

Retroactivity (Cont'd)

[Exceptions: Historic and Sporadic Dumping]

International Antidumping Code:

11 (iii) Where for the dumped product in question the authorities determine

- (a) either that there is a history of dumping which caused material injury or that the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause material injury, and
- (b) that the material injury is caused by sporadic dumping (massive dumped imports of a product in a relatively short period) to such an extent that, in order to preclude it recurring, it appears necessary to assess an antidumping duty retroactively on those imports,

the duty may be assessed on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures.

Antidumping Act, 1921, As Amended:

No special provision for historical or sporadic dumping in the U.S. law. The 90-day reach-back provision of Article 11 (iii) does not add anything not contained in the present U.S. law which allows a 120 day reach-back, except that in situations described in Section 14.9 (f) of the Treasury Regulations, where purchase price is the basis for comparison with foreign market value, retroactivity which is not allowed under Section 14.9 (f) of the Treasury Regulations would be possible under Article 11 (iii) if the importer should have known about the exporter's practice of dumping and that material injury would be caused thereby.

Comment:

As a practical matter, since provisional measures would only be initiated upon a preliminary decision of dumping and sufficient evidence of injury, any benefits of such 90-day "reach-back" may be watered down by a delay in reaching such preliminary decision. For example, if such decision is reached 30 days after complaint, the "reach-back" would only be retroactive 60 days before the complaint, etc. The Treasury could completely negate the effectiveness of this provision by delaying its preliminary decision until 90 days after complaint so that there could be no reach-back to entries made before the complaint.