

THE APPLICATION OF U.S. UNFAIR TRADE LAWS TO ENERGY FLOWS: PROSPECTS AND RISKS†

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1. INTRODUCTION

The world wide decline in energy prices during the 1980s has led to an increased focus on international trade in energy in general, and on U.S. imports of low-priced foreign energy products in particular. This increased focus has, in turn, prompted a national debate over the impact of international energy trade on U.S. security, U.S. energy industries, and the U.S. economy as a whole.¹

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¹ See generally *World Oil Outlook: Hearings Before the Committee on Energy and Natural Resources*, 100th Cong., 1st Sess. 100-39 (1987); U.S. DEP'T OF ENERGY, *ENERGY SECURITY: A REPORT TO THE PRESIDENT OF THE UNITED STATES* (1987) [hereinafter *ENERGY SECURITY*]; Possible Effects of Changing World Crude Petroleum Prices, USITC Pub. 1494, Inv. No. 332-161 (1984); W. HOGAN, *THE \$200 BILLION SURPRISE: ENERGY SECURITY AND THE OIL TARIFF* (1987). Although petroleum imports have received perhaps the most attention because of the oil price shocks of the 1970s, and the price collapse in the mid-1980s, see, e.g., OFFICE OF TECHNOLOGY ASSESSMENT U.S. OIL PRODUCTION: THE EFFECT OF LOW OIL PRICES (1987), trade in other energy commodities is beginning to gain increased attention as well. For example, the impact of U.S. imports of refined and enriched uranium from Canada on the domestic uranium industry has been the focus of sharp debate during consideration of the United States-Canada Free-Trade Agreement. United States-Canada Free-Trade Agreement done Dec. 22, 1987-Jan. 2, 1988, 27 I.L.M. 281 [hereinafter *FTA*]. See, e.g., *Hearings Before the Senate Committee on Energy and Natural Resources on the U.S.-Canada Free Trade Agreement*, 100th Cong., 2d Sess. 100-830 (1988); *Hearings Before the House Committee on Energy and Commerce Subcommittee on Energy and Power on Energy Provisions in the U.S.-Canada Free Trade Agreement*, 100th Cong., 2d Sess. 100-179 (1988); *Uranium Enrichment Program, Hearing Before the House Subcommittee on Energy and Power, Commission on Energy and Commerce*, 100th Cong., 1st Sess. 100-57 (1987); *Canada Reserves Increase; Facility Planned in NWT*, NUCLEAR NEWS Nov. 1987, at 55; *One Hell of a Fight*, MACLEAN'S, Oct. 26, 1987, at 26; *Pact with Canada Splits U.S. Industry*, N.Y. Times, Oct. 12, 1987, at D8, col. 5; *On the Fast Track*, Wash. Post, June 11, 1988, at A24 (FTA entangled with the troubles of the U.S. uranium industry). See also *Huffman v. Western Nuclear Inc.*, 486 U.S. 663, 102 S. Ct. 2087 (1988) (holding that the Atomic Energy Act of 1954, § 161(v), 42 U.S.C. § 2201(v) (1982 & Supp. III 1983), does not require the Depart-

One important aspect of this debate is whether U.S. unfair trade laws, and in particular, the antidumping law² and Section 301 of the Trade Act of 1974³ can be applied to energy trade. The antidumping law forbids unfairly low pricing of imports, while Section 301 of the Trade Act of 1974 affords the President the authority to respond to unjustifiable, unreasonable, and discriminatory acts, policies, and practices of foreign governments. Indeed, the antidumping law has already been invoked in connection with trade in an energy product, fuel ethanol.⁴

For domestic parties facing dumping or other unfair practices from abroad, these laws provide the prospect that relief can be obtained, but only if the domestic parties can satisfy the considerable statutory requirements and prove the existence of an "unfair" practice warranting remedial action. Prospective petitioners also face the at least equally important question of whether available relief would prove effective if obtained.

Conversely, foreign governments, producers, and importers face the risk that their trade, businesses, and national policies will be disrupted. They must determine whether they can prevail against claims of unfair practices, and how best to minimize the resulting disruption if they cannot.

Finally, proceedings under these laws with respect to energy trade will likely raise unusual issues and questions of first impression that will require creative arguments by counsel in order to fit energy products within legal frameworks typically applied to manufactured goods.

2. THE ANTIDUMPING LAW AND ENERGY IMPORTS

The antidumping law, which is set forth in title VII of the Tariff Act of 1930, as amended, requires that antidumping duties be imposed on imported merchandise if:

- (1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold

ment of Energy (DOE) to restrict enrichment of foreign uranium where such restriction would not achieve the statutory goal of "assur[ing] the maintenance of a viable domestic uranium industry" because the statute ties the degree of restriction to be imposed to the achievement of that goal). In addition, U.S. imports of electricity from Canada have also gained increased attention. See H. LEE, N. FOSTER, & E. PARSON, *CANADIAN ELECTRICITY IMPORTS: AN ASSESSMENT OF THE NATIONAL SECURITY, ECONOMIC, AND ENVIRONMENTAL IMPLICATIONS* (1988).

² Tariff Act of 1930, §§ 731-39, 19 U.S.C. §§ 1673-73i (1982 & Supp. V 1987).

³ 19 U.S.C. §§ 2411 (1982 & Supp. V 1987).

⁴ See Fuel Ethanol from Brazil, 51 Fed. Reg. 5,572 (1986). See *infra* notes 88-102 and accompanying text for a detailed discussion of this case.

in the United States at less than its fair value; and
 (2) the [U.S. International Trade] Commission determines that . . . an industry in the United States . . . is materially injured, or . . . is threatened with material injury, or . . . the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise⁵

Once these statutory requirements have been met, Commerce must impose an antidumping duty upon the imported merchandise in an amount equal to the excess of the "foreign market value" (FMV) of the merchandise over its "United States price" (USP).⁶

Within the framework of the antidumping laws, there are a number of specific issues that are likely to arise in cases involving energy imports.

2.1. *The Standing Requirement*

An antidumping case brought pursuant to a private petition must be filed by an "interested party . . . on behalf of an industry."⁷ Thus,

⁵ 19 U.S.C. § 1673 (1982).

⁶ Several additional observations about this arcane and complicated procedure are worth noting. First, an antidumping investigation is usually directed at all imports of the subject merchandise from a named country or countries; that is, it is country specific, and covers imports from only the nations named in the petition.

Second, the antidumping statute does not require a finding of "predatory" dumping (dumping below cost that is intended to destroy an industry). The Antidumping Act of 1916, 15 U.S.C. § 72 (1982), a criminal statute that has rarely been invoked and never successfully prosecuted to date, is the mechanism for challenging predatory pricing. For a discussion of the legislative history and judicial construction of the 1916 Antidumping Act, see *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 402 F. Supp. 251, 259 (E.D. Pa. 1975).

Third, the entire antidumping proceeding, which requires both "preliminary" and "final" determinations by both the Department of Commerce (Commerce) and the International Trade Commission (ITC) after public hearings, must normally, as a matter of law, be completed within a one-year period. See 19 U.S.C. §§ 1673a-d (1982 & Supp. 1987). The various deadlines are as follows: Commerce must decide whether to initiate an investigation within 20 days following the filing of a petition; a preliminary injury determination by the ITC is due within 45 days; a preliminary dumping determination is due by the 160th day (if the case is extraordinarily complicated, by the 210th day); a final dumping determination by Commerce is due on the 235th day (in complicated cases on the 285th day); a final injury determination by the ITC is due by the 280th day (in complicated cases by the 330th day); and the final publication of an antidumping order is due 7 days following an affirmative final injury determination by the ITC. These statutory deadlines make necessary the imposition of strict deadlines for answering burdensome data requests on both domestic and foreign parties. The short time frame is designed to allow relief to be granted in time to assist an injured domestic industry before it has been irreparably weakened by less than fair value (LTFV) imports.

a petitioner must meet two requirements in order to have standing. First, the petitioner must be an "interested party," whose statutory meaning includes the following possible parties: a manufacturer, producer, or wholesaler in the United States of a product "like" the imported product under investigation; a certified union, or other organization or group of workers, representative of an industry engaged in the production of a "like product;" a trade association, a majority of whose members manufacture, produce, or wholesale a like product in the United States; or an association, a majority of whose members is composed of interested parties as described above with respect to a like product.⁸

Second, the petitioner must be "representative" of the domestic industry, whether national or regional in nature. The domestic industry is defined as the "domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product."⁹

This requirement originally was construed to mean that the petitioner must demonstrate the support of domestic producers accounting for a majority of the domestic production of a product like the merchandise under investigation in order to bring an antidumping proceeding.¹⁰ The Department of Commerce (Commerce) has since ruled, however, that a petitioner need not prove that at least fifty-one percent of a domestic industry supports the petition. In practice, Commerce will accept petitioners' claims that a majority of the industry supports a petition unless a substantial proportion of the domestic producers of the investigated product come forward to oppose it.¹¹

In making its representativeness determination, Commerce may exclude from consideration domestic producers that are also importers

cases are initiated on the basis of petitions filed by private parties, an antidumping investigation can also be self-initiated by the Department of Commerce if it determines, from available information, that a formal investigation is warranted. *See* 19 U.S.C. § 1673a(a). Commerce can draw upon information available from other governmental bodies, such as the DOE, or the Department of the Interior. Indeed, the DOE, which plays the lead role in energy policy matters, might recommend to Commerce that it initiate a case.

⁸ 19 U.S.C. § 1677(9) (1982 & Supp. V 1987).

⁹ 19 U.S.C. § 1677(4) (1982 & Supp. V 1987).

¹⁰ *Gilmore Steel Corp. v. United States*, 585 F. Supp. 670 (Ct. Int'l Trade 1985). *See also* S. REP. No. 249, 96th Cong., 1st Sess. 62, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS 381, 448.

¹¹ *See* Certain Textile Mill Products and Apparel from Malaysia, 50 Fed. Reg. 9,852, 9,853 (Dep't Comm. 1985) (final determination); Live Swine and Fresh, Chilled, and Frozen Pork Products from Canada, 50 Fed. Reg. 25,097, 25,098 (Dep't Comm. 1985) (final determination); Certain Fresh Atlantic Groundfish from Canada, 50 Fed. Reg. 10,041, 10,046 (Dep't Comm. 1986) (final determination).

because their interests are wedded to imports.¹² In *Frozen Concentrated Orange Juice from Brazil*, the exclusion of importing producers resulted in a finding that the remaining domestic producers had standing to file the petition.¹³

Standing would likely be an issue in antidumping cases brought with respect to various forms of energy imports. Although energy producers, trade associations, and others in the industry plainly would qualify as interested parties, in certain circumstances it may prove difficult for such parties to meet the "on behalf of" requirement. The natural gas industry, for example, is broad and diverse, consisting of independent companies, wildcatters, and subsidiaries or affiliates of oil companies. Consequently, it could be difficult for any particular group of companies to prove that they account for a *majority* of domestic production of natural gas. In such circumstances, the safer course may be for a trade association or a union to bring the case.

Of course, since so many domestic energy firms are currently engaged in importing cheap foreign energy products—especially oil, gas, and electricity—they may be inclined to oppose any antidumping petition. If those firms accounted for more domestic production of the product under investigation than could the petitioners, Commerce would likely dismiss the petition for lack of standing.¹⁴

Yet, as noted above, Commerce might well determine that energy firms with substantial imports—the major oil companies, for example—should be excluded in determining standing because their interests are tied to imports. Such a ruling would facilitate meeting the standing test. Thus, using the example of an oil case, if the major oil companies (majors) opposing the case are excluded, the remaining independents and wildcatters could be deemed representative of the domestic industry.

2.2. Energy Forms: Merchandise or Services

The antidumping law authorizes an investigation only as to

¹² See *Frozen Concentrated Orange Juice from Brazil*, 52 Fed. Reg. 8,324 (Dep't Comm. 1987) (final determination) (excluding for standing purposes, juice producers that import more than 50% of the juice they sell from Brazil); cf. *Fabricated Automotive Glass from Mexico*, 50 Fed. Reg. 1,906 (Dep't Comm. 1985) (final affirmative countervailing duty determination) (excluding two U.S. manufacturers of automotive glass from the domestic industry because "they are the major importers . . . [with] substantial ownership interest[s] in a Mexican exporter").

¹³ *Orange Juice from Brazil*, 52 Fed. Reg. at 8,325-26.

¹⁴ See *Carbon Steel Plate from Japan*, 51 Fed. Reg. 13,039, 13,040 (1986) (final determination) (presumption in favor of standing can be overcome where a substantial number of domestic producers of the product opposed the petition).

whether a class or kind of foreign "merchandise" is being imported at less than fair value (LTFV).¹⁵ Thus, the statute confers antidumping jurisdiction only with respect to commodities, and *not* with respect to intangibles or services. The difficult issue is where the dividing line between merchandise subject to the antidumping law and services not subject thereto lies.¹⁶

There is little doubt that oil, gas, coal, and uranium are merchandise, and therefore subject to the antidumping laws. These articles of commerce are sold to customers through distribution channels and are classified as merchandise subject to customs duties under the Tariff Schedules of the United States (TSUS).¹⁷

The jurisdictional issue would likely arise, however, in cases involving intangible energy forms such as electricity. Electricity is sold through distribution channels like merchandise, and is consumed like

¹⁵ 19 U.S.C. § 1673(1) (1982).

¹⁶ The customs law defines "merchandise" to include "goods, wares, and chattels of every description." 19 U.S.C. § 1401(c) (1982 & Supp. V 1987). *See* Certain Automated Fare Collection Equipment and Parts Thereof from France, 47 Fed. Reg. 55,339 (Int'l Trade Comm'n 1987) (preliminary material injury determination) (The French manufacturer of the subject merchandise also provided "testing, installation, and interim maintenance services," which were excluded from the investigation. "In customs usage . . . 'merchandise' describes a good having a physical existence rather than intangibles."). *See also* J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 40 (1969) (indicating that "service" dumping, the use of discriminatory pricing to enable an exporter, through minimal freight rates, to be able to offer his products at lower prices, is not actionable dumping under the GATT).

However, the line between merchandise and services was blurred in previous investigations. *See, e.g.*, Rail Passenger Cars from Canada, 47 Fed. Reg. 36,042, 36,044-45 (Int'l Trade Comm'n 1982) (preliminary material injury determination) (In additional views, Commissioner Calhoun stated: "We have never been called upon to consider, for example, issues such as the applicability of the statute to services But this investigation presents . . . exactly these novel and mixed questions of law and fact Indeed, as an initial matter, we have before us the mixed question of what exactly is being imported. Is it only components? . . . Or could the imported article be the technological expertise of [the respondent foreign manufacturer]? These factual questions, if they are to be considered, must be addressed along with the underlying legal question of whether the imports referred to under Section 703 as 'merchandise' include service functions"). Although Commissioner Calhoun's comments are not precisely on point here, inasmuch as they regard services that have been incorporated into the merchandise under investigation, they nevertheless illustrate that the distinction between services and merchandise is not always clear.

¹⁷ *See* U.S. INT'L TRADE COMM'N, *TARIFF SCHEDULES OF THE UNITED STATES ANNOTATED*, USITC Pub. No. 1910 (1987) [hereinafter TSUSA] No. 475.05-10, U.S. INT'L TRADE COMM'N, *HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES*, USITC Pub. No. 2130 (1st ed. 1988) [hereinafter HTS] § 2709 (crude oil); TSUSA No. 475.25-70, HTS § 2710 (refined oil and motor fuels); TSUSA No. 475.15-15, HTS § 2711.11.00 (natural gas); TSUSA Nos. 475.18, 401.60, 517.51, 521.31, HTS § 2701.11.20 (coal); TSUSA No. 422.50, HTS § 2844.20.10 (uranium oxide); TSUSA No. 422.52, HTS § 2844.10, .20.50 (uranium trioxide); TSUSA No. 629.50, HTS § 2844.10.10 (uranium metal); TSUSA No. 601.57, HTS § 2612.10.00 (uranium ore).

merchandise. Yet, electricity was considered an "intangible" and, on that basis, was specifically exempted from customs duties under the TSUS.¹⁸ In contrast to oil, gas, and coal, electricity has no TSUS number.

On the other hand, some commentators have argued that electricity could be treated as a tangible good, noting, for example, that the Harmonized Tariff Schedules contain a classification for electrical energy.¹⁹ Nevertheless, whether this would transform electricity into merchandise under the antidumping laws is an open question. Indeed, the headnotes to the Harmonized System suggest otherwise: "Electrical energy shall not be subject to the entry requirements for imported merchandise set forth in Section 484 of our Tariff Act of 1980 . . . but shall be entered on a periodic basis in accordance with regulations to be prescribed by the Secretary of Treasury."²⁰

A related problem might arise were a product like natural gas to be sold in the United States at lower prices than in Canada, due to low transportation charges for gas exports and higher transport rates for domestic gas shipments. Determining whether such transport rates are actionable under the antidumping law as price discrimination relating to a product would be very difficult because gas pricing often is a composite of the cost of the gas and pipeline transportation. The same issue could arise with respect to electricity as well.

Finally, administering any antidumping order with respect to an intangible energy form would be far from simple. Electricity from Canada is not entered through U.S. Customs, but over international power lines. Thus, the government would have to devise a new system to administer any antidumping duties to be imposed on such energy forms.

2.3. *Relationship of the Antidumping Law to Other Federal Regulatory Schemes*

A number of federal agencies possess considerable authority over, and expertise concerning, energy matters. The question thus arises as to what, if any, involvement these agencies would or could have in an antidumping proceeding.

First, the International Trade Commission (ITC) and Commerce may seek to draw upon the expertise of these agencies—the ITC in

¹⁸ See TSUSA, General Headnote 5(c).

¹⁹ See Powell, *International Energy Trade and the Unfair Trade Laws*, 11 U. Int'l & Comp. L.J. 198 (1982).
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²⁰ See HTS ch. 27 note 5(b).

defining an industry and in assessing injury and Commerce in deciding whether to self-initiate a case. The Energy Information Administration, for example, has a wealth of data concerning energy imports, domestic production, consumption and the like that would be relevant to an ITC injury determination.

Second, the interplay between the antidumping law and federal statutes regulating the pricing of particular energy products, such as natural gas²¹ and electricity,²² could give rise to issues of overlapping agency jurisdiction and, where state public utilities are concerned,²³ federal preemption. In this regard, the existence of complex regulatory regimes might preclude the application of the antidumping laws to natural gas and electricity imports.²⁴ Sharing jurisdiction over an energy import with another federal agency, such as the Federal Energy Regulatory Commission, or with a state utility commission, is also problematic. For example, in determining the United States price of imported electricity or natural gas, Commerce would be confronted with the paradox of determining the "fair market value" of these products in the context of a regulated industry. Furthermore, the imposition of an antidumping duty by Commerce on electricity or natural gas might diminish another regulatory agency's ability to control the prices of those commodities.

²¹ See 15 U.S.C. §§ 717, 717c-717e (1982); 42 U.S.C. § 7172(a)(1)(C) (1982) (authorizing the Federal Energy Regulatory Commission (FERC) to establish, review, and enforce rates and charges for the transportation and sale of natural gas by a producer or gatherer or by a natural gas pipeline or natural gas company).

²² See 16 U.S.C. § 824 (1982 & Supp. 1987); 42 U.S.C. § 7172(a)(1)(B) (1982) (authorizing FERC to establish, review, and enforce rates and charges for the transmission or sale of electric energy).

²³ See ENERGY SECURITY, *supra* note 1, at 134 ("Rates for retail electricity sales are typically set by State or municipal authorities."). See, e.g., N.Y. PUB. SERV. L. § 66(12) (McKinney 1990).

²⁴ One may draw an analogy with conflicts between judicial enforcement of the antitrust laws and advancement of regulatory goals. Some courts have determined that an agency's jurisdiction was exclusive, preempting judicial application of the antitrust laws. See, e.g., *United States v. National Ass'n of Sec. Dealers*, 422 U.S. 694 (1975) (holding that, notwithstanding alleged restraints on the sale of mutual fund shares, repeal of the antitrust laws was necessarily implied "to assure that the federal agency entrusted with regulation . . . could carry out that responsibility free from the disruption of conflicting judgments by courts exercising jurisdiction under the antitrust laws"). Similarly, Commerce might determine that another agency, such as FERC, has exclusive jurisdiction over particular energy products. See ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS, 599-605 (2d ed. 1984).

Indeed, the trade laws themselves contain provisions directing one agency to yield jurisdiction over a case to another agency in particular circumstances. See, e.g., 19 U.S.C. § 1337(b)(3) (1982) (whenever the ITC has reason to believe that claims in a section 337 investigation come within the purview of the antidumping or countervailing duty laws, it shall notify the Secretary of Commerce to that effect and may suspend its investigation pending the Secretary's decision on the matter).

Such issues could be resolved on a case-by-case basis using a three step analysis. First, one should look for an express repeal of the antidumping law for the energy product in question.²⁵ If there has been no express repeal, one should determine whether the statutes can be construed in a consistent fashion.²⁶ Finally, where the regulatory regimes are in clear conflict and not reconcilable, the most recent statute governs under the "last in time" rule.²⁷

Finally, there are questions of policy and agency discretion. Whereas the views of other federal agencies would be sought to help shape relief at the Presidential level in a Section 201 "escape clause" case or a Section 232 "national security" case, these agencies would play little role in an antidumping investigation. Once the requisite findings are made by the ITC and Commerce, Commerce *must* impose antidumping duties in the amount of the dumping; it has no discretion in this regard.

These energy agencies can play a policy role only in counselling Commerce whether to self-initiate a case or in persuading Commerce to settle a case before making a final determination of LTFV imports. Under the antidumping law, Commerce has flexibility to suspend a proceeding and to enter into agreements with respondents (including, possibly, the foreign governments) that provide certain assurances that the respondents will raise their prices so as to eliminate dumping margins.²⁸ In certain circumstances, the agencies may prefer such negotiated agreements, which provide the flexibility to shape remedies that best fit the attendant circumstances.

²⁵ See N. SINGER, 1A SUTHERLAND STATUTORY CONSTRUCTION, § 23.07 (4th ed. 1985) [hereinafter SINGER].

²⁶ See *FTC v. Cement Inst.*, 333 U.S. 683, 689-95 (1948) (concurrent Federal Trade Commission and Department of Justice jurisdiction approved); *Friedlander v. United States Postal Serv.*, 658 F. Supp. 95, 103 (D.D.C. 1987) (approving concurrent Postal Service, Food and Drug Administration and Federal Trade Commission jurisdiction. "[W]here more than one regulatory system is applicable to a certain subject matter, both systems are to be given effect and reconciled.").

²⁷ See SINGER, *supra* note 25, § 23.09 ("Where there is an ambiguity in the statute, the legislative intent is the source of compromise, but where a conflict is readily seen by an application of the later enactment in accord with that intent, it is clear that the later enactment is intended to supersede the existing law."); *cf. Galliano v. United States Postal Serv.*, 836 F.2d 1362 (D.C. Cir. 1988) (Federal Election Campaign Act, 2 U.S.C. §§ 431-56 (1982 & Supp. V 1987), impliedly repealed the prior enactment of the Postal Service's jurisdiction over mailings by political action committees to solicit money; FECA's detailed, specific provisions controlled matters that might otherwise fall under the total governance of the more broadly conceived and crafted postal fraud prescriptions contained in 39 U.S.C. § 3005 (1982 & Supp. V 1987)). Similarly, a detailed and specific regulatory scheme for pricing a particular energy product arguably should be given priority over a broader statute designed to counteract price discrimination of imported merchandise in general.

2.4. The "Fair Value" Determination

Commerce's calculation of LTFV and dumping margins—the difference between foreign market value (FMV) and United States price (USP)—is a highly technical and complex exercise.

2.4.1. Foreign Market Value

FMV is primarily defined as the price at which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country from which it is exported, in the usual wholesale quantities, and in the ordinary course of trade for home consumption.²⁹

If home market sales do not exist, or if sales made at prices above the cost of production are insignificant in relation to exports (the cutoff point is normally five percent), then sales of such or similar merchandise for export to third countries other than the United States will form the basis for FMV.³⁰ If home market sales constitute less than five percent of all non-U.S. exports, third country sales or "constructed values" will be used.³¹

If home market and third country sales are nonexistent or unreliable, FMV will be based on the product's constructed value.³² Commerce must also resort to constructed value where home market or third country sales, whichever are relevant, are made at or below the cost of production over an extended period of time, in substantial quantities, and at prices that do not permit recovery of all costs within a reasonable period of time in the normal course of trade.³³ Under the antidumping law, constructed value is the sum of the costs of materials and fabrication, general expenses, and profit.³⁴

To produce a fair, or "apples to apples," comparison with USP, calculating FMV requires a number of complicated adjustments to account for differences in levels of trade,³⁵ quantities sold,³⁶ "other cir-

²⁹ 19 U.S.C. § 1677b(a)(1)(B) (1982).

³⁰ 19 U.S.C. § 1677b(a)(1)(B) (1982).

³¹ 19 C.F.R. § 353.4(a) (1988).

³² 19 U.S.C. § 1677b(a)(2) (1982).

³³ 19 U.S.C. § 1677b(b) (1982). *See, e.g.*, 64K Dynamic Random Access Memory Components from Japan, 51 Fed. Reg. 15,943 (1986).

³⁴ 19 U.S.C. § 1677b(e) (1982). General expenses must equal at least ten percent of the material and fabrication costs and profit must equal at least eight percent of all costs. *Id.*

³⁵ 19 C.F.R. § 353.19 (1988).

³⁶ 19 U.S.C. § 1677b(a)(1)(A) (1982).

cumstances of sale,"³⁷ and the merchandise being compared.³⁸ In addition, when the "exporter's sale price" (ESP) is used as the basis for determining USP,³⁹ FMV may be further adjusted by deducting indirect selling expenses up to the amount of general selling expenses deducted from ESP.⁴⁰

2.4.2. *United States Price*

Under the statute, USP is defined as either "purchase price" (PP) (essentially, the price at which the imported merchandise is sold to an unrelated purchaser in the United States),⁴¹ or ESP (the price at which the imported merchandise is resold in the United States by or for the account of the exporter).⁴²

Both PP and ESP are adjusted to ensure that: (a) they include, among other things, the cost of containers, coverings, and packing, and indirect taxes imposed on the subject merchandise that are rebated or not collected by reason of its exportation;⁴³ and (b) they do *not* include the costs associated with bringing the subject merchandise from the place of shipment in the exporting country to the place of delivery in the United States.⁴⁴ In addition, ESP must be further reduced by the amount of: (a) commissions, but not profit, for selling the merchandise in the United States; (b) expenses generally incurred in selling the subject merchandise in the United States; and (c) any increased value resulting from a process of manufacture or assembly performed on the subject merchandise after importation and before its first sale to an unrelated purchaser.⁴⁵

2.4.3. *Calculating FMV and USP for Energy Products*

The complexity of the price calculations, and the associated adjustments, make it difficult for domestic energy producers contemplating a dumping petition to determine whether LTFV dumping has, in fact, occurred.

Energy prices may include transportation expenses that vary significantly between domestic and export markets.⁴⁶ The requisite adjust-

³⁷ 19 U.S.C. § 1677b(a)(4)(B) (1982).

³⁸ 19 U.S.C. § 1677b(a)(4)(C) (1982).

³⁹ See *infra* notes 46-48 and accompanying text.

⁴⁰ 19 C.F.R. § 353.15(a), (c) (1988).

⁴¹ 19 U.S.C. § 1677a(a) (1982 & Supp. V 1987); 19 U.S.C. § 1677a(b) (1982).

⁴² 19 U.S.C. § 1677a(c) (1982).

⁴³ 19 U.S.C. § 1677a(d)(1) (1982).

⁴⁴ 19 U.S.C. § 1677a(d)(2) (1982).

⁴⁵ 19 U.S.C. § 1677a(e) (1982).

ments for transportation costs may significantly affect the dumping analysis. Suppose, for example, that an energy product is sold in Canada at thirty dollars per cubic meter, with home market transportation costs of eight dollars per cubic meter. At the same time, the energy may be exported to the United States at twenty-five dollars per cubic meter, with only two dollars per cubic meter in transport costs. At first blush, the pricing appears discriminatory—thirty dollars in the domestic market versus twenty-five in the United States, or a dumping margin of five dollars. Yet, under the dumping analysis, adjustment must be made for the transportation costs by deducting eight dollars from the thirty dollar home market price and two dollars from the twenty-five-dollar export price. The result is twenty-two dollars in the home market and twenty-three dollars in the United States, or no dumping margin at all.

Similarly, price differentials may be explained by differences in the circumstances of sales, such as commissions, payments to agents, and other selling expenses, between the United States and home markets. Such differences, too, are factored into the dumping equation and will often affect final dumping margins.

Petitioners in antidumping cases involving energy products may also seek to avoid the use of home market prices as the benchmark for FMV because many energy producing nations sell energy at very low prices at home to encourage economic growth, while selling at higher prices abroad. Such two-tier pricing is common.⁴⁷ In such circumstances, petitioners may successfully avoid the use of home market prices as FMV on the ground that foreign producers sell only a small percentage of their energy output in their home markets. Particularly in oil and gas markets, which are international in scope, foreign producers may sell the majority of their product in export markets. Thus, using third country pricing or constructed value may prove to be a key issue in some cases.

A decision by Commerce to use constructed value in lieu of domestic or export prices may not be beneficial to petitioners. In the oil and gas industries, for example, the cost of production in oil-producing nations (especially in the Middle East) is very low. Of course, the cost of production of other energy sources, which are driven by oil prices, may be different. The costs of these alternative energy sources are higher than oil, and market prices of these sources have been depressed because of the abundance of low-priced oil and gas. Calculating con-

⁴⁷ Indeed, petitioners have alleged that such two tier pricing confers a subsidy. *See, e.g.*, Portland Hydraulic Cement and Cement Clinker from Mexico, 48 Fed. Reg. 43,063, 43,066 (Dep't Comm. 1983) (final determination); Carbon Black from Mexico, 48 Fed. Reg. 29,564, 29,566 (Dep't Comm. 1983) (final determination).

structed value involves calculating not only the costs of exploring for, drilling, and extracting oil, but also an imputed cost or value of the oil in the ground (in essence, the "material" cost).⁴⁸

In short, foreign producers and importers can use the FMV and USP formulae in setting prices so as to avoid LTFV sales. When imports from a nation are increasing, and the U.S. industry is losing sales to imports, such precautionary actions are advisable. Notwithstanding good faith efforts to avoid dumping, however, a foreign producer cannot entirely eliminate the risk of antidumping proceedings. Since cases are brought against all producers from a country, and are not company-specific, the conduct of one or two large producers from a country can lead to a finding of LTFV imports and the imposition of an antidumping order against all producers from that nation. A company that has priced high enough may avoid actual duties under the order, but competitive circumstances can make such pricing difficult.

2.5. *The Injury Phase*

In the injury phase of the proceeding, the ITC must determine: (1) the scope of the domestic industry that produces a product like the article under investigation; (2) whether the industry is materially injured or is threatened with material injury; and (3) if so, whether the injury or threat thereof is by reason of LTFV imports.

⁴⁸ An example of "imputing" the cost or value of a natural resource can be found in Commerce's preliminary affirmative countervailing duty determination in Certain Softwood Lumber Products from Canada, 51 Fed. Reg. 37,453, 37,457 (Dep't Comm. 1986). Commerce was investigating, inter alia, provincial stumpage programs whereby the provincial governments sold or leased rights to cut and remove standing timber from provincial forest lands. *Id.* at 37,454. The petitioners successfully contended that these programs conferred a good, timber, to Canadian lumber companies at preferential rates. *Id.* at 37,454-55. In order to determine the amount of the benefit conferred, Commerce recognized that it had to determine the value of the timber *itself*, as well as other costs. *Id.* at 37,457. "The primary input into the selling of stumpage rights is the tree itself. While the provincial governments incur no direct costs for trees and the land on which they are situated, an imputed or indirect cost is associated with the intrinsic value of the tree and land." *Id.*

Commerce, however, had no information available "that reflect[ed] the exact value of provincial timber resources . . ." *Id.* It resolved this problem by selecting "surrogates that best portray[ed] timber value in each province. For British Columbia and Alberta, we used competitive bid prices [for stumpage] under government administered programs as surrogates for the value of standing timber in these provinces . . . For Quebec and Ontario we used private prices [for stumpage] reported in the New Brunswick response as a surrogate." *Id.* at 37,457-58.

Reliance on such surrogate measures, however, would likely be more problematic where energy products are involved. For example, virtually all foreign oil is owned and extracted by foreign governments. Consequently, there might not be alternative bidders for private owners whose valuation of the oil could be used for comparison.

2.5.1. *The Like Product Determination*

Under the antidumping law, the ITC must find a domestic industry producing a like product. The statute defines a like product as a product that is like, or, in the absence of like, most similar in characteristics and uses with, the imported article subject to investigation.⁴⁹ In making its like product determination, the ITC traditionally examines the following criteria: (1) physical characteristics and uses; (2) interchangeability of products; (3) channels of distribution; (4) customer perceptions of the articles; and (5) common manufacturing equipment, techniques, facilities, and production employees.⁵⁰

The like product determination is not, in and of itself, a mechanism for ending the proceeding because the ITC must find the domestic industry producing the product the "most similar" in characteristics and uses to the imported article. Yet, the like product determination can figure prominently in the outcome of the case; what industry is selected may affect whether material injury is found. Moreover, the ITC may elect to separate the subject imports and competing domestic products into different like products. In such circumstances, the ITC must make separate injury findings with respect to each of the industries producing the like products.⁵¹ Thus, the ITC could make an affirmative injury determination for one group of like products, and a negative injury finding for another group. Obviously, this would create an incentive for foreign producers to shift production towards products outside the scope of the antidumping order, which, in turn, could have a significant impact on energy trade.

Although energy products are typically viewed as fungible (i.e., oil is oil and gas is gas), the determination of what particular energy products are like other energy products can be critical in determining the outcome of energy products cases. One potentially dispositive issue is whether unprocessed energy forms (e.g., crude oil) are like processed energy forms (e.g., refined oil products). Such considerations will be important not only in determining what industry segment will be analyzed for injury purposes, but also whether the relief will be meaningful. Different determinations on crude oil and refined oil products, for example, could result in a dumping order against crude oil, but not on refined products. This outcome would create incentives for foreign pro-

⁴⁹ 19 U.S.C. § 1677(10) (1982).

⁵⁰ See, e.g., Digital Readout Systems and Subassemblies thereof from Japan, USITC Pub. 2150, Inv. No. 731-TA-390 (Jan. 1989) (final injury determination).

⁵¹ See, e.g., Certain Radio Paging and Alerting Receiving Devices from Japan, USITC Pub. 1410, Inv. No. 731-TA-102 (Aug. 1983) (final injury determination) (separating tone-only pagers from display pagers for injury determination).

ducers and exporters to refine their products before sale to the United States, which, in turn, would have a significant impact on the domestic refining industry. It would also continue to materially injure the domestic crude oil industry.

Energy products may be differentiated under the “like product” criteria employed by the Commission. For example, the ITC could consider the end use of the energy product in making its determination.⁵² For example, a petroleum product used primarily as a motor fuel can be distinguished from a second petroleum product used as residual fuel oil even though both are produced from crude oil.

A second factor the ITC could consider is the energy product’s physical characteristics. Petroleum products, for example, have been distinguished for customs purposes on the basis of gravity, sulphur content, flashpoint, pouring point, and kinematic viscosity.⁵³ Natural gases are differentiated in the tariff schedules by type (e.g., ethane, methane, butane) and by minimum purity levels.⁵⁴ Coal is differentiated in the tariff schedules by form and by uses.⁵⁵ All of these characteristics could be used to distinguish energy imports from domestic products.

2.5.2. *Excluding Certain Producers from the Domestic Industry*

In determining the domestic industry producing a like product, the ITC is statutorily permitted to exclude producers “related to exporters or importers” from the domestic industry “in appropriate circumstances.”⁵⁶ In assessing whether domestic firms should be excluded as “related parties,” the ITC considers the following factors: (1) the percentage of domestic production attributable to the related importer or producer; (2) the reasons that the domestic firm has chosen to import the subject merchandise (i.e., whether the firm benefits from the LTFV articles or whether the firm must import in order to continue domestic production and compete in the domestic market); and (3) the position of the related producers vis-à-vis the rest of the domestic industry.⁵⁷

The exclusion of such related producers could have a significant impact on the outcome of energy cases. As noted above, many of the “majors” import significant amounts of oil. If such firms were ex-

⁵² See *supra* note 50 and accompanying text.

⁵³ See *Coastal States Marketing Inc. v. United States*, 646 F. Supp. 255 (Ct. Int’l Trade 1986), *aff’d*, 818 F.2d 860 (Fed. Cir. 1987).

⁵⁴ TSUSA No. 475.15. See also HTS § 2711.

⁵⁵ TSUSA No. 521.31. Cf. HTS §§ 2701-04.

⁵⁶ 19 U.S.C. § 1677(4)(B) (1982).

⁵⁷ See *Rock Salt from Canada*, USITC Pub. 1798, Inv. No. 731-TA-239 (Jan. 1986) (final injury determination).

cluded, the industry determination would focus on the injury to independents and wildcatters—which are more adversely affected by low priced oil imports. Given the international nature of many energy markets, this issue is likely to arise in cases involving other energy forms as well.

2.5.3. *The Injury Standard*

Under the antidumping law, the ITC must decide whether the domestic industry producing the like product is materially injured or threatened with material injury. The statute defines material injury as “harm which is not inconsequential, immaterial, or unimportant.”⁵⁸ In making its material injury determination, the ITC must consider, among other factors, a number of criteria set forth in the statute: (1) the volume of imports of the merchandise subject to the investigation; (2) the effect of imports of such merchandise on prices of like products in the United States; and (3) the impact of imports on domestic producers of like products.⁵⁹

The statute requires the ITC to consider certain factors with respect to each of the criteria set forth above. In evaluating the volume of imports, the statute requires the ITC to consider whether the volume of imports, or any increase in that volume (either in absolute terms or relative to domestic production or consumption) is significant.⁶⁰ In evaluating the effect of imports of the subject merchandise on prices in the United States for like products, the statute requires the ITC to determine whether there has been significant price undercutting by the imported merchandise of the like products in the United States; in addition, the ITC must determine whether, to a significant degree, such imports otherwise depress domestic prices, or prevent domestic price increases that would otherwise have occurred.⁶¹ In evaluating the impact of imports of such merchandise on domestic producers of like products, the statute requires the ITC to evaluate all relevant economic factors that have a bearing on the condition of the domestic industry, including the following factors: (1) any actual or potential decline in output, sales, market shares, profits, productivity, return on investments, or utilization of capacity; (2) factors affecting domestic prices; and (3) any actual or potential negative effect on cash flow, inventory, employment, growth, ability to raise capital, or investment.⁶²

⁵⁸ 19 U.S.C. § 1677(7)(A) (1982).

⁵⁹ 19 U.S.C. § 1677(7)(B) (1982).

⁶⁰ 19 U.S.C. § 1677(7)(B)(i), (C)(i) (1982).

⁶¹ 19 U.S.C. § 1677(7)(B)(ii), (C)(ii) (1982).

⁶² 19 U.S.C. § 1677(7)(B)(iii), (C)(iii) (1982).

In assessing injury under these criteria, the statute requires the ITC to focus solely on those operations of the domestic producers engaged in the manufacture of the like product, rather than on the producer's entire operations.⁶³ If separate data on domestic production or producer profits are not available, however, then the injurious effect of the dumped imports is evaluated with respect to the narrowest group or range of products, which includes a like product, for which the necessary data are available.⁶⁴

Given the size and breadth of an energy industry, the assessment of injury in energy cases may be a substantial undertaking. Procedurally, the investigation by the ITC, including the issuance of questionnaires, would be very time-consuming. As to the merits, the size and diversity of these industries could also make proving injury difficult — the profitability of energy firms may vary significantly with size and relative efficiency.

The injury test, however, should not create any significant hurdles in a case involving imported oil, particularly in view of the oil industry's collapse in 1985 and 1986. Cheap oil imports plainly have had a significant impact on the U.S. oil industry, however it is defined. Many domestic energy firms have suffered significant losses in their oil production divisions in recent years. Of course, these companies may have reported overall profits due to strong performance in other fields, such as chemical production. However, the overall profitability of these firms would not preclude an affirmative material injury finding in an oil or gas case since the ITC would examine only those operations of energy firms engaged in domestic production of like energy products, or if separate data is not available, the narrowest product grouping for which the firm keeps separate data.

2.5.4. *Cumulation*

The antidumping law permits the ITC to assess cumulatively the volume and effect of imports of like products from two or more countries if such imports compete with each other and with domestically-produced products in the U.S. market.⁶⁵ Since many energy forms are sold in international markets, pricing and other sales practices can be very similar from one nation to another. Thus, there is a fair prospect that an energy antidumping case, if brought, would be against imports from more than one nation, and that such imports would be cumulated

⁶³ 19 U.S.C. § 1677(4)(D) (1982).

⁶⁴ *Id.*

⁶⁵ 19 U.S.C. § 1677(7)(C)(iv) (Supp. V 1987).

for determining injury.

The ITC can also make an affirmative determination upon a showing of a threat of material injury.⁶⁶ The finding must have a "basis of evidence" that the threat is "real," and that "actual injury is imminent;" it "cannot be made on the basis of mere conjecture or supposition."⁶⁷

2.5.5. *Threat of Injury*

In determining whether an industry in the United States is threatened with material injury by reason of LTFV imports, the ITC must consider, inter alia, the following factors: (1) any increase in production capacity, or existing unused capacity, in the exporting country likely to result in a significant increase in imports of the merchandise to the United States; (2) any rapid increase in U.S. market penetration, and the likelihood that penetration will increase to an injurious level; (3) the probability that imports of the merchandise will enter the United States at prices that will have a depressing or suppressing effect on domestic prices of the merchandise; (4) any substantial increase in inventories of the merchandise in the United States; (5) the presence of underutilized capacity for producing the merchandise in the exporting country; (6) any other demonstrable adverse trends that indicate the probability that the importation (or sale for importation) of the merchandise, whether or not it is actually being imported at the time, will be the cause of actual injury; and (7) the potential for product shifting if production facilities owned or controlled by the foreign manufacturers that can be used to produce articles subject to a pending dumping or countervailing duty investigation or final order are also used to produce the merchandise under investigation.⁶⁸

2.5.6. *The "By Reason of" Requirement*

In order to make an affirmative finding, the ITC must also find that the domestic industry has been injured or threatened with injury "by reason of" the LTFV imports. Under this test, LTFV imports need not be a cause of injury greater than any other cause (as would be the case in a Section 201 or "escape clause" investigation), but need only be a significant factor in causing injury.⁶⁹ The factors considered

⁶⁶ 19 U.S.C. § 1673(2)(A)(ii) (1982).

⁶⁷ 19 U.S.C. § 1677(7)(F)(ii) (Supp. V 1987).

⁶⁸ 19 U.S.C. § 1677(7)(F) (Supp. V 1987).

⁶⁹ See, e.g., Certain Forged Steel Crankshafts from Brazil, USITC Pub. 2038, Inv. No. 701-TA-282 (Nov. 1987) (final injury determination); S. REP. No. 249,

in determining causation include the following: (1) the volume of importation; (2) the level of market penetration by the imports; (3) whether there has been substantial price undercutting by the foreign producers that tends to depress or suppress domestic prices; and (4) whether domestic sales have been lost to the foreign merchandise.⁷⁰

Typically, the ITC will evaluate the fungibility of the imported articles and the domestic like products in determining causation. As a general matter, the more fungible the two products are, the more likely it is that price will be the determining factor in the sale and, hence, that the ITC will find a sufficient causal connection between the LTFV imports and the injury to the domestic industry (in the form of lost sales).

If an antidumping case were brought against energy imports and the ITC found the U.S. industry to be suffering material injury, the relatively low causation requirement would not, in all probability, be a serious obstacle to relief.⁷¹ Unlike many consumer products where differences in quality or style may have a large impact upon final sales, energy products are highly fungible—whether in raw or refined form. Given such fungibility, price is likely the determining factor in final sales of most energy products, and LTFV imports would likely be found to displace domestic product sales on a price basis. In such circumstances, the ITC could not easily conclude that LTFV imports were not a factor in causing harm to the industry.

supra note 10, at 75, 1979 U.S. CODE CONG. & ADMIN. NEWS at 461.

⁷⁰ 19 U.S.C. § 1677(7)(B), (C) (1982).

⁷¹ Additionally, as a procedural matter, the ITC is likely to find a reasonable indication of material injury at the preliminary determination stage of an energy case. This is so because the burden of proof that must be met by respondents to reach a negative preliminary injury determination is exceedingly high. *See American Lamb Co. v. United States*, 785 F.2d 994 (Fed. Cir. 1986) (ITC may issue negative preliminary determination only when the record as a whole contains clear and convincing evidence that there was no material injury or threat of such injury, and that no likelihood exists that contrary evidence will arise in final investigation).

The practical consequences are that antidumping cases will have price effects on energy imports at the preliminary determination stage. The reason is that affirmative preliminary determinations by Commerce and the ITC result in a suspension of liquidation of entries by Customs pending the final determination and the imposition of an antidumping duty order, if appropriate. 19 U.S.C. § 1673b(d) (1982). Imported energy products cannot be withdrawn from the Customs warehouse unless the importer posts a cash bond to guarantee the payment of the antidumping duty. Because the final margin may be substantially different from the preliminary margin, there may be considerable uncertainty as to the amount of the cash bond. The payment of a cash bond, in turn, may compel the importer to raise the price for the energy products, even though the

2.6. *The Non-Market Economy Antidumping Provision*

The statute contains special antidumping provisions addressing the problems presented by imports from state controlled or non-market economies (NMEs).⁷² In NMEs, home market prices and costs are set by the state and do not reflect what market economists would consider to be reliable indicia of a product's fair market value or costs. For these reasons, the antidumping law requires that FMV be determined in NME cases on the basis of prices charged for such or similar merchandise by a producer in a "surrogate" country selected by Commerce.⁷³

Commerce Department regulations require, where possible, the selection of a surrogate country which is at a comparable stage of economic development to the exporting NME under investigation.⁷⁴ In comparing levels of economic development of the NME and a prospective surrogate, Commerce considers such factors as per capita gross national product and infrastructure development.⁷⁵ If no surrogate producer can be located, or if no producers are willing to cooperate with the ITC in supplying the necessary cost or pricing information, the ITC must use the constructed value of the imported NME goods; this is determined by calculating the costs of producing the same or similar merchandise in a surrogate market economy to the extent such information is publicly available.⁷⁶

Despite the high level of governmental involvement in the energy trade of many Middle Eastern countries, such countries would not be considered NMEs for the purposes of the antidumping law. However, a number of NMEs, including the Soviet Union, China, and Romania, are heavily involved in global energy trade. Energy imports from these nations would have to be evaluated by reference to the prices or costs of energy in a surrogate country selected by Commerce. NME rules thus create significant uncertainty over proper pricing levels for NME imports. The benchmark prices or costs cannot be determined in advance of the proceeding because the surrogate would be unknown. Based on

⁷² 19 U.S.C. § 1677b(c) (1982).

⁷³ *Id.*

⁷⁴ 19 C.F.R. § 353.52(b) (1989).

⁷⁵ 19 C.F.R. § 353.52(b)(1) (1989).

⁷⁶ *See, e.g.*, Urea from the German Democratic Republic, 52 Fed. Reg. 19,549 (Dep't Comm. 1987) (final determination) (Since Commerce was unable to obtain costs or prices from producers in surrogate countries, Commerce relied on "factors of production reported by [respondent] or, where the response was not sufficient, or not adequately verified . . . information provided by petitioner or otherwise available to the Department. We valued labor in the [surrogate country] from public sources. Where either the response did not report factors or where [surrogate country] values were not available from public sources, we used factors and cost data from the petition relative to the production in the GDR.")

past NME cases, however, the possible surrogates could be narrowed down to a handful that Commerce would be likely to seriously consider.⁷⁷ NME exporters could then use as benchmarks the prices used in such countries in seeking to avoid providing goods at LTFV.

A more difficult problem likely to arise in an antidumping investigation involving an NME is the impact that trade in fungible products, such as energy products, would have on calculating foreign market value. In *Urea from the German Democratic Republic*,⁷⁸ Commerce recognized that because the merchandise under investigation was "urea . . . a fungible commodity traded throughout the world . . . , the level of market share of a specific group of importers tend[ed] to affect sales elsewhere."⁷⁹ That investigation disclosed evidence that urea from NMEs, which were "major participants in world urea trade," was a significant cause of distorted "urea prices worldwide."⁸⁰ Consequently, Commerce concluded that "determining foreign market value on the basis of prices in any market would be inappropriate."⁸¹ So, too, NME exports of energy products may render price-based FMV calculations unreliable, and force Commerce to use factors of production valued in a surrogate country from publicly available data.

If, however, Commerce determines that the surrogate country's exports are made at prices that permit recovery of all costs within a reasonable period of time, then Commerce will use this surrogate's third country sales, notwithstanding the fungibility of the subject merchandise.⁸²

2.7. *Scope and Circumvention Issues*

As noted above, antidumping orders are country specific and apply to imports from a particular exporting nation. This country specificity poses difficult questions regarding energy products that are transhipped through numerous countries before reaching their final destination. Such products may be blended with similar or identical products

⁷⁷ See, e.g., *Urea from the Socialist Republic of Romania*, 52 Fed. Reg. 19,553 (Dep't Comm. 1987) (Commerce selected the United Kingdom as the surrogate for Romania.); *Urea from the Union of Soviet Socialist Republics*, 52 Fed. Reg. 19,557 (Dep't Comm. 1987) (Commerce selected the United Kingdom as the surrogate for the USSR.); *Potassium Permanganate from the People's Republic of China*, 48 Fed. Reg. 36,175 (Dep't Comm. 1987) (Commerce initially selected India as the surrogate for China.).

⁷⁸ 52 Fed. Reg. 19,549 (Dep't Comm. 1987).

⁷⁹ *Id.* at 19,550.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² See *Potassium Chloride from the German Democratic Republic*, 50 Fed. Reg. 4,557 (Dep't Comm. 1985) (final determination).
 Published by the Dept. of Commerce at 1985 (final determination).

from other nations, or undergo substantial processing in other countries, en route.

2.7.1. *Scope*

2.7.1.1. *Transshipment*

The mere transshipment of energy through other nations by a foreign producer does not preclude the application of antidumping duties.⁸³ In certain circumstances, however, an intermediate country will be deemed the country of exportation for purposes of calculating FMV. For example, if a manufacturer or producer does not know at the time of sale the country to which the buyer intends to export the merchandise, the merchandise is exported for resale by, or on behalf of, the buyer to a country other than the United States, and the merchandise undergoes substantial transformation, then the intermediate country will be deemed the country of exportation.⁸⁴

2.7.1.2. *Substantial Transformation*

Merchandise can also be deemed to originate in an intermediate country if the merchandise undergoes sufficient processing operations so as to be "substantially transformed" into a different article of merchandise. In making substantial transformation determinations, Commerce does not consider itself bound by customs precedents, especially where further processing might be perceived as an avenue for circumvention of an antidumping investigation or order.⁸⁵

Whether the processing of energy forms constitutes substantial transformation is a question of fact, and depends on the degree and extent of primary processing, the value added thereby, and the differences in characteristics, circumstances, uses, and distribution of the processed and unprocessed energy.⁸⁶ Under the substantial transforma-

⁸³ See Calcium Partothenate from Japan, 45 Fed. Reg. 59,933, 59,934 (Dep't Comm. 1980).

⁸⁴ 19 U.S.C. § 1677b(f) (Supp. V 1987).

⁸⁵ See Dynamic Random Access Memory Semiconductors of 256 Kilobits and Above from Japan, 51 Fed. Reg. 28,396, 28,397 (Dep't Comm. 1986) (investigation suspended).

⁸⁶ See, e.g., Tapered Roller Bearings and Certain Components Thereof from Japan, 46 Fed. Reg. 40,550, 40,551 (1981) (unfinished tapered roller bearing parts were the not same class or kind of merchandise as finished tapered roller bearing parts (and therefore were not included within the scope of the antidumping order) because "[t]here are major differences in physical characteristics, manner of sale, and use (or lack of it) between finished and certain unfinished tapered roller bearings. . . . [T]he finished manufacturing, assembly, inspection, and packing costs incurred in the United States on these unfinished components account for approximately 40 percent of the value

tion test, it is unlikely that the blending of oils or other fungible energy forms from different nations will change the country of origin of the product for antidumping purposes.⁸⁷

2.7.2. *Circumvention*

If Commerce were to impose an antidumping order on a fungible energy product from one or more countries, it might have difficulty enforcing the order. As noted above, energy products such as oil and natural gas are highly fungible, and are often combined from many sources prior to sale and processing in a third country (e.g., the refining of crude oil into petroleum products). The blending of crude oils prior to refinement, in addition to transshipment practices, may render it extremely difficult for a customs official to ascertain the origin of any particular shipment for purposes of enforcing an antidumping order. In addition, many energy products, such as oil, are exported to third countries for refining prior to sale. This increases the prospects of a successful circumvention of dumping duties because a customs invoice might simply list as the country of origin the country in which the oil was refined, or the last country in which the crude oil was blended.

Moreover, an antidumping order against several nations may have little impact on pricing where the energy source is fungible and sold in international markets. While the producers involved may transfer shipments to other nations to avoid the order, other importers could take their places. If pricing is set on a global basis, and most exporters are price takers, the substitute importers, too, will have little choice but to price at very similar levels. Thus, the effectiveness of antidumping orders in such internationalized markets is doubtful.

of the finished inner race assemblies and other races . . ."; *see also* 19 C.F.R. § 10.14(b) (1989) (Under Customs regulations, foreign-made articles become products of the United States if "they undergo a process of manufacture in the United States which results in their substantial transformation. Substantial transformation occurs when, as a result of manufacturing processes, a new and different article emerges, having a distinctive name, character, or use, which is different from that originally possessed by the article or material before being subject to the manufacturing process.").

⁸⁷ Cf. United States-Canada Free-Trade Agreement, *done* Dec. 22, 1987-Jan. 2, 1988, 27 I.L.M. 281. Under Article 301 of the Free-Trade Agreement, a product is deemed to originate in the territory of a Party (either the United States or Canada) if it has been "transformed in the territory of either Party . . . so as to be subject to a change in tariff classifications . . ." However, a product will not be considered to originate in the territory of a Party "merely by virtue of having undergone mere dilution with water or another substance that does not materially alter the characteristics of the good."

2.8. *Fuel Ethanol From Brazil*

As noted at the outset, an antidumping case involving fuel ethanol from Brazil was brought before Commerce and the ITC; Commerce determined that the subject merchandise was sold for LTFV, but the ITC determined that the domestic industry was neither materially injured nor threatened with material injury by reason of the LTFV imports.⁸⁸ While fuel ethanol is not as important an energy product as oil, coal, or uranium, the case nevertheless highlights several issues likely to arise in an energy case.

2.8.1. *Foreign Market Value*

On the Commerce side of the investigation, two issues arose with respect to calculating FMV. First, some of the respondents argued that Commerce should not use home market sales to determine FMV because of the existence of price controls on fuel ethanol in Brazil.⁸⁹ Commerce disagreed: "We determined that home market sales could be used since[:] (1) the mere existence of price controls does not invalidate home market prices . . . ; and (2) these home market sales were in the ordinary course of trade of fuel ethanol in Brazil."⁹⁰

Second, Commerce relied on constructed value to determine FMV because the respondent's home market ethanol sales were made at prices that did not permit recovery of the acquisition costs. Thus, the presence of government imposed price controls was an important, and possibly dispositive, factor.

2.8.2. *USP and Middleman Dumping*

Commerce also investigated whether the respondent trading companies engaged in "middleman dumping," that is, selling fuel ethanol abroad at prices below the cost of acquiring the fuel ethanol.⁹¹ In cases of middleman dumping, Commerce will base USP on the exporter's sales price.⁹²

Since the trading companies commingled their acquisitions of ethanol, both before exportation and between importation and sale in the

⁸⁸ Fuel Ethanol from Brazil, 51 Fed. Reg. 5,572 (Dep't Comm. 1986) (final affirmative determination); Certain Ethyl Alcohol from Brazil, USITC Pub. No. 1818, Inv. No. 731-TH-248. (comm. final negative) (March 1986).

⁸⁹ *Fuel Ethanol*, 51 Fed. Reg. at 5,574. It appears that the price controls kept prices artificially low.

⁹⁰ *Id.*

⁹¹ *Id.* at 5,573.

⁹² *Id.*

United States, Commerce could not attribute acquisition costs directly to specific sales of fuel ethanol.⁹³ Consequently, Commerce decided that basing the middleman dumping analysis “solely upon whether *any* sales have been made at prices below acquisition costs by *any* amount” would be inappropriate.⁹⁴ Instead, Commerce determined that “the proportion of sales priced below the cost of acquisition as well as the magnitude of the resulting losses in those sales forms an appropriate basis” for a finding of middleman dumping.⁹⁵

Also noteworthy is Commerce’s determination of middleman dumping despite the trading company’s major supplier’s knowledge at the time of sale that the merchandise was destined for the United States.⁹⁶ While recognizing the traditional administrative practice of “using the price between a manufacturer and unrelated trading company for exports to the United States when the manufacturer knew the destination at the time of its sale to the exporter,”⁹⁷ Commerce nevertheless elected to examine “all facets of a transaction. Where there is a specific allegation that a trading company is failing to recover its costs in transactions concerning the subject merchandise, we will investigate to determine whether there is ‘middleman dumping.’”⁹⁸

Given the frequent involvement of trading companies in energy trade, middleman dumping may often be an issue in antidumping cases involving energy products.

2.8.3. *Like Product and Domestic Industry*

The ITC’s like product analysis turned on the differences in physical characteristics between fuel ethanol and ethanol used for other industrial applications.⁹⁹

The role that government frequently plays in energy was an especially important factor with respect to the domestic industry and injury issues. In this regard, the domestic ethanol industry’s growth was the result of both federal and state government policies. As the ITC noted:

In the mid-1970s, the U.S. government set up a program of tax subsidies and loan guarantees to spur development of the

⁹³ *Id.*

⁹⁴ *Id.* (emphasis added).

⁹⁵ *Id.*

⁹⁶ *Id.* at 5,576-77.

⁹⁷ *Id.* at 5,577.

⁹⁸ *Id.*

⁹⁹ *Ethyl Alcohol from Brazil*, USITC Pub. 1818, Inv. No. 731-TH-248, at 3-4.

(“[I]mported fuel ethanol is separate and distinct from imported industrial ethanol because of its concentration and its chemical impurities.”).

domestic fuel ethanol industry and other renewable domestic fuel sources. Many states also provided tax subsidies of their own as additional incentives to produce fuel ethanol [I]t has had to rely on subsidies in order to compete in the marketplace. In 1985 those subsidies averaged 95 cents per gallon.¹⁰⁰

Thus, while encouraging the fuel ethanol industry's growth, substantial financial support from the government may also have resulted in denying the industry relief from LTFV imports. Although the industry was relatively young, it exhibited "signs of strength, contrary to what one normally expects to find in an emerging industry which has encountered difficulties developing consumer acceptance for a new product."¹⁰¹

Similarly, other energy product industries may find that government support in the form of subsidies or tax incentives, while improving the industry's performance, may make proving material injury from LTFV imports very difficult.

2.8.4. *Circumvention*

Commerce briefly noted its concern about the possibility that the antidumping order could be circumvented through importation of ethanol blends. To prevent such circumvention, Commerce announced its intention to work closely with the Customs Service.¹⁰²

3. SECTION 301 AND ENERGY TRADE

Section 301 of the Trade Act of 1974¹⁰³ is designed to enable the President to:

(A) enforce the rights of the United States under any trade agreement; or (B) to respond to any act, policy, or practice of a foreign country or instrumentality that (i) is inconsistent with the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or (ii) is unjustifiable, unreasonable, or discriminatory and burdens or restricts United States commerce; the President shall take all appropriate and feasible action within his power to enforce such rights or to obtain the elimination of such act, policy, or

¹⁰⁰ *Id.* at 5.

¹⁰¹ *Id.*

¹⁰² *Fuel Ethanol*, 51 Fed. Reg. at 5,573.

¹⁰³ 19 U.S.C. §§ 2411-15 (1982 & Supp. V 1987).

practice.¹⁰⁴

3.1. Actionable Practices

Section 301, by its terms, is broad in scope and allows the President to take action against a wide range of "unfair" practices by foreign governments with respect to *both* goods and services.¹⁰⁵ Unfair government policies and practices that may be subject to retaliation under Section 301 can fall into one or more of three categories: "unjustifiable," "unreasonable," and "discriminatory."

An "unjustifiable act" is "any act, policy or practice which is in violation of, or inconsistent with, the international legal rights of the United States," including any act, policy, or practice that "denies national or most-favored-nation treatment, the right of establishment, or protection of intellectual property rights."¹⁰⁶ Such measures as tariffs or other import restrictions that impair the value of trade commitments to the United States are included within this category.¹⁰⁷

¹⁰⁴ 19 U.S.C. § 2411(a) (Supp. V 1987).

¹⁰⁵ See S. REP. NO. 1298, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7186, 7301-03 ("Under Section 301 the President would be given broad authority to retaliate against both 'unreasonable' as well as 'unjustifiable' import restrictions . . . which are illegal under international law or inconsistent with international obligations . . . [T]he Committee amended subparagraph 301(a) . . . to make it explicit that U.S. commerce includes U.S. services associated with international trade.").

¹⁰⁶ 19 U.S.C. § 2411(e)(4) (Supp. V 1987). Interestingly, although the provision that denial of protection of intellectual property rights is "unjustifiable" was added to Section 301 in 1984, recent Section 301 determinations that have focused on inadequate protection of intellectual property rights have been phrased in terms of finding such policies to be "unreasonable," rather than "unjustifiable." See, e.g., Presidential Documents, Memorandum of July 21, 1988, Determination Under Section 301 of the Trade Act [sic], 53 Fed. Reg. 28,177 (1988) (President determined that the Government of Brazil's "failure to provide process and product patent protection for pharmaceutical products is unreasonable"); Memorandum of Oct. 6, 1986, Determination Under Section 301 of the Trade Act of 1974, 51 Fed. Reg. 35,993 (1986) (President determined that Brazilian laws and policies restricting foreign investment, including U.S. investment, in Brazilian informatics sector and withholding "adequate and effective intellectual property protection for U.S. computer software and other informatics products" were "unreasonable").

¹⁰⁷ See, e.g., Memorandum of Dec. 24, 1987, Determination Under Section 301 of the Trade Act of 1974, 52 Fed. Reg. 49,139 (1987) (President determined that European Community's "Council Directive Prohibiting the Use in Livestock Farming of Certain Substances Having a Hormonal Action" was inconsistent with the GATT Agreement on Technical Barriers to Trade and, therefore, unjustifiable); Memorandum of April 17, 1987, Determination Under Section 301 of the Trade Act of 1974, 52 Fed. Reg. 13,419 (1987) (President determined that the Government of Japan had not implemented or enforced provisions of the United States-Japan Arrangement concerning Trade in Semiconductors, and that such inaction impaired U.S. benefits under the Arrangement).

An "unreasonable act" is "any act, policy, or practice which, while not necessarily in violation of or inconsistent with the international legal rights of the United States, is otherwise deemed to be unfair and inequitable," includes the denial of fair and equitable: "(A) market opportunities; (B) opportunities for the establishment of an enterprise; or (C) provision of adequate and effective protection of [United States] intellectual property rights."¹⁰⁸ Also included is the provision of export subsidies on commodities that depress the world price for such commodities.¹⁰⁹

A "discriminatory action" is "any act, policy, or practice which denies national or most-favored-nation treatment to United States goods, services, or investment."¹¹⁰ Thus, discriminatory foreign government standards or rules with respect to a product's marketing or production, discriminatory rules of origin, and retroactive business practices are actionable.¹¹¹

3.2. U.S. Commerce

The President is authorized to respond to an act, policy, or practice of a foreign country or instrumentality that is "unjustifiable, unrea-

¹⁰⁸ 19 U.S.C. § 2411(e)(3) (Supp. V 1987). *See, e.g.*, Korea's Restrictions on Access to Its Wine Market, 53 Fed. Reg. 22,607 (1988) (investigation of Korean practices, including "combination of a 100 percent tariff applied to table wines and a quota on imports, creating a price escalation through the distribution system that prevents imported wine from being price competitive with domestically produced wine"); Memorandum of Nov. 16, 1984, Determination Under Section 301 of the Trade Act of 1974, 49 Fed. Reg. 45,733 (1984) (President determined that Argentina's importation restrictions, "through its postal authorities, on services provided by U.S. courier companies are unreasonable"); Memorandum of August 14, 1986, Determination Under Section 301 of the Trade Act of 1974, 51 Fed. Reg. 29,445 (1986) (President determined that the Republic of Korea's policy of "denying effective protection to intellectual property rights" was unreasonable).

¹⁰⁹ *See* Memorandum of June 28, 1982, Determination Under Section 301 of the Trade Act of 1974, 47 Fed. Reg. 28,361 (1982) (President determined that the European Economic Community's provision of subsidies on sugar exports was "inconsistent with the . . . [GATT] Standards Code . . . and depressed U.S. sugar prices," and appeared to agree with the petitioner's contention that the subsidies imposed were "unreasonable burdens on U.S. commerce").

¹¹⁰ 19 U.S.C. § 2411(e)(5) (Supp. V 1987).

¹¹¹ *See, e.g.*, Korea's Restrictions on Access to Its Cigarette Market, 53 Fed. Reg. 4,926 (1988) (investigation of the Republic of Korea's practices of, inter alia, "[f]ixing the retail price of imported cigarettes at a prohibitively high level through a combination of a high tariff, discriminatory domestic taxes . . . restricting imports and dictating the brand mix, and quantity of imports without reference to market factors . . . [and] imposing a discriminatory retail margin"); Presidential Determination Under Section 301(a), Soviet Marine Insurance Practices, 43 Fed. Reg. 25,212 (1978) (President determined that the Soviet Union applied a higher insurance rate to cover insurance of U.S. flag vessels in United States-Soviet Union grain trade, and excluded U.S. marine cargo underwriters from participation in United States-Soviet Union bilateral trade).

sonable, or discriminatory and burdens or restricts United States Commerce."¹¹²

Under the statute, the term "commerce" includes not only international trade in merchandise, but also "services (including transfers of information) associated with international trade, whether or not such services are related to specific goods," and "foreign direct investment" by U.S. persons "with implications for trade in goods and services."¹¹³ Thus, any unfair acts that burden or restrict U.S. services or direct investments may be actionable. For example, the application of Section 301 opened the Korean insurance market to foreign firms, including U.S. firms.¹¹⁴

3.3. Section 301 Procedure

A proceeding under Section 301 may be self-initiated by the United States Trade Representative (USTR) or initiated by any "interested person" who files a petition with the USTR.¹¹⁵ Once a petition is self-initiated or a private petition is accepted and the case initiated, the USTR conducts an investigation and recommends to the President appropriate action under Section 301.¹¹⁶ Before making recommendations, the USTR must, unless expedited action is required, provide an opportunity for the presentation of views, including a public hearing if requested, and obtain advice from the appropriate industry advisory representatives.¹¹⁷

After deciding to initiate a Section 301 case, the USTR, on behalf of the United States, must request consultations with the foreign country or instrumentality named in the petition.¹¹⁸ If the case involves a trade agreement and no mutually acceptable resolution is reached during any consultation period prescribed in the agreement, the USTR must initiate proceedings pursuant to any formal dispute resolution procedures provided for thereunder. Resorting to such dispute resolution mechanisms, especially under the GATT, often results in lengthy delays in obtaining meaningful relief.

¹¹² 19 U.S.C. § 2411(a)(1)(B)(ii) (1982 & Supp. V 1987).

¹¹³ 19 U.S.C. § 2411(e)(1) (Supp. V 1987). See also S. REP. NO. 1298, *supra* note 105, 1974 U.S. CODE CONG. & ADMIN. NEWS at 7303.

¹¹⁴ See Initiation of Investigation Under Section 301: Korea's Restrictions on Insurance Services, 50 Fed. Reg. 37,609 (1985).

¹¹⁵ 19 U.S.C. § 2412(a) (1982 & Supp. V 1987). The USTR must make recommendations within the statutory time limit, and within one year in any event. *Id.*

¹¹⁶ 19 U.S.C. § 2414(a) (1982 & Supp. V 1987).

¹¹⁷ 19 U.S.C. §§ 2155, 2412(b)(2), 2414(b) (1982 & Supp. V 1987).

3.4. *Unfair Energy Practices: Prospects and Risks*

Since foreign energy production is heavily regulated and, indeed, often controlled by foreign governments, Section 301 may be the most appropriate mechanism with which to redress unjustifiable, unreasonable, or discriminatory foreign governmental acts, policies or practices that affect the energy trade. The breadth of the statute, and the presidential discretion thereunder, make it a weapon particularly well suited for responding to such practices.

At the same time, such proceedings, particularly with respect to oil, gas, and uranium, could cause considerable international tension. Foreign governments view the right to control natural resources within their territories as a national right. Moreover, governmental energy policies frequently are based on national security considerations. Indeed, U.S. energy policy is driven largely by security concerns. Thus, a foreign nation may view a Section 301 action challenging its actions and policies as an affront to its sovereignty.

A potential petitioner's chief prospects for success in using Section 301 are in remedying unreasonable or discriminatory actions, rather than unjustifiable actions, since few agreements currently provide the United States with benefits regarding energy trade.¹¹⁹

Private parties could use Section 301 to enforce U.S. rights under the United States-Canada Free-Trade Agreement (FTA). For example, the two-tier pricing practices of foreign governments, which provide low prices at home and higher prices abroad for energy products, arguably are "discriminatory" practices.¹²⁰

Similarly, many practices of the Organization of Petroleum Exporting Countries (OPEC) cartel, including its fixing of the levels of prices, output, and exports to the United States, may be unreasonable or discriminatory conduct under the statute.¹²¹ (The United States-Ca-

¹¹⁹ See FTA, *supra* note 1. The FTA devotes an entire chapter to energy trade. The provisions are designed to ensure that any measures regulating energy enacted by one party will not have adverse effects on the other party's ability to trade in that energy product. Specific annexes address trade in uranium (Annex 902.5) and hydroelectric power (Annex 905.2).

¹²⁰ See *supra* note 110.

¹²¹ Although Section 301 has never been successfully invoked to remedy anticompetitive practices, the Auto International Association, a group of independent manufacturers and wholesale distributors of auto parts, filed a petition in May 1988, which it withdrew in July 1988, after it became apparent that the Administration strongly opposed it. The petition alleged that the Japanese government permitted the use of predatory and anticompetitive practices by Japanese auto manufacturers and auto parts suppliers. According to the the Association, these practices resulted in an expanding Japanese share of the U.S. market for auto parts, and a shrinking U.S. share of the Japanese market. The complaint was phrased so as to track certain amendments to Section 301, appearing in H.R. 3, 100th Cong., 1st Sess. (1987), and H.R. 4848, 100th

nada Free-Trade Agreement is a major exception.) Such action plainly burdens U.S. commerce.

The nationalization of a U.S. energy company's overseas facility by the host government is also arguably a discriminatory action that burdens or restricts U.S. direct investment in that country. For example, a U.S. oil company might bring a Section 301 action to exert pressure on the foreign government involved to provide proper compensation for expropriating its foreign facility. The leverage for obtaining reasonable compensation would come from the risk that the nation involved could lose trade benefits and face trade restrictions under Section 301 if just, prompt, and reasonable compensation were not awarded to the U.S. company. Thus, Section 301 would not prove very useful vis-à-vis a nation such as Libya, which presently has virtually no economic relations with the United States. On the other hand, the statute could prove useful vis-à-vis countries such as Angola, Egypt, and especially Mexico, which do have trade relations with the United States.

The use of Section 301 may also prove expedient in the oil and gas equipment and services sector. As other nations increasingly compete in this market, U.S. companies may face additional restrictions on the export of oil field equipment and technical services, including both tariffs and non-tariff barriers. Indeed, if oil prices rise again, foreign governments may target this sector for investment and development, and take steps to protect it from outside competition. Conversely, a foreign government might use export subsidies and other financial incentives to boost exports and increase its industry's market share at the expense of other countries' oil and gas equipment industries.

In electricity trade, Section 301 could also prove useful to the extent that Canada continues to deny U.S. consumers and industries equal access to its energy, particularly electricity, notwithstanding the FTA.¹²²

Finally, although Section 301 traditionally has been viewed as a tool for opening foreign markets to U.S. products and services, the statute could also be used to counteract burdens and restrictions on U.S. trade and commerce caused by unfair acts, policies, and practices regarding exports to the United States. The legislative history of Section 301 demonstrates that Congress intended the President to have the au-

Cong., 2nd Sess. (1988), that specify that Section 301 applies to anticompetitive, cartel-like practices.

¹²² See, e.g., *Ontario Government Introduces Three Bills Aimed at Circumventing Free Trade Agreement*, Int'l Trade Rep. (BNA) 973 (Jul. 6, 1988) (Among the legislation was a proposal to "limit electricity exports to the United States and force exports prices higher than those charged Canadian consumers.").

thority to retaliate against subsidized exports that reduce domestic sales by U.S. companies.¹²³

Invoking Section 301 in response to subsidized imports from foreign countries is not without precedent. In 1982, the Administration used Section 301 to initiate dispute settlement proceedings with the European Community on the reduction of or elimination of the European Community's export subsidies.¹²⁴ In that case, the subsidies caused world sugar prices to fall; low prices adversely affected U.S. sugar producers. Even though the subsidies reduced primarily U.S. exports of refined sugar, the case nevertheless demonstrates that Section 301 need not be viewed simply as a market opening tool.

In another 1982 case, the Tool and Stainless Steel Industry Committee and the United Steelworkers of America alleged that the European Community, Belgium, France, Italy, the United Kingdom, Austria, and Sweden were subsidizing the production of specialty steel "in a manner inconsistent with their obligations under . . . [the GATT] Subsidies Code."¹²⁵ The USTR determined that "imports [of specialty steel] have steadily captured a larger share of the U.S. market, further depressing operating rates, employment, prices and revenues."¹²⁶ Consequently, the President ordered the ITC to conduct an expedited Section 201 investigation and the USTR to initiate multinational and bilateral discussions to eliminate trade-distortive practices in this sector.¹²⁷

More recently, U.S. officials have reportedly considered using Section 301 to retaliate against Canadian violations of the softwood lumber pact,¹²⁸ under which the Canadian government promised to offset the effects of Canadian softwood lumber export subsidies through export charges.¹²⁹ Any Canadian failure to comply with the pact would be

¹²³ See S. REP. NO. 1298, *supra* note 105, 1974 U.S. CODE CONG. & ADMIN. NEWS at 7208; H. REP. NO. 571, 93d Cong., 1st Sess. 10 (1973) ("Under Section 301 the President may suspend or otherwise limit the benefits of trade agreements, or impose duties or other import restrictions on the products of countries that . . . provide subsidies . . . which have the effect of . . . reducing sales of U.S. products in the domestic market."). However, presidential action against subsidized imports under section 301 must be predicated upon a prior finding that the antidumping and countervailing duty laws do not provide an adequate remedy. *Id.*

¹²⁴ See *supra* note 109.

¹²⁵ Determination Under Section 301 of the Trade Act of 1974, 47 Fed. Reg. 51,717 (1982).

¹²⁶ *Id.* at 51,718.

¹²⁷ See *id.* at 51,717. The President's memorandum also hinted at possible additional action on an "emergency interim basis." *Id.*

¹²⁸ *Administration Hints at Section 301 Retaliation against Canada*, INSIDE U.S. TRADE, July 29, 1988.

¹²⁹ Memorandum of Understanding between the Governments of Canada and the United States of America to resolve differences with respect to the conditions affecting

unjustifiable and unreasonable under Section 301.¹³⁰

In view of the foregoing, using Section 301 to offset the adverse effects of cheap energy imports on the domestic energy industry is intriguing. Indeed, compared to the antidumping law, Section 301 appears to be a more effective trade remedy statute in several respects. First, a domestic energy producer bringing an antidumping petition must comply with several procedural requirements.¹³¹ In contrast, Section 301 merely requires that the domestic party filing the petition be any interested person.¹³² Section 301 has no express standing or representation requirements, but simply a requirement that the petitioner "describe briefly the interest of the petitioner which is affected by . . . the act, policy or practice which is the subject of the petition."¹³³

Second, the flexibility of Section 301 permits producers in one particular energy sector, such as coal, to seek relief from unfair foreign acts, policies, or practices in another energy sector, such as electricity or oil. This possibility contrasts sharply with the like product analysis in the antidumping statute. More importantly, this flexibility responds to a basic reality to which the relatively rigid antidumping law cannot respond—an energy product may be price sensitive to a different, but substitutable, energy product. As the price of oil rose in the 1970s, for example, investment in developing other energy products, such as nuclear power, natural gas, and, to a lesser degree, synthetic fuels also increased.¹³⁴ When oil prices collapsed in 1985, these alternative energy industries suffered, as consumers and businesses returned to heating their homes and running their factories with cheap oil. Section 301, unlike the antidumping laws, could be invoked relatively easily by such industries against oil or other different energy products.

Third, apart from the effect of cheap oil imports on other energy product industries, it is fundamentally incongruous to discuss dumped energy products in the context of the antidumping laws. As a general matter, energy producing countries do not export their energy products

trade in softwood lumber products, Dec. 30, 1986, United States-Canada (amended Dec. 16, 1987 and Apr. 7, 1988) (available through Office of the United States Trade Representative).

¹³⁰ Memorandum of Dec. 30, 1986, Determination Under Section 301 of the Trade Act of 1974, 52 Fed. Reg. 231 (1987).

¹³¹ See *supra* notes 7-20 and accompanying text.

¹³² 19 U.S.C. § 2412(a) (1982 & Supp. V 1987).

¹³³ 15 C.F.R. § 2006.1(a) (1989). The petition must also include as much information as is reasonably available to the petitioner about the foreign act, policy or practice that is the subject of the petition, including the following: the foreign governments or instrumentalities that are involved; the products or services that are affected by the foreign act, policy, or practice; and the volume of trade involved. 15 C.F.R. § 2006.1(a)-(f) (1989).

at prices below home market prices or the cost of production. On the contrary, the form of price discrimination that is more likely to be encountered is two-tier pricing, whereby domestic users benefit from energy prices lower than those available in foreign markets. In short, two-tier price discrimination is precisely the *reverse* of the price discrimination contemplated in the antidumping laws. Section 301, however, is sufficiently flexible to address the burdens on U.S. commerce and trade that may result from two-tier pricing.

3.5. *Remedy Options*

Upon making an affirmative finding under Section 301, the President may take "all appropriate and feasible actions within his power" to remedy the practice.¹³⁵ The President may exercise authority with respect to "any goods or sector" on a nondiscriminatory basis, or solely against the foreign country or instrumentality involved, regardless of whether such goods or sector were included in the act, policy, or practice.¹³⁶ Thus, the President can retaliate against an unfair practice involving energy through actions directed against other goods or sectors. This ability gives the President substantial leverage to act if the United States engages in substantial trade with the target nation.

The President's range of possible actions is broad. He may utilize any power within his authority under the Constitution and federal law. He may also seek legislation to rectify the practice, as has been done in the past.¹³⁷

Section 301 empowers the President to suspend, withdraw, or prevent the application of trade agreements, or to impose duties or other import restrictions on the products of a foreign country or instrumentality, or to impose fees or restrictions on their services.¹³⁸ Thus, the President could establish a variable import fee on oil, or quotas on natural gas imports. The President may also restructure the terms and conditions of service sector authorizations (i.e., any lease, permit, or other authorization issued under federal law that permits foreign suppliers access to the U.S. market) or deny the issuance of such

¹³⁵ 19 U.S.C. § 2411(a) (1982 & Supp. V 1987).

¹³⁶ 19 U.S.C. § 2411(a)(2) (Supp. V 1987).

¹³⁷ See Memorandum of July 31, 1980, Determination Under Section 301 of the Trade Act of 1974, 45 Fed. Reg. 51,173 (1980) (President determined that enactment of "mirror legislation" was "an appropriate and feasible response to the Canadian practice of denying an income tax deduction to Canadian advertisers who contract with U.S. television and radio broadcasting stations located near the U.S.-Canadian border . . . for advertising aimed primarily at the Canadian market").

¹³⁸ 19 U.S.C. § 2411(b) (1982 & Supp. V 1987).

authorizations.¹³⁹

Additionally, the President, could negotiate bilateral or multilateral agreements on energy trade pursuant to his inherent constitutional authority. Such negotiations could be directed at remedying unfair practices, such as two-tier pricing, or opening foreign markets to U.S. energy products and related products (such as oil and gas equipment).

Agreements frequently are negotiated to settle Section 301 investigations. Such agreements include the United States-Japan semiconductor arrangement,¹⁴⁰ the leather and footwear agreement between the United States and Japan,¹⁴¹ and most recently, the United States-Japan agreements on beef and citrus.¹⁴² As a practical matter, the primary advantage of these agreements is that they require a foreign government to take actions to remedy the unfair act, policy, or practice. Thus, the President requires no additional statutory authority to resolve the dispute.

Such agreements could be enforced under Section 301 because a violation of the agreement by the foreign government would constitute an unjustifiable act, policy, or practice. Indeed, the parties could expressly stipulate that violation of the agreement would be considered unjustifiable or unreasonable and therefore subject to retaliation.¹⁴³

The actual remedy options that would likely be selected in a Section 301 case involving energy products are difficult to determine, and probably would vary from case to case. As a policy matter, the USTR seeks to target retaliation against the same sector as the products subject to the unfair practice, despite authority to target any goods or services.

Cases involving unrelated unfair practices could also affect energy trade because the statute does not dictate that the relief granted under its authority be confined to the product or products with which the actionable practice is concerned. However, because inexpensive energy is available from abroad, the United States would incur as a cost the lost benefits of inexpensive resources for the economy. Thus, costs to the domestic economy and to consumers must be considered in shaping Section 301 relief.

Furthermore, one should recognize that price and quality restrictions directed against a single country may not be effective due to the

¹³⁹ 19 U.S.C. § 2411(b), (e)(6) (1982 & Supp. V 1987).

¹⁴⁰ Arrangement Concerning Trade in Semiconductor Products, Sept. 2, 1986, United States-Japan, 25 I.L.M. 1409-28.

¹⁴¹ Proclamation No. 5,448, Increase in the Rates of Duty on Certain Articles From Japan, 51 Fed. Reg. 9435 (1986).

¹⁴² Investigation Concerning Japan's Restrictions on Imports of Fresh Oranges and Orange Juices, 53 Fed. Reg. 25,714 (1988).

global scope of energy markets.

In addition, until recently, Presidents have been reluctant to employ Section 301 against the United States' trading partners for fear of retaliation against U.S. exports. This issue, too, must be considered in shaping relief, although the apparent willingness of the Reagan Administration to invoke or threaten to invoke Section 301 sanctions against important trading partners, such as Japan, suggests that this consideration is now less important than it once was.

Finally, one should note that although the remedy options under Section 301 are far more flexible and offer potentially greater prospects for effective relief than those under the antidumping law, the risks present under Section 301 are likewise greater. Under the antidumping law, once all of the statutory requirements have been met, action by Commerce is mandatory. The same cannot be said of Section 301. A domestic energy industry, such as coal, may present an excellent case for relief from the impact of unfairly low priced oil, and yet, the President may decide that cheaper energy imports are of greater importance to the U.S. economy than a stronger and healthier coal industry.

3.6. *Section 301 and the 1988 Trade Agreement*

The Omnibus Trade and Competitiveness Act of 1988 (the Act)¹⁴⁴ made several changes to Section 301 that may significantly alter the prospects and risks for petitioners and respondents under Section 301. The amendment most likely to have a substantial impact on future cases is the mandatory retaliation provision. The Act requires mandatory retaliation, subject to narrow exceptions, in cases where: (1) U.S. rights under a trade agreement are being denied; or (2) an act, policy, or practice of a foreign government violates, is inconsistent with, or denies U.S. benefits under a trade agreement, or is "unjustifiable" and burdens or restricts U.S. commerce.¹⁴⁵ While the form of retaliation is discretionary, the economic amount must be equivalent in value to the burden or restriction imposed by the foreign unfair practice on U.S. commerce.¹⁴⁶ Consequently, violations of a trade agreement by a foreign power involving energy products and resulting from an earlier Section 301 investigation could result in mandatory sanctions.

¹⁴⁴ See Omnibus Trade and Competitiveness Act of 1988, § 1301, Pub. L. No. 100-418, 102 Stat. 1107 (1988) (to be codified at 19 U.S.C. § 2411).

¹⁴⁵ *Id.* at 1164.

4. CONCLUSION

Section 301 and the antidumping law are very different unfair trade statutes, which can be invoked by petitioners if they can meet the considerable requirements needed for relief, and if they believe the available relief could be effective. Each statute has certain advantages. Meaningful relief against a particular nation's pricing policies and other unfair practices in international energy markets may be difficult to obtain. At the same time, however, foreign energy producers should understand the risks of trade restrictions and factor them into their business planning.