practice, a product sold in the comparison market will normally not be considered 'comparable' \ldots{} to a product sold in the United States if the difference in variable manufacturing costs between the two products is greater than 20 percent of the total manufacturing cost of the comparison-market product. \textit{Id.}
\item \textsuperscript{27} A showing merely that the domestic industry has been harmed is not sufficient. 19 U.S.C.A. § 1671(a)(2) (West 1999).
\item \textsuperscript{28} See id. §§ 1671(a)(2), 1673(2). Remedial measures also are permissible where the suspect activity injures or threatens to injure the establishment of an industry. \textit{Id.} § 1673 (2).
\item \textsuperscript{29} See WMCP 105-4, \textit{supra} note 8, at 70.
\item \textsuperscript{30} See \textit{id.}
\end{itemize}
2.1.2. Regulation of Antidumping and Countervailing Duties
Under GATT

The primary provision in GATT regarding the imposition of antidumping and countervailing duties is Article VI. The Agreement on Implementation of Article VI ("ADA")\textsuperscript{31} and the Agreement on Subsidies and Countervailing Measures ("ASCM")\textsuperscript{32} clarify and supplement the terms of Article VI. The WTO Agreements and GATT 1994 are incorporated into the U.S. international trade laws.\textsuperscript{33} Therefore, the terms of Article VI, the ADA and the ASCM apply to investigations by the DOC and the ITC as do the provisions of the Tariff Act and the ITC regulations discussed above.\textsuperscript{34} In substance, these provisions are very similar to the U.S. antidumping laws.\textsuperscript{35} Article VI defines dumping as the introduction of


\textsuperscript{33} See 19 U.S.C.A. § 3511 (West 1999).

\textsuperscript{34} "No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect." 19 U.S.C.A. § 3512 (West 1999); see also Matthew Schaefer, National Review of WTO Dispute Settlement Reports: In the Name of Sovereignty or Enhanced WTO Rule Compliance?, 11 ST. JOHN'S J. LEGAL COMMENT. 307, 332-33 (1996).

Any amendment to a WTO agreement that would apply to the United States requires the United States to consent to the amendment, with the exception of those that are truly procedural and would not affect the substantive rights or obligations of the United States. Indeed, the WTO protects United States sovereignty in this regard to a greater degree than its predecessor, the GATT, the de facto institution of the world trading system for the past fifty years.

\textit{Id.} (citations omitted).

\textsuperscript{35} See, e.g., Schaefer, supra note 34, at 329.

Unfortunately, rhetoric concerning sovereignty was raised to such a level in the course of the Uruguay Round debate that reality was blurred... The debate over sovereignty has falsely promoted the notion that our citizenship interests are being exchanged for our consumer interests... An alternative and more compelling explanation is that the WTO dispute
goods into commerce "at less than [their] normal value."36 Furthermore, like the U.S. AD/CVD laws, Article VI allows remedial action only if "the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry."37 Like the U.S. laws, Article VI authorizes alternatives to the price of the allegedly dumped products in the home market as a basis for comparison: "In the absence of such domestic price," the price of the exported product may be compared either to (1) "the highest comparable price for the like product for export to any third country in the ordinary course of trade," or (2) "the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit."38 The Antidumping Agreement sets forth specific guidelines regarding the imposition of antidumping duties under Article VI of GATT, and the ASCM sets forth specific guidelines relating to the imposition of countervailing duties under Article VI of GATT.39

2.1.3. Purpose/Theory of U.S. AD/CVD Laws

Proponents of U.S. AD/CVD laws traditionally have responded to their critics, in part, with the argument that the laws are necessary to protect the economic interests of the United States, whose markets are more open to foreign imports than those of any other country in the world.40 In order for the global economy truly to flourish, they argue, the high level of access to U.S. markets that is granted to foreign exporters must be reciprocated. Those exporters' own governments must allow U.S. companies to compete with their domestic companies on a level field of play.41 The ab-

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36 See GATT, supra note 6, art. VI, para. 1.
37 Id.
38 Id.
39 See, e.g., ADA, supra note 31, art. 2, para. 2.2 (regarding considerations in calculating a constructed value for comparison where sales in the home market are insufficient). The Antidumping Agreement and the ASCM are discussed in greater detail below. See infra Section 4.2.
sence of this reciprocity (i.e., the failure of foreign governments to allow U.S. companies to enter into their own domestic markets, or the subsidization of companies which compete in with U.S. companies in U.S. markets) enables the foreign exporters to engage in unfair trade practices that could potentially drive U.S. companies out of business.42

2.1.3.1. Dumping

When foreign exports are prevented from entering a country’s markets, a “sanctuary market” is created for domestic producers of the product in question. With no competition, the domestic producers are free to charge higher prices for their products than they would in an open market.43 The producers then can sell their products at very low prices (i.e., “dump” them) in the U.S. market, offsetting the resulting losses with high profit margins earned in the home “sanctuary” market, and driving their U.S. competitors out of business.44

2.1.3.2. Subsidization

Foreign producers also may be able to undersell competitors in the U.S. market, even if their home market welcomes outside competition, by receiving financial assistance from their government. This financial assistance, it is argued, provides the same benefit to foreign exporters as a closed market: it gives them the ability to charge unreasonably low prices in the U.S. market. The subsidized foreign producers offset the resulting losses, not with high profit

42 See id.

43 See GREG MASTEL, ANTIDUMPING LAWS AND THE U.S. ECONOMY 5 (1998) (“A closed home market allows companies to charge high prices at home because they face no foreign competition.”).

44 See supra note 41.
margins earned in their home sanctuary market, but with the sub-
sidies.

2.1.3.3. The U.S. Laws' Response

The U.S. AD/CVD laws, proponents argue, are "a defensive in-
strument needed as an effective response to market distortions
abroad which create or foster unfairly priced and injurious exports
to the United States." The creation of sanctuary markets and the
 provision of countervailable subsidies are examples of "market
distortions," and U.S. AD/CVD laws respond to them, in theory,
by offsetting the benefit they provide to the foreign exporters with
an equivalent cost, in the form of an antidumping duty or a coun-
tervailing duty. A foreign producer selling goods in the U.S. mar-
ket at prices lower than the prices at which the producer sells the
same goods in another market (for example, its home market) will
be susceptible to an antidumping duty or, if the price differential is
facilitated by a subsidy from the producer's government, a coun-
tervailing duty.

2.2. The Continued Dumping and Subsidy Offset Act of 2000

CDSOA was signed into law by President Clinton on October
18, 2000. The effect of the new Act is, quite simply, to put the
proceeds from antidumping duties and countervailing duties di-
rectly in the treasuries of the corporations for whose benefit the

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45 140 CONG. REC. S5666, S5670, supra note 40.
46 The distinction between subsidies that are countervailable and those that
are not, is defined by the statutes and the WTO Agreement, discussed below.
47 See Lindsey, supra note 26, at 2 ("Dumping... results from interventionist
government policies and structural differences between national economies.
Those market distortions allegedly give foreign firms an unfair competitive ad-
antage.").
48 See WMCP 105-4, supra note 8, at 65.
49 See GATT, supra note 6, art. VI, para. 5 ("No product of the territory of any
contracting party imported into the territory of any other contracting party shall
be subject to both anti-dumping and countervailing duties to compensate for the
same situation of dumping or export subsidization.").
50 See WMCP 105-4, supra note 8 at 65.
51 On signing the bill, President Clinton urged Congress "to override [the]
provision, or amend it to be acceptable" before the close of the 106th session.
President William J. Clinton, Statement on Signing the Agriculture, Rural Devel-
opment, Food and Drug Administration, and Related Agencies Appropriations
duties (the "underlying duties") are imposed. According to Senator Robert Byrd (D-WV), who inserted the provision into the FY 2000 Agriculture Appropriations bill, U.S. companies would have received approximately $39 million worth of these duties in 1999 had the provision been in effect. A company is eligible to receive a pro rata portion of the payments made under CDSOA ("offsets" or "distributions") if: (1) that company was a petitioner or an interested party in the proceedings resulting in the duty; and (2) that company remains in operation. The "catch" is that each recipient's pro rata share of the proceeds is calculated according to that recipient's share of "qualifying expenditures." That is, a complainant company in a AD/CVD action will receive money only if it has made qualifying expenditures, and it will receive only the amount equal to its pro rata portion of the total qualifying expenditures made by all the complainants in the action. This caveat in CDSOA presumably is designed to give the provision the flavor of "compensation." This Comment makes the argument that, on the contrary, CDOSA offsets are compensatory, if at all, in form only.

55 See id. § 1675c(b)(4).
56 See id. §§ 1675c(a), 1675c(b)(4).
57 CDSOA lists several categories of "qualifying expenditures." See id. § 1675c(b)(4). This "qualification" is not discussed in the remainder of this Comment, because it does not meaningfully affect the analysis. Most, and perhaps all, of the listed expenditures are expenditures that a petitioning company incurs constantly in the ordinary course of its business. Because the recipients of CDSOA offsets would, without these funds, incur these expenses anyway, the requirement that the offsets be distributed only to the extent of these expenditures is meaningless. Money, after all, is fungible. Having devoted the offsets to manufacturing facilities, equipment, research and development, personnel training, or any of the other listed purposes, the recipient will have an amount equal to the amount of the offset to use in whatever way it wishes.
58 CDSOA does not distinguish "qualifying expenditures" from "injury" that the underlying duties were calculated to redress. To the extent that the injury is fully redressed by the underlying duties, there is no place within the framework of GATT for an additional distribution to the complainant companies, regardless what eligibility requirements are attached to the distributions. See generally infra Section 4.

Two fundamental concerns underlie the criticisms made of U.S. antidumping and countervailing duty laws—one is conceptual and one is practical. In *The U.S. Antidumping Law: Rhetoric vs. Reality*, Brink Lindsey touches on both of these issues:

> It is beyond the scope of this article to explore ... whether the distinction between 'natural' and 'artificial' competitive advantages is intellectually coherent, and whether erecting trade barriers against imports that enjoy ... advantages characterized as artificial constitutes sound trade policy or indeed promotes fairness in any meaningful sense of that term. The aim here is narrower: it is simply to examine whether the reality of antidumping practice matches its rhetoric. Are the antidumping duties, for better or worse, really offsetting the effects of market-distorting government policies?

In simpler terms, these two issues are: (1) whether the conditions sought to be remedied by the U.S. laws really are “unfair” and, thus, whether they ought to be remedied in the first place; and, even assuming that these allegedly unfair conditions really are unfair, (2) whether the U.S. laws effectively detect and counter them, rather than making things worse by disturbing conditions of fair trade themselves.

Section 3.1 briefly addresses the first question. It offers no answer, but only a suggestion about how to approach the problem. A great deal of the literature discussing this problem assumes that the purpose of the U.S. AD/CVD laws is to ferret out and neutralize the effects of sanctuary markets and price discrimination. From this assumption, many critics proceed with statistical data and other evidence showing that the U.S. laws do not do this, concluding that the U.S. laws are poor trade policy with little or no additional justification. In addressing Lindsey’s first question, this line of attack is too narrow conceptually. Section 3.2 addresses the second question in some detail.

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60 *Id.* at 5 (emphasis added).
3.1. Are the Conditions Sought to Be Remedied by the U.S. Laws Really Problematic?

The U.S. AD/CVD laws, including CDSOA, are designed expressly to enhance conditions of fair trade. Opponents of the laws allege that the conditions the U.S. laws remedy are not “unfair” at all. Rather than resulting from a sanctuary market or price discrimination, opponents argue, low-cost sales by foreign exporters may result from normal business practices—practices engaged in by U.S. companies every day. As Hindley points out in Antidumping Industrial Policy, a foreign producer’s exporting a product to the United States at less than that producer’s average cost may result simply from excess production capacity, different employment practices, or temporary start-up costs that, for competitive reasons, it cannot afford to pass on to its customers. Diminishing excess capacity and “eating” excessive startup costs are innocent, even beneficial market phenomena. Nevertheless, that producer could potentially be subject to a remedial duty under U.S. laws. In simpler terms, the argument goes something like this: (1) Subsidies and/or sales at below “fair value” sometimes occur even though there is no sanctuary market or price discrimination; (2) therefore, antidumping and countervailing duties—which under U.S. laws are imposed on the basis of the existence of subsidies and/or sales at below fair value—are imposed, at least

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61 See supra note 7 and accompanying text.
63 See HINDLEY & MESSERLIN, supra note 1, at 11 (explaining that, although they often capture situations of price discrimination or sanctuary markets, “[c]urrent antidumping laws . . . can be applied in a vastly broader range of circumstance”).
64 See id. at 11-12.
65 See id. at 13.
66 See id. at 13-14.
67 See Lindsey, supra note 26, at 9.

A finding of dumping using constructed value offers no evidence of the existence of a sanctuary home market. All that such a finding can show is that US sales are being made below some baseline level of profitability; it cannot show that home-market sales are above any similar baseline, as home-market sales are excluded from the dumping calculation.

Id.
sometimes, even though there is no sanctuary market or price discrimination; (3) therefore, U.S. laws are bad.

The problem with this reasoning is that it does not address the argument that sales by foreign producers in the United States at below the producers' cost of production are wrong for some other reason—perhaps such sales are wrong per se,68 or perhaps they are wrong for some other specific reason that has little or nothing to do with sanctuary markets or price discrimination.69 Many critics of the U.S. laws make this mistake. They evaluate the U.S. laws only in terms of the rhetoric offered by the laws' advocates.

To be sure, the rhetoric and literature supporting U.S. antidumping laws employ concepts like "sanctuary markets" and "price discrimination." Even if these concepts are the most effective tools with which to entice undecided Members of Congress to vote for legislation such as CDSOA, however, they are a poor standard by which to evaluate CDSOA and the other U.S. AD/CVD laws. These laws are not intended to reveal "price discrimination" and "sanctuary markets." Rather, they are intended to reveal sales at below fair value,70 and subsidies,71 respectively. The wording of the statute indicates that perhaps Congress has determined that sales at below fair value are worth preventing whether they result from price discrimination, sanctuary markets, or some other condition or conditions.

Accordingly, it is not logical to leap from the fact that antidumping and countervailing duties are imposed, at least sometimes even though there is no sanctuary market or price discrimination, to the conclusion that, therefore, the U.S. laws are bad. The

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68 Conceptually, the law would be fully justified under the theory that sales below fair value are wrong per se. Of course, if selling below cost is wrong per se, then remedies available to U.S. companies to compensate for below-cost selling by foreign producers should also be available to compensate for below-cost selling by other U.S. producers. That argument, however, is beyond the scope of this Comment.

69 Boltuck and Litan explain that simple protectionism may be a valid motivation for AD/CVD regulation. See Boltuck & Litan, supra note 62, at 10 (explaining that if firms do not enjoy home market protection they may be driven out of business and rendered unable to return).

70 See 19 U.S.C.A. § 1673 (West 1999) ("[i]f... the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value... ").

71 See id. § 1671 ("[i]f... the administering authority determines that the government of a country... is providing, directly or indirectly, a countervailable subsidy... ").
question should not be whether sales at below fair value or the existence of subsidies are a reliable proxy for the existence of sanctuary markets or price discrimination; the question should be whether sales at below fair value or the existence of subsidies are a reliable proxy for any condition or conditions which U.S. international trade laws ought to discourage.

Assuming that subsidies and sales below fair value really do correspond to conditions of unfair trade—sanctuary markets, price discrimination, or some other conditions—a conceptual question remains, according to Lindsey, whether it is appropriate to remedy those problems:

Granted, cheap imports are capable of injuring specific import-competing firms; those same cheap imports, however, just as clearly benefit the U.S. companies that buy and use them, not to mention the millions of consumers who buy from those companies. So why is it appropriate to sacrifice the interests of some Americans to the interests of others?72

In response to this, supporters of the U.S. Laws such as Jeffrey Garten, former Undersecretary of Commerce for International Trade, have argued that although cheap imports may seem like a benefit to U.S. consumers, the benefit is only short-term.73 In the long run, those cheap imports will result in (1) unemployment, as U.S. producers are driven out of business; and (2) higher prices—when the foreign producers have no competition, they will have no incentive to continue selling their products at below fair value.74 This debate, however, is beyond the scope of this Comment.

3.2. Question Two: Do the U.S. Laws Effectively Detect and Counter Such Conditions?

The most obvious biases built into the U.S. remedial scheme are the conceptual flaws discussed above: U.S. laws allow remedies in response to practices that can be normal business practices,75 and the laws single out foreign companies.76 Neither of these qualities

72 Lindsey, supra note 26, at 2.
73 See supra note 40.
74 See id.
75 See generally supra Section 3.1.
76 See supra note 68.
makes sense except in light of a protectionist bias toward U.S. producers. Even at the outset, therefore, it seems getting to the courthouse (or, in this case, filing a petition with the DOC) is half the battle. This contention is supported by the high success rate of petitions filed by U.S. producers.

Other, more concrete biases are built into the U.S. remedial scheme by the specific provisions relating to the determination whether dumping or countervailable subsidization is occurring. Once again, a dumping or subsidy margin is ascertained, essentially, by subtracting the foreign export price (the price at which the goods are sold in the United States) from the normal value. When using the foreign producer's home market to determine the normal value, a "weighted average" is taken of the prices at which the foreign producer sells the product in that home market. In computing that average, however, "[s]ales made at less than cost of production may be disregarded . . . under certain circumstances." Obviously, to the extent lower sale prices are disregarded from the computation, the average of the sale prices that are included in the computation, and hence the normal value, will be higher.

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77 It should be noted that this half of the battle is not insignificant. The DOC and the ITC will not even proceed with the preliminary stages of the investigation unless the petitioners have standing, and the statutory requirements for standing are substantial. In particular, (1) the domestic producers or workers who support the petition [must] account for at least [twenty-five] percent of the total production of the domestic like product; and (2) the domestic producers or workers who support the petition [must] account for more than [fifty] percent of the production of the domestic like product produced by that portion of the industry expressing support for or opposition to the petition. 19 U.S.C.A. § 1673a(c)(4)(A) (West 1999).

78 Of the 778 total antidumping and countervailing duty cases filed in the United States from 1980-1988, 543 (69.8%) resulted in restrictions of the foreign trade in question. See Finger, supra note 2, at 251-54.

79 See supra Section 2.1.1.1.

80 See 19 U.S.C.A. § 1673b(d)(1)(A) (West 1999); see also WMCP 105-4, supra note 8, at 67.

81 WMCP 105-4, supra note 8, at 67. See also 19 C.F.R. § 351.405 (2001); Lindsey, supra note 26, at 6 (explaining that "[i]f more than 20 percent of comparison-market prices of a particular model are below cost, Commerce will exclude all the below-cost sales of that model from its calculations [pursuant to 19 C.F.R. § 351.405] on the ground that they are 'outside the ordinary course of trade.'").

82 See Tracy Murray, The Administration of the Antidumping Duty Law by the Department of Commerce, in DOW N IN THE DUMPS: ADMINISTRATION OF THE UNFAIR TRADE LAWS 23, 39 (Richard Boltuck & Robert E. Litan eds., 1991) ("The petitioners understand the effect of this provision on the margin of dumping and consequently repeatedly allege that certain home market sales are below the costs of production.")
Just as there is a built-in bias which tends to make normal value higher, there is also a built-in bias which tends to make the foreign export price lower. In determining the foreign export price, subtractions are made (in certain circumstances) for “selling commissions, indirect selling expenses, and expenses and profit for further manufacturing in the United States [and] . . . for related party profit, if any, earned in a sale through a related distributor to an end-user in the United States.” The result of these two biases is a wider—perhaps artificially wider—gap between the export price of the goods in question and the normal value of those goods, or, in other words, a larger dumping or subsidization margin.

Another bias enters the process at the injury stage of the investigation, particularly with respect to causation. The difficulty that has opened the door for this bias is well stated by Hindley as follows: “That dumping has occurred can in principle be demonstrated. That a domestic industry displays symptoms of injury can in principle be demonstrated. But those observations together do not demonstrate that the dumping has caused the injury.” Historically, the ITC has shifted between different tests regarding the injury sustained by domestic producers as a result of dumping or countervailable subsidies. One test that has been applied asks whether, but for the dumping or subsidies, the domestic industry would be better off than it is in fact. Another test asks both (1) whether the U.S. industry is in a substandard or deteriorating condition; and if so, (2) whether the dumping or subsidies are a factor in that condition.

Regardless of which test is applied, establishing a causal connection between the dumping or subsidies and the alleged injury to the U.S. domestic industry is extremely difficult. This is primarily because, as mentioned above, there are perhaps infinite factors and indicators that can be taken into consideration in determining injury. The ADA provisions on causation are an ideal illustration of the complexity in evaluating injury and its link to particular foreign imports. In Article 3 of the Agreement (“Determination of Injury”) the Agreement requires an examination of:

83 WMCP 105-4, supra note 8, at 67-68.
84 HINDLEY & MESSERLIN, supra note 1, at 17.
85 See Boltuck & Litan, supra note 62, at 19.
86 See id.
all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, [and] utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. 87

In addition to this unwieldy set of considerations (which the Agreement points out is not exhaustive), the Agreement also requires an examination of factors which might affect the condition of the domestic industry, but which are not attributable to the dumping, so that none of the injury resulting from those factors is attributed to the dumped imports. 88 Those factors include “the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade-restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.” 89

In applying these irreconcilably-complex standards regarding the injury criterion, the nature of U.S. antidumping law becomes quite clear: “When the politics of the matter compel action against imports, the legal definition of dumping can be stretched to accommodate it.” 90 As explained below, 91 however, even the malleable U.S. AD/CVD laws cannot be interpreted soundly to support CDSOA.

3.3. Bottom Line: Pre-CDSOA U.S. AD/CVD Laws Are Susceptible to Criticism as Applied, but Are Not Faulty Per Se

Who can be trusted to be brutally honest in criticizing the U.S. AD/CVD laws but the fellow WTO Members against whom they are administered. A look at the challenges that have been made against the U.S. laws in the WTO indicates that, while the biases discussed above leave plenty of room for errors in administering

87 See ADA, supra note 31, art. 3, para. 3.4.
88 Id. art. 3, para. 3.5.
89 Id.
90 Finger, supra note 2, at viii.
91 See infra Section 4.
the laws, the basic concept is sound. With the exception of the Antidumping Act of 1916, U.S. AD/CVD laws generally are not attacked in WTO dispute settlement proceedings as “illegal” or “invalid” under the terms of the Final Act.\footnote{The term “illegal” would be a misnomer. A U.S. law or regulation, or a decision made pursuant to a U.S. law or regulation, cannot be “illegal” as such, because “WTO dispute settlement panel reports or appellate body reports are not self-executing and do not change United States law. Congressional action, in concert with or over the veto of the President, remains the exclusive avenue to change United States law.” Schaefer, supra note 34, at 330 (footnote omitted).} Rather, the challenges leveled against the U.S. laws relate to their application—to the validity or amount of the particular antidumping and countervailing duties that are imposed.

As noted above, the U.S. laws are very similar to the provisions of the Final Act.\footnote{See supra Section 2.1.2.} The definition of dumping is extremely similar, the requirement of injury or threatened injury is contained in both, and the use of a constructed or substitute value with which to compare the price of the exported goods in question is permitted in both. An important difference between the Final Act and the U.S. laws, however, is the methodology prescribed by the ADA regarding how the determinations that lead to the imposition of a remedial measure are to be made.\footnote{See ADA, supra note 31, arts. 2-3 (regarding determination of dumping and determination of injury, respectively).} These prescriptions are extremely significant in conjunction with the standard of review used in dispute settlement proceedings in which the United States is a respondent.

Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes\footnote{Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement, Annex 2 [hereinafter DSU].} provides the standard of review with regard to “consultations and the settlement of disputes between Members concerning their rights and obligations under the provisions of the Agreement Establishing the World Trade Organization . . . and of this Understanding taken in isolation or in combination with any other covered agreement.”\footnote{Id.} Under that article, “a panel has the authority to determine for itself the facts and the law of the case, and is not required to defer to an administering authority’s assessment of the facts or its interpretation of the cov-
ered agreements." The Antidumping Agreement, however, contains its own provisions regarding the standard of review to be applied in cases involving Article VI and the Antidumping Agreement. In contrast to the above-quoted provision of Article II, the ADA provides:

(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;

(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

There is as yet only limited case law applying these provisions in evaluating U.S. AD/CVD measures, and it seems practitioners disagree whether the future of U.S. laws under the WTO system will be bleak or robust For the purposes of this Comment, how-

98 ADA, supra note 31, art. 17, para. 17.6.
99 A Westlaw search of all Panel and Appellate Body reports with respect to which the United States was a respondent yields only fifty-two of the former and ten of the latter.
100 See, e.g., Richard Cunningham, Commentary on the First Five Years of the WTO Antidumping Agreement and Agreement on Subsidies and Countervailing Measures, 31 LAW & POL'Y INT'L Bus. 897, 901 (2000).

It was feared that the hostility of most WTO member nations to U.S. antidumping practice would result in decision after decision overturning the results of U.S. cases. Additionally, under the new procedures the
ever, that debate need not be resolved. From the cases that do exist, it is clear that opponents of particular trade remedies imposed under the U.S. laws generally do not dispute the validity of the pre-CDSOA U.S. AD/CVD laws, but only their implementation. Further, in settling these disputes, WTO authorities give substantial deference to the DOC and ITC.

4. CDSOA: STEPPING OVER THE LINE

While fervent disagreement will continue over the conceptual motivations of the U.S. AD/CVD laws, and over the particulars of their administration, the basic concept seems legitimate. The same cannot be said about CDSOA.

4.1. Introduction: An Economic Assumption

Proponents of CDSOA have argued that the CDSOA offsets need not be justified in terms of the provisions of GATT relating to antidumping duties and subsidies. This argument stems from the notion that CDSOA distributions merely represent a choice by the U.S. government regarding how to dispose of the underlying duties. As one practitioner put it, "[T]he Byrd amendment makes no change to current U.S. dumping and countervailing duty laws. 'This is about the U.S. government... deciding what is going to be done with government revenues.'" On its merits alone, this argument, which apparently equates the autonomy of the U.S. government with immunity from the provisions of GATT, deserves little attention. However, it provides a convenient context in which...

United States would no longer be able to block the adoption of adverse panel reports. It has not turned out that way at all... The United States obtained agreement for a higher standard of review where panels considered the validity of a member nation's antidumping decision. In essence, the panel must give considerable deference to the agency's determination.

Id.; cf. Rosenthal & Vermynen, supra note 97, at 881-82 ("There have been few decisions interpreting the Antidumping and ASCM Agreements since the creation of the WTO. The decisions to date, however, raise questions about the willingness of panels to adhere to the appropriate standard of review.").

101 That basic concept is the following: determine whether an unfair practice is occurring, then determine by what amount that practice is having an unfair impact, then impose a remedy commensurate with that amount.

which to introduce some basic concepts which will be relied on in
the following discussion of CDSOA’s validity under GATT and its
value in terms of U.S. trade policy.

It is true, of course, that CDSOA distributions are about the
U.S. government deciding what is going to be done with govern-
ment revenues. It is also true, however, that when a foreign gov-
ernment pays subsidies to its exporting companies, those subsidies
are about that government deciding what is to be done with its
own revenues. Both types of payments are subject to scrutiny un-
der GATT. The reason is not that WTO member countries must get
permission from their fellow WTO member countries before im-
plementing decisions about what to do with their revenues. Rather,
the reason is that WTO member countries are mutually
bound under a system that regulates activities affecting the balance
of fairness in international trade, and, intentionally or not, that is
precisely what CDSOA distributions do.

The difference between CDSOA “offsets,” on the one hand, and
“subsidies,” on the other, is a distinction in name only. If a subsidy
received by a foreign exporter improves the position of that com-
pany vis-à-vis its U.S. competitors, then “offsets” received by a U.S.
company improve the position of that U.S. company vis-à-vis its
foreign competitors.103 That CDSOA distributions improve the po-
sition of the U.S. companies who receive them does not mean,
however, that the offsets violate GATT or U.S. AD/CVD laws; it
means only that the offsets fall within the reach of those provi-
sions. The more important question is whether they improve the
position of U.S. companies who receive them too much. Having
dispensed with the argument that the offsets are “immune” from
scrutiny under GATT, this Comment now will address this more
complicated question.104

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103 Not only does this fact underlie the argument articulated in this Com-
ment, it also underlies the AD/CVD laws of the United States and of GATT.
However, the particular situation described here—in which money is distributed
by the government to domestic producers to remedy their unfair position relative to
their foreign competitors, is not the situation with which the U.S. AD/CVD laws
are concerned. Rather, they are concerned with the situation in which money is
distributed to domestic producers even though they are not at a disadvantage relative
to their foreign competitors. The effect of the offsets in each case is the same.
Only their name is different: in the former situation they are “remedial”; in the
latter situation they are “unfair.”

104 I use the term “complicated” loosely. Although the question whether
CDSOA distributions are excessive in this way is complicated relative to the
It is not within the scope of this Comment (nor is it within the expertise of the author) to demonstrate exactly how much a CDSOA distribution improves the position of a U.S. company who receives it. Conveniently, however, it is also not necessary in the analysis that follows to do so. Nevertheless, for the sake of illustration, assigning a value will be useful. Therefore, the following discussion, at times, will incorporate the following assumption: one dollar paid as a CDSOA offset to a U.S. company, “A,” improves the position of A vis-à-vis its foreign competitor company, “B,” to the same extent that one dollar paid to B by its government improves the position of B vis-à-vis A. If this is true, and if the U.S. AD/CVD laws are correct in positing that the one dollar payment to B (e.g., as a subsidy) has an effect equal to a one dollar duty charged B (e.g., as a countervailing duty), then the following corollary is true: one dollar paid as a CDSOA offset to A improves the position of A vis-à-vis B to the same extent as a one dollar duty charged B.105

4.2. Evaluating CDSOA Under GATT and the WTO Agreements

On January 9, 2001, Australia, Brazil, Chile, the European Communities, India, Indonesia, Japan, Korea and Thailand filed a request for consultations with the United States regarding CDSOA. This request for consultations alleges the following:

The [Continued Dumping and Subsidy Offset] Act seems to be inconsistent with the obligations of the United States under: (1) Article 18.1 of the ADA, in conjunction with Article VI:2 of the GATT and Article 1 of the ADA; (2) Article 32.1 of the ASCM, in conjunction with Article VI.3 of the GATT and Articles 4.10, 7.9 and 10 of the ASCM; (3) Article X (3)(a) of the GATT; (4) Article 5.4 of the ADA and Article 11.4 of the ASCM; (5) Article 8 of the ADA and Article 18 of the ASCM; and (6) Article XVI.4 of the Marrakesh Agree-

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105 Again, it is not necessary that this assumption be correct down to the penny. Firstly, as explained below, there is ample room for error. Secondly, much of the following discussion does not rely on this assumption at all.

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ment establishing the WTO, Article 18.4 of the ADA and Article 32.5 of the ASCM.106

On June 1, 2001, Canada and Mexico filed a second request for consultations, alleging similar violations of GATT.107 Argentina and Guatemala have requested to join in these consultations.108 As these requests for consultations make clear, the ADA and the ASCM present two alternative approaches for challenging CDSOA (or for defending it, as the case may be). The first approach is to conceive of CDSOA offsets as a remedial measure taken in response to conditions of unfair trade. If this approach is taken, CDSOA distributions must satisfy the substantive and procedural requirements of Article VI of GATT, the ADA, and the ASCM regarding the imposition of antidumping duties and countervailing duties. The second approach is to conceive of CDSOA offsets as subsidies, in which case they must avoid the provisions of Article VI and the ASCM which prohibit certain subsidies.

4.2.1. CDSOA as a Remedial Measure

CDSOA offsets are often defended as a remedial measure—i.e., an extra "kick" necessary to make the underlying duties really work.109 If the underlying duties generally are insufficient, as many of the beneficiaries of CDSOA offsets allege, to remedy the harm caused by the dumping or subsidies which the underlying duties are designed to remedy, some additional remedy may indeed be necessary.

Article VI and the related agreements, however, require more than simply that "some additional remedy may indeed be neces-

106 Request for Consultations by Australia, Brazil, Chile, the European Communities, India, Indonesia, Japan, Korea and Thailand, United States—Continued Dumping and Subsidy Offset Act of 2000, 2001 WL 21481, at *2 (Jan. 9, 2001); see also id. ("The Act appears to nullify or impair the benefits accruing to Australia, Brazil, Chile, the EC, India, Indonesia, Japan, Korea and Thailand under the cited agreements in the manner described in Article XXIII.1(a) of GATT.").

107 See Request for Consultations by Canada and Mexico, United States—Continued Dumping and Subsidy Offset Act of 2000, 2001 WL 587629 (June 1, 2001).


109 See, e.g., supra note 41 ("This legislation is designed to ensure that our domestic producers can compete freely and fairly in global markets.").
necessary" — i.e., that the remedy be qualitatively justified. They require, further, that the remedy be appropriate in amount — i.e., that the remedy be quantitatively justified. The requirements of GATT (and of the U.S. AD/CVD laws, for that matter) are quite specific and quite demanding regarding (1) the amount of the remedy ultimately imposed, and (2) the adequacy of the investigation that leads to the remedial action. CDSOA offsets fall short of both these requirements.

4.2.1.1. CDSOA Offsets Are Necessarily Excessive in Amount; They More than "Offset" the Harm Caused by Dumping and Subsidization

With respect to the allowable amount of an a remedy in response to dumping, Article VI, para. 2 of GATT provides:

In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of

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110 See, e.g., ASCM, supra note 32, art. 7, para. 7.9:

In the event the Member has not taken appropriate steps to remove the adverse effects of the subsidy or withdraw the subsidy within six months from the date when the DSB adopts the panel report or the Appellate Body report, and in the absence of agreement on compensation, the DSB shall grant authorization to the complaining Member to take countermeasures, commensurate with the degree and nature of the adverse effects determined to exist, unless the DSB decides by consensus to reject the request (emphasis added).

Id.

111 Id. art. 19, para. 19.4 ("No countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product."); id. at para. 19.2 ("The decision whether the amount of the countervailing duty to be imposed shall be the full amount of the subsidy or less, are decisions to be made by the authorities of the importing Member.") (emphasis added); see also ADA, supra note 31, art. 9, para. 9.3 ("The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.").

112 See, e.g., ASCM, supra note 32, art. 2, para. 2.4 ("Any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence."); art. 11 (requiring that an investigation be initiated only "upon written application by or on behalf of the domestic industry," except as provided in paragraph 11.6); art 11, para. 11.6 (providing that the authorities concerned may proceed with an investigation absent a written application "only if they have sufficient evidence of the existence of a subsidy, injury and causal link"). See also ADA, supra note 31, art. 5.
such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.113

With regard to the allowable amount of an action against actionable subsidies, Article VI, para. 3 provides:

No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation. ..."114

The limitation on the amount of any remedial measure—be it an antidumping duty or a countervailing duty—is repeated frequently throughout the ASCM and the Antidumping Agreement. Effectively, these limitations impose a “cap” on the amount of a country’s response to dumping or a countervailable subsidy, and that cap is equal to the margin of dumping or of subsidization as defined in GATT, the Agreements, and the imposing country’s trade regulatory laws.

Conceptually, this “cap” makes perfect sense. As discussed above115 U.S. AD/CVD laws are based on the premise that certain trade practices, including government subsidies and sanctuary markets, put foreign companies who export to the United States at an unfair advantage vis-à-vis their U.S. competitors. For example, government subsidies effectively lower the production costs of the companies who receive them. As a result, those foreign companies will have a higher profit margin than their U.S. competitors who receive no subsidization. The U.S. laws adjust this “unfair” discrepancy by (1) determining the amount by which the foreign exporters are benefiting unfairly as a result of the unfair trade practice;116 and (2) imposing a duty on the foreign exporters equal to

113 GATT, supra note 6, art. VI, para. 2 (emphasis added).
114 Id. art. VI, para. 3 (emphasis added).
115 See supra Section 2.1.3.
116 See supra Section 2.1.1.1.
that amount. The duty raises the costs of the companies by the same amount as the countervailed subsidies lower them. As a result, those companies' profit margins are brought back down to a "fair" level. In addition to GATT, the U.S. AD/CVD laws also recognize this quantitative limitation on the amount of a remedy implemented in response to dumping or subsidization.

The principle behind this "cap" is that a duty of one dollar charged against a foreign company offsets the effects of a one-dollar subsidy received by that company (or, in the case of dumping where no subsidization is taking place, a one-dollar differential between the U.S. sales price and the normal value) of the dumped product. As the statute prescribes, the remedy must be equal to the harm actually being caused by the unfair dumping or subsidization. A duty in the amount of two dollars, therefore, would be excessive: the first dollar would equalize the balance of fairness between the subsidized company and its U.S. competitors, but the second dollar would tip the scale in the other direction, giving the U.S. companies an unfair advantage. Recalling the economic assumption noted above (i.e., one dollar paid as a CDSOA offset has the same effect as a one dollar duty charged a subsidized foreign exporter), it must also be true, then, that a duty of one dollar plus a CDSOA distribution of one dollar would be excessive. The one-dollar duty would equalize the balance of fairness between the subsidized company and its U.S. competitors, but the one-dollar CDSOA offset would tip the scale in the other direction, giving the U.S. companies an unfair advantage.

This analysis might be challenged, however, because of another premise on which it is based. That premise is that the margin of dumping or of subsidization is equal to the harm actually caused by the dumping or subsidization that occurs. What result, proponents of CDSOA might ask, if the duties charged against a foreign company do not offset the harm caused by the situation of subsidization or dumping being addressed. Given the overwhelming complexity inherent in the dumping and subsidy margin determinations, this could be true for at least two reasons: (1) the DOC

117 See id.

118 See 19 U.S.C.A. § 1671(a) (West 1999) (providing that the amount of a countervailing duty shall be "equal to the amount of the net countervailable subsidy...") (emphasis added); id. § 1673 (providing that the amount of an anti-dumping duty shall be "equal to the amount by which the normal value exceeds the export price (or the constructed export price) for the merchandise..." ) (emphasis added).
and/or the ITC could simply misapply the procedures for calculating the margin of dumping or subsidization; or (2) the procedures by which the DOC and ITC calculate the margin of dumping or subsidization could be inherently ill-suited for quantifying accurately the actual harm caused by the dumping or subsidization.

If either of these is the case, it is possible that the antidumping and countervailing duties that result from those determinations are too low. If the underlying duties are low, then perhaps proponents of CDSOA would be\textsuperscript{119} correct in asserting that, even when the remedial effects of CDSOA distributions are added to the remedial effects of the underlying duties, the total remedy still does not exceed the amount necessary to offset the harm caused by the dumping or subsidization.

Not likely. It is quite possible that the procedures used to calculate the margin of dumping or subsidization are inherently ill-suited for quantifying accurately the actual harm caused by the dumping or subsidization. In fact, it is \textit{quite likely} that this is true, as Section 3.2 of this Comment explains in detail. However, as Section 3.2. of this Comment also explains, the biases built into the U.S. AD/CVD laws tend to \textit{inflate}, rather than \textit{deflate}, the margin of dumping and/or subsidization relative to the harm actually being caused by those conditions. To the extent the underlying duties are miscalculated, they are far more likely to be \textit{higher} than the actual harm being remedied than \textit{lower} than the actual harm being remedied. Much more importantly, even if the underlying duties are too low to offset the harm being remedied, the miscalculation would have to be enormous in order for the extra "kick" of the CDSOA distributions to be warranted.

This problem is easily understood in mathematical terms. Where A equals the amount of the underlying duties; B equals the amount of the CDSOA distributions; and C equals the amount of the harm actually caused by the dumping and/or subsidization, the CDSOA distributions are valid\textsuperscript{120} only if:

\begin{align*}
A + B & \leq C \\
2002] CONTINUED DUMPING & SUBSIDY OFFSET ACT 441
\end{align*}

\textsuperscript{119} The subjunctive tense is used here because the Author is not aware of any proponents of CDSOA who have actually addressed the question whether CDSOA distributions are quantitatively justified.

\textsuperscript{120} The distributions are "valid" if, when combined with the underlying duties such as they are, the total benefit to the U.S. companies who receive them does not exceed (i.e., is less-than-or-equal-to ("\leq")) the actual harm caused by the dumping or subsidization. See supra note 103 and accompanying text.
A + B ≤ C

The economic assumption stated above (that a one-dollar CDSOA distribution has the same remedial effect as a one-dollar duty charged to a subsidized or dumping foreign exporter) says, in mathematical terms, that A equals B. Therefore, this equation can be re-written as:

A × 2 ≤ C

or:

A ≤ .5 × C

In other words, the CDSOA distributions are valid only if the underlying duties themselves offset no more than half of the harm actually caused by the dumping or subsidization. This would require, obviously, that the DOC miscalculates the margin of dumping or subsidization by fifty percent. This makes clear why it is not necessary for the economic assumption explained above to be spot-on accurate. 121 To test the ample margin of error, let us assume momentarily that the assumption is wrong, and that one dollar in CDSOA distributions has an effect equal to only a fifty-cent ($0.50) duty charged to the foreign exporter. The prognosis for CDSOA looks better, but not by much. In that case, the calculations by the DOC and ITC still would have to be inaccurate by at least thirty-three percent. 122 In other words, the CDSOA distributions would be valid only if the underlying duties compensate for no more than two-thirds of the harm actually caused by the dumping or subsidization. Let us assume, alternatively, that the economic assumption is incorrect in the opposite direction and, in fact, one dollar in CDSOA distributions has an effect equal to a duty in the amount of one dollar and fifty cents ($1.50). In this case, CDSOA distributions would be valid only if DOC miscalculates the margin of dumping or subsidization by sixty-six percent. 123

121 See supra note 105 and accompanying text.
122 Under this alternative assumption—i.e., B = .5 × A, rather than B = A—the calculation would be as follows: A + B ≤ C, so 1.5 × A ≤ C, so A ≤ .66 × C.
123 Under this alternative assumption—i.e., B = 1.5 × A, rather than B = A—the calculation would be as follows: A + B ≤ C, so 3 × A ≤ C, so A ≤ .33 × C.
Assuming, therefore, that the underlying duties come anywhere near compensating the petitioning U.S. companies for the harms actually caused by the dumping or subsidization being remedied, CDSOA distributions overcompensate the recipients, placing them at an advantage vis-à-vis the companies who paid the underlying duties.

4.2.1.2. “Continued Dumping...” or Not, CDSOA Distributions Do Not Satisfy the Investigation Requirement of GATT and the U.S. Laws

The foregoing discussion demonstrates that, absent an error of inconceivable proportions in the calculation of the underlying duties, CDSOA distributions are excessive because, when added to the amount of the underlying duties, the total advantage bestowed on the U.S. companies who receive the distributions is well in excess of the actual harm done to those companies by the dumping and/or subsidization being remedied. One could get around this analysis by arguing that CDSOA distributions should not be added to the underlying duties at all, because although both the offsets and the underlying duties are actions against dumping and/or subsidization, they are responses to distinct situations of dumping or subsidization.

The name of the Act itself seems to encourage this distinction, and some supporters of the Act argue that the additional remedial measure is necessary in order to deal with circumvention of, and even blatant disregard for, antidumping and countervailing duties imposed by the United States. This argument, in effect, justifies CDSOA distributions as a “second phase” of remediation: whereas the underlying duties may offset fully the harmful effects of the initial situation of dumping or subsidization in response to which the duties were imposed, if any dumping or subsidization contin-


We cannot afford to sacrifice the U.S. steel industry and thousands of American jobs in an attempt to prop up faulty foreign economies... The Continued Dumping and Subsidy Offset Act enforces our trade laws and protects U.S. workers from the harmful effects of foreign competitors who disregard the law and simply consider antidumping and countervailing duties a cost of doing business.

Id.
ues after the antidumping or countervailing duty order is entered, that "continued" dumping or subsidization causes a distinct harm that must be remedied. The CDSOA distributions offset this additional and distinct harm, and so they are not limited by the "cap" as described above.

This argument simply misunderstands the way antidumping and countervailing duties work as a remedy to dumping and subsidization. The fact that dumping or subsidization continue to occur after the underlying duties are imposed does not mean that the harm caused by that dumping or subsidization has not been remedied in full. The purpose of the underlying duties is not to extinguish the dumping or subsidization in response to which they are imposed; rather, it is to offset the effects of that dumping or subsidization. In fact, if the dumping or subsidization does cease, so does the duty, as well it should. After all, if the dumping or subsidization ceases, then, a fortiori, so do the effects of the dumping or subsidization, and hence, the need for a response to those effects.

Another problem in considering CDSOA distributions as a remedy for a distinct situation of "continued" subsidization or dumping is posed by the investigation requirement of Article VI, the ADA, and the ASCM. With regard to the imposition of an an-

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125 See, e.g., Press Release, Regula Fights Weakening of U.S. Trade Laws in the World Trade Organization (Feb. 9, 2001), at http://www.house.gov/regula/pr020901.htm ("The U.S. steel industry and its workers are suffering from the impact of unfair imports. We must strongly support our laws that combat these unfair imports including the recent change in our law that protects against continued dumping of imports even after duties have been imposed. ...") (quoting Rep. Ralph Regula).

126 The limit on the amount of CDSOA distributions under this alternative conceptualization, would be expressed mathematically not as: A + B ≤ C, where C equals the total harm to be remedied, but rather as: A ≤ C1 and B ≤ C2 where C1 equals the total harm from the initial situation of dumping, and C2 equals the total harm resulting from the "continued" dumping or subsidization.

127 Although not discussed in detail, Article VI, para. 5 may preclude this conception of CDSOA offsets at the outset. See GATT, supra note 6, art. VI, para. 5. Although the offsets are neither antidumping duties nor countervailing "duties" as such, this prohibition could be interpreted to imply a broader prohibition on the imposition of more than one remedy.

128 See, e.g., 19 C.F.R. § 351.222(b)(A) (2001) (providing for the revocation of an antidumping duty order where "all exporters and producers covered at the time of revocation by the order ... have sold the subject merchandise at not less than normal value for a period of at least three consecutive years... "); see also id. § 351.218(a) (providing for the revocation of an order where the Secretary determines that "dumping or countervailable subsidies would [not] be likely to continue or resume if [the] order were revoked").
tidumping or countervailing duty, Article VI of GATT provides the following:

(a) No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.129

Similar requirements regarding factual support for antidumping and countervailing duties are contained in the ADA and the ASCM.130 Conceived as distinct from the underlying duties, the CDSOA offsets cannot “bootstrap” the investigation that supported the underlying duties. This seems quite obvious where the offsets take place a year or more after the assessment of the underlying duties, but it also would hold true where the offsets take place immediately after the underlying duties are assessed.131 There must be a dedicated investigation into the extent and nature of the particular situation of dumping or subsidization to which the CDSOA offsets purportedly respond. If a proponent of CDSOA were to argue that the offsets respond to a different situation of dumping or subsidization in order to avoid the two remedies being combined and therefore deemed excessive, it must deal with the consequences of that construction. Those consequences, of course, are fatal.

129 GATT, supra note 6, art. VI, para. 6(a).
130 See supra Section 2.1.2; see also ADA, supra note 31, art. 3, para. 3.1.

A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

ASCM, supra note 32, art. 15, para. 15.1 (using exactly the same language as Article 3, paragraph 3.1 of the ADA).

131 See generally 19 U.S.C.A. § 1675c(c) (West Supp. 2001) (providing that offsets pursuant to the Act “shall be made not later than sixty days after the first day of a fiscal year from duties assessed during the preceding fiscal year”). Depending on when during the fiscal year the duty is imposed, the offsets could be distributed from zero to fourteen months later.
The only way CDSOA distributions can satisfy the investigation requirement is if they are considered as a response to the same situation of dumping or subsidization as the underlying duties. Those duties, presumably, resulted from an investigation that complied with the provisions of the ADA and the ASCM, and so that investigation is, effectively, bootstrapped onto the CDSOA distributions. Considered this way, however, the CDSOA distributions must be added to the amount of the underlying duty in order to evaluate the amount of the total remedial action being taken to that single situation of dumping or subsidization. By adding “A + B,” the total remedy almost certainly will be greater than “C,” as it were; that is, the total remedy almost certainly will be excessive in light of the actual harm caused by the dumping or subsidization.

The combination of the “cap” on the total remedy and the investigation requirements puts CDSOA between a rock and a hard place. CDSOA distributions cannot be considered separable from the underlying duties for the purpose of the maximum allowable amount requirement but inseparable from the underlying duties for the purpose of the investigation requirement.

4.2.2. Evaluating CDSOA as a Subsidy

An alternative approach in challenging CDSOA, reflected in the request for consultations cited above, is to consider CDSOA offsets as subsidies. The United States likely would not argue that CDSOA offsets are subsidies—that would be making half of the opponents’ argument for them.132 Besides, characterizing the offsets as subsidies lacks the political appeal of wielding the Act as a trade remedy, defending righteous U.S. markets against “faulty foreign economies.”133 Nevertheless, the argument already has been made by opponents of CDSOA.134

As an initial matter, before addressing the difficulties posed by the definition and specificity requirements of the ASCM,135 which relate to whether a subsidy is a prohibited subsidy, it is not self-evident that CDSOA offsets to U.S. companies are characterized

132 But not the whole argument. Even if it were agreed that the offsets are subsidies, the challenging parties would still have to show that they are a prohibited subsidy. See generally ASCM, supra note 32.
133 Santorum Press Release, supra note 124.
134 See supra note 106.
135 See infra Sections 4.2.2.1.1. & 4.2.2.1.2.
properly as "subsidies" to begin with. Most significantly, it can be argued that these offsets are not paid to U.S. companies by the U.S. government. Because the ASCM prohibits subsidies provided "by a government or any public body within the territory of a Member," therefore, payments originating from foreign countries might not be covered by the prohibition.

Although the offsets distributed to U.S. companies under CDSOA are funded by foreign companies, those offsets should be considered payments by the U.S. government. Even supposing, arguendo, that these funds were not to be paid out of a U.S. Treasury account, but were to be paid directly to the U.S. companies or to an escrow account administered by an agent appointed by those companies or by the Treasury Department, the role of the U.S. government would be more than sufficient. First, complainant companies would not be entitled to these funds at all were it not for the largess with which the drafters of CDSOA apparently were overcome in October of 2000. Second, even if CDSOA offsets were not made directly by the government, the "deflection" or "laundering" effected by this arrangement would fall within Article 1, paragraph 1.1(a)(2), which incorporates the definitional portion of Article XVI of GATT.

4.2.2.1. ASCM Requirements Regarding Prohibited Subsidies

4.2.2.1.1. Definition of "Subsidy"

"Subsidy" is defined in Article 1 of the ASCM as follows:

For the purpose of this Agreement, a subsidy shall be deemed to exist if: (a)(1) there is a financial contribution by a government or any public body within the territory of a

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135 ASCM, supra note 32, art. 1, para. 1.1(a)(1).
136 See 19. U.S.C.A. §§ 1675(e)(1), 1675(e)(2) (West Supp. 2001) (providing that "the Commissioner [of Customs] shall establish in the Treasury a special account" for each antidumping or countervailing duty imposed, and "shall deposit into the special accounts, all antidumping or countervailing duties ... that are assessed ... under the ... order with respect to which the account was established").
137 See ASCM, supra note 32, art. 1, para. 1.1(a)(2) (including in the definition "any form of income or price support in the sense of Article XVI of GATT 1994"). GATT Art. XVI, para. 1, in turn, relates to "any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory" (emphasis added).
Member (referred to in this Agreement as "government"), i.e. where: (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees); (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits); (iii) a government provides goods or services other than general infrastructure, or purchases goods; (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments; or (a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994; and (b) a benefit is thereby conferred (footnote omitted).  

At first glance, CDSOA offsets do not fit squarely within these guidelines. A "direct transfer of funds" seems to imply that the government is giving its own money to the recipients. Likewise, the government is not making "payments to a funding mechanism"—the payments are borne by the countries who pay the underlying duties. The closest match appears to be "revenue that is otherwise due is foregone."

It could be argued, based on the parenthetical example, that the foregoing of revenue otherwise due is intended to involve only revenue due from the benefiting parties. WTO panel decisions interpreting this provision, however, suggest otherwise. These decisions have focused not on why or how the revenue is "due" the government, but rather on the "financial contribution" inherent in the government's act of forfeiture itself. In Certain Measures Affecting the Automotive Industry, the panel indicated that revenue from customs duties is not excluded:

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139 See ASCM, supra note 32, art. 1, para. 1.1.

140 As would be the case, for example, if the government waived the obligation of company X to pay a tax on X's income.
With respect to the first element, a financial contribution under paragraph 1.1(a)(1)(ii) of the SCM Agreement exists when government revenue that is otherwise due is foregone or not collected. In the ordinary sense, 'government revenue' is raised through internal taxes and other charges including customs duties. Since government revenue is foregone when a customs duty is waived, the Duty Waiver amounts to a financial contribution.\footnote{WTO Dispute Panel Report on Canada—Certain Measures Affecting the Automotive Industry, 2000 WL 282504, at *136, para. 6.461 (Feb. 11, 2000) (emphasis added); see also WTO Dispute Panel Report on Indonesia—Certain Measures Affecting the Automobile Industry, 1998 WL 375971, at *67, para. 5.139 (July 2, 1998) (“Under the 1993 incentive programme, the Government foregoes or does not collect revenue that is otherwise due by granting an exemption from or reduction in the rate of import duties on automotive parts and components. Thus, there is the requisite financial contribution by the Government.”).}

As to the question whether revenue that is foregone is "otherwise due," the panel found in "United States—Tax Treatment for Foreign Sales Corporations," that:

In accordance with its ordinary meaning, . . . 'otherwise due' [refers] to the situation that would prevail but for the measures in question. It is thus a matter of determining whether, absent such measures, there would be a higher tax liability. In our view, this means that a panel, in considering whether revenue foregone is "otherwise due", must examine the situation that would exist but for the measure in question. Under this approach, the question presented in this dispute is whether, if the FSC scheme did not exist, revenue would be due which is foregone by reason of that scheme.\footnote{WTO Dispute Panel Report on the United States—Tax Treatment for "Foreign Sales Corporations," 1999 WL 973750 at *280, para. 7.45 (Oct. 8, 1999) (emphasis added).}

The question, therefore, is whether, if CDSOA did not exist, revenue from antidumping and countervailing duties imposed by the U.S. government would be due the U.S. government. In case there were any question, the statement made by Senator DeWine
upon introducing the bill offers proof positive that this is the case.143

4.2.2.1.2. Specificity

The specificity requirement in GATT is not unique. U.S. AD/CVD laws contain a similar requirement.144 The purpose of a specificity requirement is to “ensure that many of the familiar activities of governments are not characterized as ‘subsidies.’”145 Article 8, paragraph 8.1 of the ASCM provides that subsidies are not actionable unless they are specific within the meaning of Article 2.146 Article 2 sets out the principles with which to determine whether a particular subsidy is specific.

Article 2, paragraph 2.1(a) provides that a subsidy is deemed to be specific “[w]here the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises.”147 Article 2, paragraph 2.1(b) provides that a subsidy shall not be deemed specific:

Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to (footnote omitted).148

143 See supra note 41 (“Currently, revenues raised through import duties and fines go to the U.S. Treasury. Under our bill, duties and fines would be transferred to injured U.S. companies as compensation for damages caused by dumping or subsidization.”) (quoting Sen. DeWine).


145 Alan O. Sykes, Countervailing Duty Law: An Economic Perspective, 89 Colum. L. Rev. 199, 204 (1989); see also ASCM, supra note 32, art. 8, para. 8.1 n. 23 (“It is recognized that government assistance for various purposes is widely provided by Members and that the mere fact that such assistance may not qualify for non-actionable treatment under the provisions of this Article does not in itself restrict the ability of Members to provide such assistance.”).

146 See ASCM, supra note 32, art. 8, para. 8.1.

147 Id. art. 2, para. 2.1(a).

148 Id. art. 2, para. 2.1(b) (footnote omitted). In addition, this provision requires that “The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.” Id.
Because CDSOA does not expressly limit eligibility for receipt of the offsets to a particular industry or group of industries, and because the requirements for eligibility are laid out fairly clearly in the law, these two guidelines cut against construing CDSOA offsets as specific subsidies. Despite this, CDSOA offsets could be construed as specific if they are sufficiently similar to one of the illustrative examples of export subsidies provided in Annex I to the ASCM. Regardless of the other provisions regarding specificity, if CDSOA offsets can be considered any one of these examples, they are conclusively established as actionable. Unfortunately, CDSOA offsets are distinct from all of these examples in that they are not contingent in any way on exportation by the recipients of the funds.

The best bet for an opponent of CDSOA offsets with regard to the specificity requirement is paragraph 2.1(c) of Article 2. This "catch-all" provision provides that even where neither 2.2(a) nor 2.2(b) apply, a subsidy may still be specifically based on "other factors." These factors are: (1) "use of a subsidy programme by a limited number of certain enterprises," (2) "predominant use by certain enterprises," (3) "the granting of disproportionately large amounts of subsidy to certain enterprises," and (4) "the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy." Based on the sheer number of AD/CVD cases brought by the U.S. steel industry, an argument can be made that CDSOA offsets are specific to the U.S. steel industry because the steel industry uses U.S. AD/CVD laws disprop-

149 See supra Section 2.2.
150 See ASCM, supra note 32, Annex I.
151 See GATT Dispute Panel Report on Brazil—Export Financing Programme for Aircraft, 2000 WL 668957, at *14, para. 6.31 (May 9, 2000) (explaining that "a Member may establish that a measure is a prohibited export subsidy by going directly to the Illustrative List, without first demonstrating that a measure falls within the scope of Article 3.1(a)", and noting further that "[t]his is confirmed from the words 'subsidies contingent . . . upon export performance, including those illustrated in Annex I'").
152 This distinction is not fatal, because the list in Annex I is merely illustrative; it is not exhaustive of all types of subsidies that are actionable. See id. at 13, para. 6.30.
153 See ASCM, supra note 32, art. 2, para. 2.1(c).
154 Id.
portionately, and therefore would benefit disproportionately from the offsets made under CDSOA.\footnote{Of the approximately 1000 Antidumping and Countervailing duty cases that were brought by U.S. companies since January 1, 1980, approximately 430 were brought by U.S. steel companies and/or with respect to steel products. See United States International Trade Administration, Antidumping and Countervailing Duty Cases Initiated Since January 1, 1980, available at http://ia.ita.doc.gov/stats/pet-init.htm.}

This catch-all provision in the ASCM corresponds to 19 U.S.C. § 1677(5A). In particular, section 1677(5A) provides that a foreign subsidy is specific if (1) "an enterprise or industry is a predominant user of the subsidy;"\footnote{19 U.S.C.A. § 1677(5A)(D)(iii)(II) (West 1999).} or (2) "An enterprise or industry receives a disproportionately large amount of the subsidy."\footnote{Id. § 1677(5A)(D)(iii)(III).} Ironically, these provisions seem to apply to CDSOA even more squarely than the ASCM provision. As mentioned above, approximately forty-three percent of all antidumping and countervailing duty cases brought since 1980 have been brought by the U.S. steel industry.

4.3. Evaluating CDSOA as a Matter of Trade Policy

This Section lists briefly some of the ways in which CDSOA conflicts with U.S. AD/CVD laws and policies, irrespective of its implications for U.S. obligations under GATT 1994 and the WTO Agreement.

4.3.1. CDSOA Discourages Formation of Suspension Agreements

As an important supplement to the negative incentives provided by U.S. AD/CVD duties, companies often have entered into "Suspension Agreements" which resolve their disputes without the interference of U.S. regulatory authorities and without the economic and political effects of duties. Unfortunately, the new Act promises an extremely strong financial reward to U.S. companies who are willing to initiate AD/CVD investigations. This incentive undoubtedly will dissuade some domestic companies from negotiating a suspension agreement where, without this incentive, such an agreement would have been reached.\footnote{146 Cong. Rec. H9699 (daily ed. Oct. 11, 2000) (statement of Rep. Kolbe).} In addition, this incen-
tive has serious implications for the integrity of the administration of the U.S. laws themselves.159

4.3.2. CDSOA Will Encourage Retaliatory Actions by WTO Members

One of the most significant problems threatened by CDSOA is the possibility of retaliatory duties or statutory measures. The legitimacy of such retaliatory remedies in response to CDSOA offsets depends, at least theoretically, on the proper characterization of the offsets as countervailable subsidies. These offsets are properly characterized as countervailable subsidies, however, and the concerns expressed by many proponents of the Act are well-founded.160

4.3.3. CDSOA Betrays the Principles Behind U.S. AD/CVD Laws

Most significantly, CDSOA betrays the pre-existing U.S. AD/CVD laws. First, it requires that U.S. AD/CVD laws actually be administered incorrectly.161 Second, it will cause more antidumping investigations than intended by the Tariff Act by encouraging false representations of support for the duties sought by complaining companies. As explained above,162 an antidumping investigation will not proceed unless it is demonstrated that the complainant companies represent a sufficient portion of the domestic industry allegedly harmed by the dumping, and unless a sufficient portion of the industry shows its support for the investigation. This “standing” requirement ensures that the petition is being brought “on behalf of” a domestic industry,163 as the law says

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159 This effect, which relates to standing, is discussed below. See infra Section 4.3.4.

160 See, e.g., supra note 158.

Subsidization of industry by any government which is a member of the World Trade Organization violates the WTO Agreement on Subsidies on Countervailing Measures. The U.S. government supported this Agreement because we sought to eliminate foreign subsidies which undercut the ability of U.S. industry to compete abroad. Payment of AD/CVD duties violates the Agreement which could lead to retaliatory tariffs against innocent U.S. exporters.

Id.

161 See supra Section 4.2.1.1.

162 See supra note 77 and accompanying text.

163 See Murray, supra note 82, at 27.
must be the case.\textsuperscript{164} Because of the possibility of financial reward for companies who participate in, or express support for, the investigation, CDSOA will result in investigations that, without such an incentive, would be terminated for lack of standing.

5. CONCLUSION

The purpose of the U.S. AD/CVD laws is to address the ill effects of foreign dumping and subsidies. As explained above,\textsuperscript{165} the underlying duties are designed to provide that remedy in full, and so the CDSOA offsets represent a remedy over-and-above what is necessary and permissible. The decidedly disagreeable result is that the U.S. AD/CVD laws provide an appropriate remedy to unfair trade practices only if the laws are administered incompetently.\textsuperscript{166} Senator DeWine tries to offer a limited defense against this criticism when he argues that “foreign producers have done the math. They have made a calculated decision that the risk of duties is a price they are willing to pay in return for the higher global market share they have gained by chipping away at the size and strength of our nation’s steel industry.”\textsuperscript{167}

Even assuming that the duties imposed under the U.S. AD/CVD laws really are inadequate to prevent the harm caused by subsidization of products imported into the United States, Article VI of GATT 1994, the ADA, and the ASCM require that any remedy be imposed only after an adequate investigation demonstrates material injury or a threat thereof. The precision required, or possible for that matter, in determining to what extent domestic industries are injured by dumping or subsidization is the subject of much debate. It seems, however, that skipping the investigation phase altogether and simply imposing a “double hit”\textsuperscript{168} in every situation falls at least slightly below the bar.

\textsuperscript{164} See 19 U.S.C.A. § 1761a(b)(1) (West 1999) ("A countervailing duty proceeding shall be initiated whenever an interested party . . . files a petition with the administering authority, on behalf of an industry, which alleges the elements necessary for the imposition of the duty. . . .").
\textsuperscript{165} See supra notes in Section 4.21.
\textsuperscript{166} See id.
\textsuperscript{167} See supra note 41.
\textsuperscript{168} See id. ("Under our bill, foreign steel producers would get a double hit from dumping: they would have to pay a duty, and in turn, see that duty go directly to aid U.S. steel producers.").
In support of the new Act, Senator DeWine, Senator Byrd, and advocates of CDSOA generally, have asserted only that pre-CDSOA U.S. AD/CVD laws inadequately addressed the harms caused to U.S. industries by dumping and subsidization.¹⁶⁹ That assertion may be true, but it is nothing more than a articulation of a problem. Regardless of the particular requirements of GATT, the WTO Agreements, or the U.S. AD/CVD laws for that matter, common sense dictates that the severity of the solution should be commensurate with the severity of the problem. CDSOA makes the assumption that the amount of the remedy provided by CDSOA is commensurate with the residual injury caused by the unfair trade practices after the underlying duties are assessed.

The foregoing discussion has shown that this assumption is a strikingly bad one. While having nothing more than an articulation of the problem and a bad assumption as the basis for a possible solution to that problem is an understandable situation from which to start formulating a law, it is a heck of a place to be eighteen months after the law has entered into force.

¹⁶⁹ Their factual assertion, essentially, is that pre-CDSOA U.S. AD/CVD laws inadequately addressed the harms caused to U.S. industries by dumping and subsidization.