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Competition, Trade and the Antitrust Division: 1981

*Joel Davidow**

One of the primary purposes—some would say *the* primary purpose—of antitrust laws is to promote efficient allocation of resources and maximum consumer choice by preventing and punishing artificial barriers to competition and unreasonable restraints of trade.¹ The Antitrust Division of the U.S. Department of Justice has therefore concerned itself with the task of breaking down those barriers. In the domestic field, this policy has traditionally taken the form of prosecuting persons and corporations who engage in price fixing or market division, or who obtain or maintain monopoly power by means of abusive practices. More recently, the Antitrust Division, while continuing its attack on private restraints, has opened a second front by seeking to narrow the scope of, or to abolish government regulations which embody or facilitate restrictions on competition. Sometimes this campaign has taken the form of advocating deregulation—the limitation or repeal of government regulation which suppresses competition.² At other times, the Antitrust Division has brought suit to prevent regulated firms from engaging in restraints on competition not justified by the

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¹ See R. BORK, *THE ANTITRUST PARADOX* 90-106 (1978); W. BOWAN, *PATENT AND ANTITRUST LAW* 1-3 (1973).

² See *Competition Advocacy and International Trade: A New Role for Antitrust Policy*, Remarks by John H. Shenefield, Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, before the ALI-ABA Course of Study on Int'l Antitrust Law, Washington, D.C. (May 26, 1978) [hereinafter cited as Shenefield Remarks].

needs of the regulatory system.³

On the international front, as well as in the domestic field, the Antitrust Division has long pursued a course of bringing suits to prevent private restraints of U.S. commerce, regardless of whether the restraint is created by Americans or foreigners.⁴ Here, too, the Division lately has taken on the additional task of opposing or seeking to minimize governmental encouragement of private restraints of trade or direct government hindrance of trade competition. In this, as in its opposition to conspiracies in restraint of trade, the Division takes its inspiration from Adam Smith, who more than two hundred years ago not only warned against price-fixing conspiracies but also excoriated the imposition of barriers to international trade, such as quotas and tariffs, as another prime source of resource misallocation.⁵ The Division now speaks out strongly for freedom of commerce and against public policies which deny American consumers the benefits of international competition.⁶ This article will survey the Division's role in dealing with restraints on international trade imposed by firms and by governments.

THE DIVISION'S ATTITUDE TOWARD PRIVATE CONDUCT

A. *Horizontal Restraints on Trade*

Our highest priority is to ensure that purely private restraints on U.S. foreign commerce do not go unpunished. In four recent cases, involving lithium,⁷ safes,⁸ watches,⁹ and mink pelts,¹⁰ the Division has invoked criminal or civil law to deal with American firms or associations which pressured their foreign counterparts to prevent the sale of competing goods in the U.S. market. The mink case, *United States v. National Board of Fur Farms*,¹¹ makes two especially important points:

³ See *United States v. Texas State Bd. of Public Accountancy*, 464 F. Supp. 400 (W.D. Tex. 1978), *modified*, 592 F.2d 916 (5th Cir.), *cert. denied*, 444 U.S. 925 (1979).

⁴ See, e.g., *United States v. American Tobacco Co.*, 221 U.S. 106 (1911); *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

⁵ 1 A. SMITH, *THE WEALTH OF NATIONS* 397-416 (Mod. Lib. ed. 1937).

⁶ Shenefield Remarks, *supra* note 2. See also *Pitfalls In Joint Course to the Import Relief Laws, Or, "Is That Antitrust?"*, Remarks by Carl A. Cira, Jr., Ass't Chief, For. Commerce Sec., Antitrust Div., U.S. Dep't of Justice, before the World Trade Inst., New York, N.Y. (Sept. 23, 1980).

⁷ *United States v. Foote Mineral Co.*, No. 74-1652 (E.D. Pa. 1974).

⁸ *United States v. Norman Morris Corp.*, No. 76-495 (S.D.N.Y. 1976).

⁹ *United States v. Diebold, Inc.*, No. 76-9A (N.D. Ohio 1976).

¹⁰ *United States v. National Bd. of Fur Farm Organizations*, 395 F. Supp. 56 (E.D. Wis. 1975).

¹¹ Fur farm organizations, charged with violation of antitrust laws, filed a motion to dismiss their indictment on the ground that they were exempt organizations under the Capper-Volstead Act. The District Court disagreed with the defendants' premise that their exempt status was established on the face of the indictment, but held that even assuming that the defendants were indeed

(1) firms which fail to persuade the government to limit imports are not permitted to take the law into their own hands and impose private limitations, and (2) firms which are the beneficiaries of limited exemption from the antitrust laws allowing them to sell or export jointly have not been given *carte blanche* to engage in conduct designed to restrain their competition with foreigners in international trade.¹²

Conspiracies to divide up world markets, then, cannot be countenanced by the Division, and may be dealt with harshly. Restriction of world competition by means of other horizontal restraints, such as boycotts, is also likely to be challenged by the Division when it exists within U.S. jurisdiction.¹³

B. Monopolization

More problematical is the question of alleged monopolization or attempted monopolization of world or U.S. markets by a foreign enterprise or syndicate. While it is certainly possible that a firm or cartel could attempt to monopolize a minor market temporarily, such as by means of predatory pricing, the vast size of the U.S. economy and the relative infrequency of successful predatory pricing¹⁴ make this a far more unlikely occurrence here than the formation of a simple market allocation or price fix. Consequently, while the Antitrust Division stands prepared to investigate and take action against any monopolizer or attempted monopolizer in any line of commerce, the Division will usually be reluctant to devote a great deal of effort to pursuing foreign firms which do no more than sell at low prices. Low prices directly benefit the American consumer and promote price competition.¹⁵ Conspiracies to restrain trade between markets tend to insulate U.S. firms from competition.¹⁶ Therefore, the Division will continue to place its emphasis on halting the latter practice.

The Department, however, will challenge monopolistic conduct which limits competition in U.S. commerce. On January 11, 1980, the

exempt organizations, the government had no duty to allege that defendants conspired with outsiders for the purpose of defeating their exempt status. *Id.* at 57.

¹² *Id.*

¹³ See *United States v. Bechtel*, 1979-1 Trade Cas. (CCH) ¶ 62,499 (D.C. Cal. 1979) (consent decree). See also *Antitrust Enforcement and the Patent System: Similarities in the European and American Approach*, Remarks by Ky P. Ewing, Jr., Deputy Ass't Att'y Gen., U.S. Dep't of Justice, before the Max Planck Inst., Munich, West Germany (Jan. 29, 1980).

¹⁴ See, e.g., Koller, *The Myth of Predatory Pricing*, 4 ANTITRUST L. & ECON. REV. 105 (1971). See also *Outboard Marine Corp. v. Pezetel*, 461 F. Supp. 384 (D. Del. 1978).

¹⁵ See Davidow, *U.S. Antitrust, Free Trade, and Nonmarket Economies*, 12 J. WORLD TRADE L. 473, 478 (1978).

¹⁶ *Id.*

Division filed a civil suit against Hercules, Inc. charging monopolization and attempt to monopolize the domestic sale of industrial nitrocellulose.¹⁷ Hercules, the only domestic producer of nitrocellulose, was charged with exchanging price information with foreign producers in order to influence and control the U.S. market price of the product.¹⁸ In a separate but related civil suit,¹⁹ the Division charged that a French company and five other foreign producers formed a marketing pool to coordinate their sales of industrial nitrocellulose in the United States. The pool used an American company as its exclusive sales agent and, thereby, fixed the price and allocated the sales of nitrocellulose imported in 1977 and 1978, in violation of Section 1 of the Sherman Act. Both suits seek injunctive relief.

C. Exchange of Information

The Division's hostility toward privately imposed restraints of trade should not be taken, however, as opposition to all forms of collective action taken by businesses to influence government policies. We recognize that as a practical matter businesses must often act jointly to provide the government with needed information and to petition the government to take action. Such business input is important in the trade field. We have tried by means of speeches and legal advice to the Office of Special Trade Representative and the Departments of State and Commerce to provide workable guidelines that will enable such valuable activity to continue without undue fear of antitrust prosecution but accompanied by adequate safeguards against private collusion.²⁰ Exchanges of information for legitimate trade purposes which do not have the intent or effect of limiting competition among those exchanging it are certainly not illegal. Similar exchanges of information in dealing with a foreign government on trade matters will most probably not be the subject of action by the Division. Of course, the Division will be likely to scrutinize any joint action of competitors

¹⁷ United States v. Hercules, Inc., No. 80-136 (D.N.J. filed Jan. 11, 1980).

¹⁸ *Id.* (Dec. 16, 1980) (consent decree), reprinted in 45 Fed. Reg. 85840 (1980).

¹⁹ United States v. Societe Nationale des Poudres et Explosifs and Fayette Chemical Corp., No. 80-149 (D.N.J. filed Jan. 1980). A settlement was proposed on Dec. 19, 1980, but is not final (copy of proposed final judgment on file in offices of the Northwestern Journal of International Law & Business). See also 46 Fed. Reg. 3671 (1981).

²⁰ See, e.g., *Exchange of Information for Presentation to Government Agencies: The Interplay of the Container and Noerr Doctrines*, Remarks by Donald I. Baker, Deputy Ass't Att'y Gen., Antitrust Div., before the ABA Nat'l Inst., Section of Antitrust Law, Hollywood, Fla. (Feb. 27, 1975); Letter from Donald I. Baker, Ass't Att'y Gen., Antitrust Div., to Robert S. Strauss, Special Representative for Trade Negotiations (April 19, 1977) (copy on file in offices of the Northwestern Journal of International Law & Business).

which goes beyond petitioning a government and amounts to voluntary exchange of pricing, marketing and other data (particularly confidential data and data clearly identifying individual firms and transactions) and could be used to effect price-fixing or market division.²¹

Also, we would seek to prevent or punish joint action aimed to harass competitors, domestic or foreign, through the bringing of groundless actions under the antitrust, antidumping, countervailing duty, or escape clause statutes or a combination of them.²² The Antitrust Division would be concerned, for example, if a trade association were used as the vehicle through which domestic competitors threatened the filing of baseless antidumping complaints in order to induce foreign producers to promise to make upward adjustments in their prices.²³ Also, antitrust issues may be raised in the event of a price-restrictive "settlement" of an antidumping or countervailing duty case carried out by the affected private parties without the participation and approval of relevant government officials.

THE DIVISION'S ROLE IN ADMINISTRATIVE PROCEEDINGS

Turning from the issue of privately imposed restraints to the issue of those created by governmental action, the Antitrust Division takes an active interest in those administrative proceedings which involve international competition issues or which may result in limitations on international competition. These are primarily Section 337 proceedings,²⁴ antidumping proceedings,²⁵ actions under the "escape clause" of the tariff laws,²⁶ proceedings to impose countervailing duties,²⁷ and market disruption cases involving imports from communist countries.²⁸

In its activity with respect to those proceedings the Antitrust Division seeks to further two distinct policies. First, the Division is interested in seeing that a sound interpretation is given to those statutes—Section 337, the antidumping and countervailing duty laws—which

²¹ See generally *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Amax, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,467 (N.D. Ill. 1977).

²² See generally *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972).

²³ See, e.g., *Antitrust Risks in Abusing the Import Relief Laws*, Remarks by Douglas E. Rosenthal, former Chief, For. Commerce Sec., Antitrust Div., before Practicing Law Inst., Washington, D.C. (Nov. 9, 1979) [hereinafter cited as Rosenthal Remarks].

²⁴ 19 U.S.C. § 1337 (1976 & Supp. III 1979).

²⁵ 19 U.S.C. § 1673 (Supp. III 1979).

²⁶ 19 U.S.C. §§ 2251-2253 (Supp. III 1979).

²⁷ 19 U.S.C. § 1671 (Supp. III 1979).

²⁸ 19 U.S.C. § 2436 (1976 & Supp. III 1979).

embody similar concepts to those contained in the U.S. antitrust laws. This is part of the Division's *amicus* work in seeking to achieve good sense and coherence in American rules dealing with business competition. Second, the Division seeks to insure with respect to all those proceedings that decisions on the merits and on relief are reached with full awareness of the importance of not hindering foreign competition arbitrarily or restricting it more broadly than necessary to achieve legitimate trade purposes. The Division has advocated these policies in several recent administrative proceedings including the pending carbon steel antidumping case,²⁹ the recent Pakistan cotton imports countervailing duties case,³⁰ the recently-concluded subway car antidumping case,³¹ and others which are discussed below.

A. Section 337 Actions

Section 337 proceedings are brought under a broadly worded statute forbidding unfair practices in international trade.³² In practice, these actions have focused until recently primarily on the protection of American patent rights.³³ While some decisions of the United States International Trade Commission (ITC) indicated that the Commission might take the view that Section 337 be enforced as a general antitrust statute,³⁴ there has, in fact, been no clear trend of cases to indicate that such a development has occurred.³⁵

The Division has taken an active role in participating in Section 337 cases, particularly when we have believed the case to be inappropriate or duplicative. Since 1975, the ITC has been required by law to consult the Justice Department and FTC on competition issues in these

²⁹ Certain Carbon Steel Products, Investigation Nos. 731-TA-18/24 (I.T.C., filed March 21, 1980), I.T.C. Pub. No. 1064 (May, 1980), 1 ITRD (BNA) 5527.

³⁰ Textiles and Textile Products of Cotton from Pakistan, Investigation No. 731-TA-62 (I.T.C., filed April 8, 1980), I.T.C. Pub. No. 1086 (July 1980), 45 Fed. Reg. 49398 (1980).

³¹ Rail Passenger Cars and Parts Thereof from Italy and Japan, Investigation Nos. 731-TA-5/6, (I.T.C., filed Jan. 1, 1980), I.T.C. Pub. No. 1034 (Feb. 1980), 1 ITRD (BNA) 5229.

³² 19 U.S.C. § 1337(a)(1) provides that:

Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States are declared unlawful . . .

³³ Rosenthal & Sheldon, *Section 337: A View from Two Within the Department of Justice*, 8 GA. J. INT. & COMP. L. 47, 48-49 (1978).

³⁴ See, e.g., Certain Welded Stainless Steel Pipe and Tube, 43 Fed. Reg. 8304 (I.T.C. 1978), *disapproved by President*, 43 Fed. Reg. 17789 (1978), 1 ITRD (BNA) 5245; Certain Electronic Audio and Related Equipment, Investigation No. 337-TA-7 (I.T.C., filed Feb. 10, 1976), I.T.C. Pub. No. 768 (April 1976).

³⁵ *Id.*

cases.³⁶ In fact, the remedial portions of Section 337 grant the ITC explicit authority to refuse a remedy "after considering . . . competitive conditions in the United States economy."³⁷ These provisions obviously provide a basis for Antitrust Division advice. In *Welded Stainless Pipe and Tube*, the Division urged that the ITC decline jurisdiction on the ground that the complainant had alleged a dumping rather than an antitrust violation, and that the matter ought to be referred to the Treasury Department.³⁸ The ITC disagreed, but President Carter refused to exclude the goods for reasons similar to those advanced by the Antitrust Division.³⁹ In *Color TV*, the Division also argued, *inter alia*, that the claim was a redundant antidumping charge masquerading as a Section 337 claim.⁴⁰ The Federal Trade Commission, the Special Representative for Trade Negotiations, and the Treasury and State Departments supported this contention, but the ITC rejected these arguments.⁴¹

The effect of provision 1105(a)(2) of the Trade Agreements Act of 1979⁴² is to alleviate the problem of duplicative remedies which concerned the Antitrust Division. This subsection amends Section 337 to require the ITC not to entertain countervailing duty or antidumping complaints posing as Section 337 claims, while permitting the Commission to continue to hear hybrid cases in which both Section 337 and countervailing duty or antidumping claims are made—provided the latter claims are tracked through Commerce.⁴³ Nevertheless, the Division remains concerned that duplicative remedies are a potential impediment to freedom of commerce, and may continue to advocate this view as appropriate.

The Antitrust Division now routinely reviews Section 337 complaints filed at the ITC, together with interim and final recommendations by the ITC, to determine whether to comment on a case or a recommendation. For instance, the Division filed comments with the ITC recommending that the exclusion order for doxycycline not apply

³⁶ 19 U.S.C. § 1337(b)(2) (1976).

³⁷ 19 U.S.C. § 1337(f)(1) (Supp. III 1979).

³⁸ 43 Fed. Reg. 8304 (I.T.C. 1978), *disapproved by President*, 43 Fed. Reg. 17789 (1978), 1 ITRD (BNA) 5245.

³⁹ *Id.*

⁴⁰ Letter from Jonathan C. Rose, Deputy Ass't Att'y Gen., to ITC Chairman Will E. Leonard (Sept. 23, 1976) (copy on file in offices of the Northwestern Journal of International Law & Business).

⁴¹ Certain Color Television Receiving Sets, Investigation No. 337-TA-23 (I.T.C., filed March 5, 1977), I.T.C. Pub. No. 938 (May 1977).

⁴² Trade Agreements Act of 1979, § 1105(a)(2), 19 U.S.C. § 1337(b)(3) (Supp. III 1979).

⁴³ *Id.*

to amounts that had already been imported.⁴⁴ A majority of the ITC agreed with this recommendation.⁴⁵ The Division also has the opportunity to participate in inter-agency reviews of affirmative ITC proceedings and thereby influence recommendations made to the President based on the record developed at the ITC.

The Antitrust Division is also interested in the settlement of Section 337 matters. While aware of the benefits of settlement and reluctant to discourage settlement, we also desire to ensure that settlements are in the public interest and reflect the judgment of the agency or agencies involved and the policy of the particular statute in question, rather than being merely a reflection of the private interests of the parties or even amounting to a price-fixing or market allocation agreement. Settlements should not be so restrictive as to reduce future price competition among firms and thus lead to results little different from the results of price-fixing.⁴⁶

In this respect, in a recent Section 337 proceeding, the petitioner challenged the import of precision resistors from France allegedly manufactured with stolen know-how.⁴⁷ The respondent interposed what amounted to a counterclaim alleging an attempt to monopolize under Section 2 of the Sherman Act. The settlement entered into by the parties and considered by the Commission was similarly reviewed by the Division pursuant to its Section 337 authority.⁴⁸

An interesting variation on the Division's statutory role under Section 337 has arisen as a result of the ITC embarking on its first substantive rule-making. On February 27, 1980, the Commission proposed requiring country-of-origin marking on imported steel wire rope.⁴⁹ The Division has submitted comments⁵⁰ opposing the rule-making for

⁴⁴ Comments of U.S. Dep't of Justice, In the Matter of Doxycycline, Investigation No. 337-TA-3 (I.T.C., filed March 27, 1979), I.T.C. Pub. No. 964 (April 1979), 44 Fed. Reg. 22523 (I.T.C. 1979).

⁴⁵ In the Matter of Doxycycline, Investigation No. 337-TA-3 (I.T.C., filed March 27, 1979), I.T.C. Pub. No. 964 (April 1979), 44 Fed. Reg. 22523 (I.T.C. 1979).

⁴⁶ See Rosenthal Remarks, *supra* note 23; *The Antitrust Division's Activities in the Area of International Trade*, Remarks by Alexander W. Sierck, Dir. of Trade Pol'y, Antitrust Div., U.S. Dep't of Justice, before World Trade Inst., New York, N.Y. (Sept. 6, 1979).

⁴⁷ Certain Precision Resistor Chips, Investigation Nos. 337-TA-63/65 (I.T.C., filed May 9, 1980).

⁴⁸ Joint Motion to Terminate with Prejudice, In the Matter of Certain Precision Resistor Chips, Investigation Nos. 337-TA-63/65 (I.T.C. filed May 9, 1980).

⁴⁹ Proposed Rule Requiring Country-Of-Origin Marking On Imported Steel Wire Rope, 45 Fed. Reg. 12835 (1980) (to be codified in 19 C.F.R. ch.II, subch. C).

⁵⁰ Comments of the U.S. Dep't of Justice, In the Matter of Proposed Rule Requiring Country-Of-Origin Marking On Imported Steel Wire Rope, 45 Fed. Reg. 12835 (1980) (copy on file at offices of Northwestern Journal of International Law & Business).

two reasons. First, substantive unfair trade practice rule-making exceeds the legislative mandate of the ITC and hinders the President's responsibilities to take action on recommendations by the ITC under Section 337.⁵¹ Second, the proposed rule attempts to regulate persons not engaged in import and conflicts with extant statutes and regulations.⁵²

B. Antidumping Proceedings

While Section 337 is basically an international unfair trade practices statute, the antidumping law also has the aspects of an antitrust law (to prevent price discrimination used for monopolization of American markets) and of a "fair competition" statute (to prevent low-priced sales which take business from American sellers). The Antitrust Division takes an active interest in the antidumping law. The Division recognizes that a law against price discrimination, interpreted too strictly, can deter vigorous price competition. Therefore, Division statements submitted to the ITC may deal with the issue of defining the relevant "industry," "like product," or causality in a particular case, by offering an independent evaluation of the history, structure and conduct of a particular industry.

For instance, in the recent preliminary injury determination by the ITC on the U.S. Steel petition for antidumping relief, the Division submitted an extensive statement addressing several issues.⁵³ The Division suggested: (1) the use of a different base period upon which to make the injury determination; (2) an examination of only the most current conditions of the industry; (3) the disaggregation of carbon steel products into separate product categories by each country of import; and (4) an evaluation of current and past industry performance indicating no material injury or threat thereof by examining revenues, prices, profits, shipments and capacity utilization.⁵⁴ Although the ITC voted in favor of a preliminary finding of injury,⁵⁵ two of the Commissioners wrote opinions analyzing injury by disaggregating the separate product lines

⁵¹ *Id.* at 5-10.

⁵² *Id.* at 10-17.

⁵³ Statement of the U.S. Dep't of Justice, In the Matter of Certain Carbon Steel Products, Investigation Nos. 731-TA-18/24 (I.T.C., filed March 21, 1980), I.T.C. Pub. No. 1064 (May 1980), 1 ITRD (BNA) 5526 (copy on file at offices of Northwestern Journal of International Law & Business).

⁵⁴ *Id.* at 3-38.

⁵⁵ In the Matter of Certain Carbon Steel Products, Investigation Nos. 731-TA-18/24 (I.T.C., filed March 21, 1980), I.T.C. Pub. No. 1064 (May 1980), 1 ITRD (BNA) 5526.

by country of import thus following the Division recommendation.⁵⁶

The revised antidumping law⁵⁷ contains some procedural improvements over the prior law. It allows speedier disposition of antidumping matters and provides some clarification of the law. It remains to be seen whether the shorter procedures serve to prevent the length of antidumping cases from being a clog on competition, and do not unduly sacrifice opportunities for parties to present their cases adequately.

The Division addressed its concerns about possible undue restraints on import competition by commenting on proposed revisions of the antidumping duty regulations.⁵⁸ Three areas of concern were noted: (1) the possibility of action taken on the basis of incomplete information; (2) the possible abuse of the regulatory process by the filing of spurious petitions; and (3) the concern that relief granted might be in excess of that needed to offset the injury.

The Division has long urged the ITC to hold that alleged injury by reason of less-than-fair-value (LTFV) sales should not automatically be found where those sales merely match equally low prices of a domestic firm, a position supported by the 1974 report of the Senate Finance Committee,⁵⁹ and one consistent with the Trade Agreements Act of 1979⁶⁰ as well. Nevertheless, in making its injury determination, the ITC may take into account the price suppression effect of LTFV sales.⁶¹ We have also argued that the ITC in making its determination of injury, should always take account of the competitive context in which the sales of the imported merchandise occurred.⁶² Thus, a higher level of market penetration should be required to be shown in cases involving concentrated U.S. industries than in industries with

⁵⁶ 1 ITRD (BNA) at 5530, 5541 (Alberger, C., and Stern, C.).

⁵⁷ 19 U.S.C. § 1673(a)-(i) (Supp. III 1979).

⁵⁸ Comments of the U.S. Dep't of Justice on Proposed Revision of the Custom Regulations Relating to Antidumping Duties (copy on file at offices of Northwestern Journal of International Law & Business).

⁵⁹ See Brief of the Antitrust Div., U.S. Dep't of Justice at 13, Northern Bleached Hardwood Kraft Pulp from Canada, 38 Fed. Reg. 87 (Tariff Comm'n 1973); S. Rep. No. 93-1298, 93rd Cong., 2d Sess. 130 (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7186, 7316.

⁶⁰ See 19 U.S.C. § 1677(7)(c)(ii) (Supp. III 1979) which mandates that the ITC evaluate the effects of price undercutting, price depression and price suppression in making its injury determination.

⁶¹ 19 U.S.C. § 1677(7)(B)(ii) (Supp. III 1979).

⁶² Comments of the U.S. Dep't of Justice on Proposed Procedures For the Conduct of Investigations of Whether Injury to Domestic Industries Results From Imports Sold at Less Than Fair Value or From Subsidized Imports to the United States (Dec. 4, 1979); Statement of U.S. Dep't of Justice In The Matter of Certain Glass-Lined Steel Storage Tanks and Glass-Lined Steel Pressure Vessels, and Parts Thereof, From France, Investigation No. 701-TA-64 (I.T.C., filed Sept. 9, 1980) (copies on file at offices of Northwestern Journal of International Law & Business).

many competitors, and that antidumping policy should not be used to create a "price umbrella" under which inefficient domestic industries could survive and even prosper.⁶³

In the recent antidumping case involving subway cars from Japan and Italy, the Division contended that the petitioner, the Budd Company, failed to prove injury in view of a Buy-American preference in the Surface Transportation Assistance Act of 1978.⁶⁴ The Division argued that such a provision granted relief to the American transit car industry and that, in any event, in order to comply with the federal law, the Japanese and Italian firms would be required to assemble cars in the U.S. with parts of U.S. origin of more than 50% in value.⁶⁵ The ITC, agreeing with the Division's position, decided that the domestic industry had not been injured.⁶⁶

Justice, in another recent case, *Canadian Nails*,⁶⁷ contended that the domestic industry had not been injured by reason of imports of Canadian nails, since Canadian nails only comprised a small part of domestic nail imports and since those nails often sold above U.S. nail prices. The ITC agreed in concluding that the domestic industry had not been injured.⁶⁸ During the *Mexican Tomatoes* LTFV proceeding before the Treasury Department, the Division questioned whether Congress intended the same policy to apply in determining LTFV with respect to seasonal agricultural products as is applied with respect to mined and manufactured products.⁶⁹ In November, 1979, the Treasury Department—at that time the responsible authority—found no sales of less than fair value.⁷⁰

⁶³ Brief of the Antitrust Div., U.S. Dep't of Justice at 7, 11-23, *Large Power Transformers from France, Italy, Japan, Switzerland and the United Kingdom*, 37 Fed. Reg. 8136 (Tariff Comm'n 1972).

⁶⁴ Statement of the Antitrust Div., U.S. Dep't of Justice, at 8-10, *In the Matter of Rail Passenger Cars and Parts Thereof from Italy and Japan*, Investigation Nos. 731-TA-5/6 (Preliminary) (I.T.C., filed Jan. 1, 1980), I.T.C. Pub. No. 1034 (Feb. 1980), 1 ITRD (BNA) 5229.

⁶⁵ *Id.* at 14.

⁶⁶ *Rail Passenger Cars and Parts Thereof from Italy and Japan*, Determination of No Injury or Likelihood Thereof in Investigations Nos. 731-TA-5/6 (I.T.C., filed Jan. 1, 1980), I.T.C. Pub. No. 1034 (Feb. 1980), 1 ITRD (BNA) 5229.

⁶⁷ Comments of the U.S. Dep't of Justice, *In The Matter of Certain Steel Wire Nails From Canada*, Investigation No. AA1921-89 (I.T.C., filed Nov. 15, 1978), I.T.C. Pub. No. 937 (Feb. 1979).

⁶⁸ *Certain Steel Wire Nails From Canada*, Determination of No Injury in Investigation No. AA1921-89 (I.T.C., filed Nov. 15, 1978), I.T.C. Pub. No. 937 (Feb. 1979), 44 Fed. Reg. 7840 (I.T.C. 1979).

⁶⁹ Letter From John H. Shenefield, Ass't Att'y Gen., U.S. Dep't of Justice, to Robert H. Mundherin, Gen. Counsel, U.S. Dep't of the Treasury (July 16, 1979) (copy on file at offices of Northwestern Journal of International Law & Business).

⁷⁰ *Certain Fresh Winter Vegetables from Mexico*, 1 ITRD (BNA) 5339 (1980).

C. *Escape Clause and Proceedings*

Escape clause proceedings⁷¹ have more affinity with traditional tariff and quota barriers to trade than do Section 337 and antidumping procedures. The latter focus on unfair and possibly anticompetitive practices while the former can be invoked in the event of serious injury or threat of serious injury to American industry, even when that injury comes about as the result of greater productive efficiency on the part of foreign industry.

While the Trade Act of 1974 requires the ITC, in advising the President on import relief measures, to take into account the economic factors listed in Section 202(c) of that Act, including the effect on consumers and competition,⁷² there are other economic factors listed in that subsection, such as effect on employment, which may come into conflict with the interests of consumers and the general interest in preserving competition. Consequently, the Antitrust Division sometimes deems it necessary or advisable to intervene in escape clause proceedings to ensure that these interests are given proper weight when the record is being developed at the ITC.

In the recent *Stainless Steel and Alloy Tool Steel* escape clause extension proceeding,⁷³ for instance, the Division urged the ITC to take into consideration the fact that imports of specialty steel products may provide necessary incentives to innovation and price competition in that concentrated industry.⁷⁴ Similarly, the Division questioned whether the proper standard for measuring the effectiveness of import relief is "recovery" of the domestic industry, as that industry argued, or whether it is simply time for adjustment to an increased level of imports.⁷⁵

In the *Clothespin* case,⁷⁶ the Division argued at the Trade Policy Staff Committee level that import relief, if granted, should take the less

⁷¹ The term "escape clause" refers to provisions in the legislation that allow relief from tariff concessions which are causing injury to domestic industry. See 19 U.S.C. §§ 2251-2253 (Supp. III 1979).

⁷² Trade Act of 1974, § 202(c), 19 U.S.C. § 2253(i)(4) (1976).

⁷³ *Stainless Steel and Alloy Tool Steel*, Investigation No. 203-TA-5 (I.T.C., filed Nov. 30, 1978), I.T.C. Pub. No. 968 (April 1980).

⁷⁴ Prehearing Brief of the Antitrust Div., U.S. Dep't of Justice at 29, *Stainless Steel and Alloy Tool Steel*, Investigation No. 203-TA-5 (I.T.C., filed Nov. 30, 1978), I.T.C. Pub. No. 968 (April 1980).

⁷⁵ *Id.* at 16.

⁷⁶ *Clothespins From The People's Republic of China, The Polish People's Republic, and The Socialist Republic of Romania*, Investigation Nos. TA-406-2/3/4 (I.T.C., filed May 16, 1978), I.T.C. Pub. No. 902 (Aug. 1978), 1 ITRD (BNA) 5435.

restrictive form of tariffs rather than quotas.⁷⁷ The President, however, granted quota relief for this industry, essentially comprised of three small firms in an economically depressed area of rural Maine.⁷⁸ The Division was more successful in the *Zinc* case⁷⁹ in its argument to the ITC that increased imports had not been shown to have caused the industry's problems. The ITC majority so found and import relief was denied.⁸⁰ The Division enjoyed a similar success at the Trade Policy Staff Committee and Trade Policy Review Group levels in advocating, along with other agencies, that these groups recommend to the President that no relief was appropriate in the case of imported copper.⁸¹ The President followed that recommendation.⁸²

Similarly, Justice took part in deliberations of the Trade Policy Committee in formulating options for the President on color television import relief.⁸³ The domestic color television industry had enjoyed three years of relief from imports through the use of orderly marketing agreements (OMA's) with Japan, Korea and Taiwan and sought an extension of the OMA's on the same terms.⁸⁴ Justice, in concurrence with several other major participants in the interagency meetings, took the position that industry conditions had sufficiently improved to warrant the complete termination of import relief.⁸⁵ The President, in turn, chose to terminate relief as to imports from Japan and continue the relief as to color televisions from Taiwan and Korea on a modest scale.⁸⁶

⁷⁷ These discussions were in private interagency sessions, and therefore no documents are publicly available.

⁷⁸ Temporary Quantitative Limitation on the Importation into the United States of Certain Clothespins, 44 Fed. Reg. 10973 (1979).

⁷⁹ Statement of the U.S. Dep't of Justice on Unalloyed, Unwrought Zinc, Investigation No. TA-201-31 (I.T.C., filed Dec. 29, 1978), I.T.C. Pub. No. 894 (June 1978), 43 Fed. Reg. 27908 (I.T.C. 1978).

⁸⁰ Unalloyed, Unwrought Zinc, Investigation No. TA-201-31 (I.T.C., filed Dec. 29, 1977), I.T.C. Pub. No. 894 (June 1978), 43 Fed. Reg. 27908 (I.T.C. 1978).

⁸¹ See note 77 *supra*.

⁸² See Unalloyed, Unwrought Copper, Investigation No. TA-201-32 (I.T.C., filed Feb. 23, 1978), I.T.C. Pub. No. 905 (Aug. 1978), 43 Fed. Reg. 49523 (1978).

⁸³ See note 77 *supra*.

⁸⁴ The OMA with Japan was announced in Presidential Proclamation 4511, 42 Fed. Reg. 32747 (1977); the OMA's with Korea and Taiwan in Presidential Proclamation 4634, 44 Fed. Reg. 5633 (1979).

⁸⁵ See note 77 *supra*.

⁸⁶ Extension of the Orderly Marketing Agreements and Temporary Quantitative Limitations on the Importation Into the United States of Color Television Receivers and Certain Subassemblies Thereof, 45 Fed. Reg. 45237 (1980).

D. Countervailing Duty Cases

The latest type of administrative proceeding in which the Antitrust Division may come to play an important part are those involving countervailing duties.⁸⁷ These cases involve the issue of subsidization by government rather than conspiracy or abuse by private firms. In the past, except in the case of duty-free goods, duties were imposed without regard to injury to any industry in the U.S. Hence the Antitrust Division had little to say in these proceedings and did not seek to participate in them. Now, as a result of the Trade Agreements Act of 1979,⁸⁸ the standard for imposition of countervailing duties is material injury to an existing or potential American industry.⁸⁹ Plainly the Division may contribute on this issue, as it does in injury inquiries under the escape clause and antidumping laws. The Justice Department, as it has done in other trade proceedings in the past, will tend to intervene in those cases where a major domestic industry is involved, especially if that industry is one which is highly concentrated or less than fully competitive or if that industry is one with respect to which the Division has special knowledge or interest because of past or present antitrust violations. In these situations, Justice will usually be disposed to intervene if the import relief proposed in the form of countervailing duties will have substantial negative effects on competition or if important issues of trade law and policy are involved.

In a recent ITC final countervailing duty injury determination, *Cotton Textiles from Pakistan*,⁹⁰ the Division submitted a statement treating two substantial issues. First, the Division advocated a definition of the relevant industry that would take into account both production and consumption aspects of the product involved.⁹¹ Second, the Division submitted data on the average margin of underselling on each of six separate products and pointed out that the average subsidy paid by the government of Pakistan would account for less than 25% of the

⁸⁷ Countervailing duties are imposed when the administrative authority determines that the manufacture, production, or exportation of merchandise imported into the United States is being subsidized, directly or indirectly, and the ITC determines that an industry in the United States is materially injured, threatened with material injury, or its establishment is materially retarded by reason of imports of such merchandise. See 19 U.S.C. § 1671(a) (Supp. III 1979).

⁸⁸ Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979) (codified in scattered sections of 13, 19, 26, 28 U.S.C.).

⁸⁹ 19 U.S.C. § 1671 (Supp. III 1979).

⁹⁰ Textiles and Textile Products of Cotton From Pakistan, Investigation Nos. 701-TA-62/63 (June 19, 1980).

⁹¹ Prehearing Statement of the U.S. Dep't of Justice at 8, In the Matter of Textiles and Textile Products of Cotton from Pakistan, Investigation Nos. 701-TA-62/63 (June 19, 1980).

margin of underselling.⁹² The Commission ruled 5-0 that no injury had occurred as a result of the subsidized imports.⁹³

THE DIVISION'S ROLE IN TRADE POLICY

The Justice Department, through the Antitrust Division, participates in the day-to-day work of the Trade Policy Committee's subordinate committees, the Trade Policy Review Group (TPRG), at the assistant cabinet secretary level, and the Trade Policy Staff Committee (TPSC), that meet frequently on trade policy matters. These matters include a wide variety of topics, from vegetables to steel, from petrochemicals to computers.

For the last year these interagency groups have devoted most of their time to recommending policy objectives and priorities for the Tokyo Round of Multilateral Trade Negotiations (MTN) and for U.S. implementing legislation, the Trade Agreements Act of 1979, which President Carter signed on July 19, 1979.⁹⁴ Indeed, during the first half of 1979, the TPSC and its subcommittees met frequently to work on MTN matters at which the Department participated and was able to present competition policy concerns in a wide variety of contexts.⁹⁵

The Department's primary objective in participating in these interagency trade policy groups is to ensure that competition policy values receive a high priority among the considerations that lead to a particular U.S. policy position. In this setting the Department argues for a U.S. economy that is freely open to the stimulus and benefits of foreign competition.

In the months ahead, the interagency consultative groups in which the Department is active will be concerned with the implementation of the MTN accords by the various signatory nations, as well as by agencies of the U.S. Government. The new provisions on antidumping, countervailing duties, standards, and government procurement all present potentially complex and important implementation issues.

Justice expects to continue to participate in developing policy approaches for the current MTN negotiations on the Safeguards Code, which seeks to establish conditions for the grant of temporary relief from import competition. In our judgment, the obligations of a code covering the grant of temporary import relief should be applied to all

⁹² *Id.* at 11-21.

⁹³ See note 30 *supra*.

⁹⁴ See note 42 *supra*.

⁹⁵ See note 77 *supra*.

forms of bilateral and multilateral arrangements affecting the price or volume of imports in which our trading partners participate.

The Department also comments on other legislative proposals in the trade area. One area involves proposals to expand the Webb-Pomerene Act,⁹⁶ which exempts export associations from the application of the antitrust laws. Such Webb Act associations number only about 30 and participate in less than 1.5% of our export trade.⁹⁷ Bills presently pending in the Senate and House provide, *inter alia*, that the exemption be extended to cover services as well as goods and to cover export trading companies.⁹⁸ The proposed legislation provides for a new certification process which requires a showing of particularized need and a disclosure of the scope and method of operation of the export association or trading company.⁹⁹ The Administration, following an inter-agency consultation including the Division, has endorsed the approach of Senate bill S.2718.¹⁰⁰

The Department is also involved with the work of the Commodities Policy Task Force, an inter-agency group which advises on objectives to be sought in the negotiations for proposed international commodities agreements. Under the recent government reorganization plan,¹⁰¹ the Special Trade Representative has assumed responsibility for commodity policy. The Antitrust Division will continue to play an active consultative role.

The Division advised the Task Force that private participation in the implementation of commodity stabilization agreements would render them vulnerable to attack under the antitrust laws, and that private agreements or side-deals arising out of these agreements are even less likely to escape antitrust scrutiny than private involvement in carrying out public agreements.¹⁰² The Division also urged that commodity stabilization agreements, however desirable they may be from the standpoint of U.S. political or economic goals, must be implemented in a reasonable and non-discriminatory manner and that the U.S. should always bear in mind that the best long-run solution to trade imbalances

⁹⁶ 15 U.S.C. § 62 (1976).

⁹⁷ Comment, *The Webb-Pomerene Act: A Reexamination of Export Cartels in World Trade*, 19 VA. J. INT'L L. 151, 173 (1978).

⁹⁸ See S. 864, 96th Cong., 1st Sess. (1979); S. 2718, 96th Cong., 2d Sess. (1980); S. 2748, 96th Cong., 2d Sess. (1980).

⁹⁹ S. 2718, § 4(b)(1), 96th Cong., 2d Sess. (1980).

¹⁰⁰ See *Hearings on S. 2718 Before the Subcomm. on Int'l Finance of the Sen. Comm. on Banking, Housing, and Urban Affairs*, 96th Cong., 2d Sess. 11 (1980) (statement of Philip M. Klutznick, Sec'y of Com.).

¹⁰¹ Exec. Order No. 12188, 45 Fed. Reg. 989 (Jan. 4, 1980).

¹⁰² See note 77 *supra*.

is a system of free trade, whatever departures from free trade may be necessary over the short term.¹⁰³

The Antitrust Division's participation in these various groups and committees is of relatively recent origin, and, as a result our contribution has initially not been as great as that of some agencies with greater experience. But our knowledge of the relation between competition policy and trade policy is growing rapidly and thus our contribution in these areas should increase accordingly.¹⁰⁴

Much remains to be done in removing and preventing barriers to international trade. In continuing its varied prosecutorial and consultative tasks, the Antitrust Division believes it can make a substantial contribution toward those important goals.

¹⁰³ *Id.*

¹⁰⁴ Shenefield Remarks, note 2 *supra*.