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Levi Daniel Boone III
University of Kentucky

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Notes

UNITED STATES PROTECTIONISM IN INTERNATIONAL TRADE—THE LAWS, THE COURTS AND THE ECONOMIC RATIONALE—AN OVERVIEW

Recent international economic developments, particularly the devaluation of the dollar, have had a disquieting effect on most Americans. At such times of economic crisis, emotional appeals for protection of the national economy by use of import barriers fall on receptive ears and become politically expedient. From the time of the Venetian merchant to the recent reopening of China to the United States, foreign trade has always been viewed with a combination of naive curiosity and guarded suspicion. The treasures of foreign countries are prized both for their novelty and their usefulness. Yet, we are always wary of the strangers "bearing gifts." Most Americans (and indeed most nationals, whatever their country) view international trade with this dual perspective and become suspicious when the benefits become shrouded in economic crisis. Unfortunately, most discussions of international trade never evolve above the emotional level. The lawyer dealing with international transactions cannot afford the luxury of ignorance or emotionalism in this area; he must understand the form which protectionism takes.

The following overview of the extensive and complex phenomenon of protectionism in the United States begins with a hypothetical situation similar to one which could lead a practitioner on his first foray into the specialized world of international trade. In the first section we shall examine "classification," an area of critical importance to the importer. The second section discusses the Customs Court and the Court of Customs and Patent Appeals, the forums in which most trade cases are decided, and will look briefly at the type of cases which may arise and the procedures for resolving them. The final section examines economic arguments for protectionism, with particular emphasis on tariffs, the primary protective device employed by the United States.

I. CLASSIFICATION, A SEMANTIC QUESTION!

Most writers who describe customs classification discuss the general approach to the tariff schedules rather than how any particular product might be classified. Apparently, they consider the product approach

to be of limited value in view of the tremendous number of diverse products which are imported annually. However, I will proceed on the basis that there is some practical merit to the product approach.

Consider the following hypothetical situation. A prospective entrepreneur is interested in importing a full line of manufactured products consisting of handicrafts, predominately wood carvings. He knows the manufacturer's price and the cost of shipping in quantity, and has an idea of the price at which he can sell these items. There remains only the question of duty in assessing the prospects of such a venture. Can he pay the duty and still remain competitive?

The *Tariff Schedules of the United States* (T.S.U.S.) published by the Tariff Commission give the rates applicable to any imported product. The schedules are also set forth in their entirety, including general headnotes, in 19 *United States Code* § 1202 (1970) [herein-cited as U.S.C.]. When examining the schedules, it is always helpful to initially read the general headnotes and consider them in reference to the question involved. General Headnote 3 pertaining to rates of duty is the first headnote deserving comment. It describes particular arrangements for products coming from the Philippine Republic and Canada.¹ If the hypothetical woodcarvings are imported from either of these countries, this headnote may be of some importance. More importantly, however, it distinguishes between the two rates of duty applicable to every item. After each item there are two columns, each listing a different rate. Column 1 is the lower rate and pertains primarily to products imported from noncommunist countries. Column 2 lists the rate at which products coming from communist countries² are to be taxed and to a large extent reflects the tariff rates in the original Tariff Act of 1930.³ Headnote 4 deals with the methods of modifying rates;⁴ headnote 5 lists intangibles to which the schedules are not applicable;⁵ and headnote 6 describes the circumstances in which packaging containers may be subject to tariff.⁶ Headnote 7 is particularly noteworthy⁷ in that it provides that articles subject to different rates of duty may be subject to the highest rate if the consignee does not adhere to procedures specified therein for facilitating

¹ 19 U.S.C. § 1202 (1970) (General Headnote 3). The reference in this particular headnote to Cuba is no longer applicable.

² Although the communist-noncommunist distinction is not technically correct, since Poland and Yugoslavia are column 1 countries, it will suffice for the present discussion.

³ Audett, *Customs Law—A Brief Review and Discussion*, 25 Sw. L.J. 441, 450 (1971).

⁴ 19 U.S.C. § 1202 (1970) (General Headnote 4).

⁵ 19 U.S.C. § 1202 (1970) (General Headnote 5).

⁶ 19 U.S.C. § 1202 (1970) (General Headnote 6).

⁷ 19 U.S.C. § 1202 (1970) (General Headnote 7).

inspection. Headnotes 8 and 9 give abbreviations and definitions to be used throughout the schedules.⁸ Headnote 10 is extremely important.⁹ It contains general interpretive rules which are to be applied when determining a product's classification and will be referred to in this discussion when necessary to distinguish between several possible classifications.

Turning now to the tariff schedules, we find that there are eight schedules, each divided into parts and subparts containing several numbered items. After the item number a description is given, followed by the rate of duty for the particular item. The schedules are entitled, (1) Animal and Vegetable Products; (2) Wood and Paper, Printed Matter; (3) Textile Fibers and Textile Products; (4) Chemical and Related Products; (5) Nonmetallic Minerals and Products; (6) Metals and Metal Products; (7) Specified Products: Miscellaneous and Nonenumerated Products; and (8) Special Classification Provisions. The first schedule that would catch the eye of a person seeking the customs classification for wood carvings is Schedule 2—Wood and Paper, Printed Matter.¹⁰

Schedule 2 is divided into five parts: (1) Wood and Wood Products; (2) Cork and Corp Products, Bamboo, Rattan, Willow and Chip, Basketwork, Wickerwork, and Related Products of Fibrous Vegetable Substances; (3) Wood Veneers, Plywood and Other Wood-Veneer Assemblies, and Building Boards; (4) Paper, Paperboard, and Products Thereof; (5) Books, Pamphlets, and Other Printed and Manuscript Matter. Once again a logical choice presents itself, *viz*, Wood and Wood Products. Looking at subparts A through F of this part, the choice becomes only slightly more difficult. Easily excluded are subparts A through D: Rough and Primary Wood Products; Wood Waste; Lumber, Flooring, and Molding; Densified Wood and Articles Thereof; and Wooden Containers. The two remaining subparts are catch-all headings: E, Miscellaneous Products of Wood, and F, Articles Not Specially Provided For, of Wood. Investigation of both of these subparts on an item by item basis now becomes necessary. Subpart E-Miscellaneous Products of Wood, contains fifteen separate classifications from Wood doors with or without hardware to Household utensils and parts thereof, *all* the foregoing not specifically provided for, of wood. As this last classification indicates, all the other

⁸ 19 U.S.C. § 1202 (1970) (General Headnotes 8 and 9).

⁹ 19 U.S.C. § 1202 (1970) (General Headnote 10).

¹⁰ 19 U.S.C. § 1202 (1970). General Headnote 10(b) points out that "the titles of the various schedules, parts, and subparts and the footnotes therein are intended for convenience in reference only and have no legal or interpretative significance."

items in subpart E were household items designed for some utilitarian purpose. Inspection of subpart F is therefore necessary. Subpart F begins with a headnote which states, "[t]his subpart covers all products of wood which are not provided for elsewhere in the tariff schedules." Within this subpart there are only two items, the last of which, item 207.01, has no bearing on our problem. Therefore, with relative ease we arrive at a customs classification for the wood carvings as item 207.00, Articles Not Specifically Provided For, of Wood, rate of duty in column 1, 8% ad valorem, and in column 2, 33 $\frac{1}{3}$ % ad valorem. For substantiation of this conclusion, it is helpful to check with *Summaries of Trade and Tariff Information*,¹¹ a publication of the United States Tariff Commission. In the discussion of item 207.00 found there, the first article mentioned is wood carvings. "Such carvings consist of figurines and novelties (many of which are produced by machine) for display and decoration in homes and offices."¹²

To move confidently to another part of the problem at this point would be premature. The classification at which we arrived, *i.e.*, 207.00, is a spillover provision designed to encompass those items not described more specifically elsewhere in the tariff schedules. The rules of interpretation in General Headnote 10 state:

(c) an imported article which is described in two or more provisions of the schedules is classifiable in the provision which most specifically describes it¹³

Thus, our original designation as woodcarvings may have been imprecise. If carved picture frames are among the articles the prospective importer plans to purchase, on closer inspection we discover that subpart E lists item 206.60, picture and mirror frames, of wood. If this example does not make one readily aware of the inherent danger of imprecise characterization, a few more examples may be enlightening.

Suppose the products sold by the foreign manufacturer are chess sets with carved wooden figures and wooden inlaid board. Careful search of the schedules will uncover, in Schedule 7, item 734.15 which encompasses, "Chess . . . and other games played on boards of special design, all the foregoing games and parts thereof (including their boards). . . ."¹⁴ The rate of duty here is two percent greater for column 1 countries than the comparable rate on item 207.00. The

¹¹ 2:2 TARIFF COMM'N, SUMMARIES OF TRADE AND TARIFF INFORMATION 111 (1968).

¹² *Id.*

¹³ 19 U.S.C. § 1202 (1970) (General Headnote 10(c)).

¹⁴ 19 U.S.C. § 1202 (1970) (Schedule 7 (734.15)).

erroneous classification would be even more dramatic and costly if a portion of the imports consisted of handcrafted ship models. In *Sawers v. United States*,¹⁵ this point was raised, the importer contending that his model boats, of chief value wood,¹⁶ should be classified under item 207.00 rather than item 737.15, the collector's determination. The rate of duty for item 737.15 was 35% ad valorem.¹⁷ The importer contended that because these models were of such high quality and value they were not of the type contemplated in 737.15; however, the Customs Court found no language in the schedule "differentiating between types of model boats with respect to value, quality of craftsmanship."¹⁸ In this case, the difference in amount of duty collected under the two classifications was almost 20% of the purchase price!

A more interesting conflict might arise between item 207.00 and item 737.40 (toy figures of animated objects). In *United States v. Abercrombie & Fitch Co.*,¹⁹ the importer succeeded in his claim that this latter classification was not applicable to miniature figures representing a hunt group. This case arose under the original Tariff Act of 1930, prior to a significant revision in the wording of this classification which might produce an opposite result today. Under the old law the term "toy" was defined as "an article chiefly used for the amusement of children, whether or not also suitable for physical exercise or for mental development."²⁰ The importer produced witnesses who testified that these articles were not used "for the amusement of children."²¹ The opinion of the Court of Customs and Patent Appeals emphasized the limits which the word "child" placed on the meaning of the term "toy" as used in this tariff schedule. All such hair splitting is rendered nugatory by the present subpart E headnote in schedule 7. Headnote 2 states that, "[f]or purposes of the tariff schedules, a 'toy' is an article chiefly used for the amusement of children *or adults*."²² Of course, the opportunity for haggling over the definition of the word "amusement" is still present.

Hopefully, these examples, while not exhaustive, have demonstrated some of the pitfalls which await the unsuspecting in the field of customs law. The safest approach is to let the Bureau of Customs do

¹⁵ 285 F. Supp. 852 (Cust. Ct. 1968).

¹⁶ When designations in the tariff schedules speak of an item "of chief value wood . . ." they mean that if component materials used in the finished product were valued separately, then one material would be valued greater than all other component parts.

¹⁷ Today the rate is 17.5% ad valorem.

¹⁸ *Sawers v. United States*, 285 F. Supp. 852, 854 (Cust. Ct. 1968).

¹⁹ 20 C.C.P.A. 267 (1932).

²⁰ Tariff Act of 1930, ch. 497, § 1513, 46 Stat. 660.

²¹ *United States v. Abercrombie & Fitch Co.*, 20 C.C.P.A. 267, 270 (1932).

²² 19 U.S.C. § 1202 (1970) (Schedule 7) (emphasis added).

the initial footwork. An exporter to the United States or an American importer may obtain a binding ruling on the tariff classification and rate of duty of specified merchandise before shipment to the United States. The Commissioner of Customs requires the following information to determine the prospective rate of duty: (a) a complete description of the goods, or when a written description is inadequate, samples, sketches, diagrams, or other illustrative material may be sent; (b) the method of manufacture or fabrication; (c) specifications and analyses; (d) quantities and costs of the component materials with percentages if possible; and (e) information available concerning the commercial designation and chief use in the United States.²³ The prospect that a foreign supplier may be reluctant to provide all of this information is always present. If the information furnished is adequate, the Bureau of Customs will make a binding decision upon which the importer can rely as a basis for placing or accepting orders for goods. Such decisions cannot be later changed by an administrative decision to impose a higher rate of duty without public notice of the proposed change to afford interested parties an opportunity to make written representations of the correct rate of duty for the merchandise.²⁴ After receiving such a binding decision the importer can then proceed, assured that this classification is the ceiling rate of duty. While the binding is compulsory upon the customs agents, it does not prevent the importer from presenting a case for a lower rate by arguing that another classification is the proper one.

This complex classification system has reached its present form through a process of evolution reflecting changes in trade policy. The primary function of this structure is to provide protection for domestic businesses unable to compete in a free market system. The difficulties of the classification system necessitate an added expense beyond the actual amount of duty levied on any particular item which can be characterized as a "hidden" duty. Such "hidden" duties brought about by legal complexities are woven into almost every aspect of the laws dealing with importation. Correct determination of the classification of imported goods is only one of a number of problems that can arise. Next we shall look at the courts in which such problems are first examined and see how they are dealt with.

II. DESCRIPTION OF THE COURTS

A. *Customs Court*

Litigation of customs matters antedates the government of the

²³ BUREAU OF CUSTOMS, CUSTOMS DUTY RULINGS ON PROSPECTIVE IMPORTS (July 1965).

²⁴ *Id.*

United States.²⁵ The important position which the policies of customs collection occupied in early America is indicated by the fact that the first substantive statute enacted by the First Congress was the Tariff Act of 1789.²⁶ Customs duties were the initial and for a long period of time the principal source of federal revenue.²⁷ Under the original Tariff Act customs suits were brought in county or state courts by a common law action against the collector of customs.²⁸ Later the action was placed within the exclusive jurisdiction of the district or

²⁵ Johnson, *The United States Customs Court—Its History, Jurisdiction, and Procedure*, 7 OKLA. L. REV. 393, n.2 (1954). [hereinafter cited as Johnson, *Customs Court*]. The colonial tariff history is summarized as follows:

Our colonial forebears [sic] also claimed and exercised the right to levy duties on imports and exports crossing the boundaries of the respective colonies. The first customhouse erected in this country was at what was then known as Hell Gate, on the bank of the East River adjacent to the then small settlement on Manhattan Island, for the sole purpose of preventing adjoining and nearby colonies from peddling their farm products to the residents of Manhattan without paying a duty or tax thereon.

Later, customhouses sprang up in New England to protect farmers of that region against certain importations from the southern colonies, and Maryland and Virginia erected their own "Hell Gates" and passed retaliatory measures to protect their tobacco growers.

As the population of the colonies increased and new frontiers were opened, the rivalry grew more tense and trade problems mounted, not only between the respective colonies, but especially in the all-important and increasing problem of the necessity for exacting import or tariff duties upon goods from foreign governments.

A tariff system had been in operation in the old world for generations when the American colonies were founded. History records that the unreasonably high duties imposed upon the American colonists by Great Britain was an important factor in fomenting the American Revolution. For more than fifty years prior thereto a trade balance tide against the American colonists and in favor of England had been constantly rising. Then, from the ending of the Revolutionary War to the convening of the first Congress, this struggling young country became financially embarrassed. The thirteen colonies, held together only by the Articles of Confederation, began imposing duties on commerce between themselves and adjacent states, but there was no organized tariff system. Despite the fact that they had won their independence, much suspicion and bickering developed prior to the time that the United States of America as such came into being. Some had their tariff rates very high; others much lower, and at least one had no tariff at all.

The situation became increasingly worse, especially government finances; in fact, the economic conditions among the respective colonies became so chaotic it was evident that one of the pressing and paramount issues to be presented to the Constitutional Convention was a uniform system of collecting tariff duties. It was therefore written into the Federal Constitution as adopted, and which became effective March 4, 1789, that the Congress be given complete control of foreign trade and the states surrender to the federal government the power to exact import duties.

²⁶ "An act for laying a Duty on Goods, Wares, and Merchandise Imported into the United States." Act of July 4, 1789, 1 Stat. 24. The Act of July 31, 1789, 1 Stat. 29 provides for the method of collecting such duties.

²⁷ Hess, *Legal Problems of the American Importer*, 35 U. Mo. K.C.L. REV. 32 (1967).

²⁸ Johnson, *Customs Court*, *supra* note 25, at 394.

circuit courts,²⁹ but by 1890 this structure had become completely unworkable. In response, Congress enacted the Customs Administrative Act of June 10, 1890,³⁰ which "codified and coordinated" the administrative management of customs. In addition the Act established the Board of General Appraisers, the forerunner of the Customs Court, and granted it the powers, duties and functions of a district court.³¹ The present United States Customs Court was created in 1926,³² but there was no significant change in its functions, powers and duties from that of the Board of General Appraisers.³³

The United States Customs Court is composed of nine judges appointed for life by the President, by and with the advice and consent of the Senate. The President designates one of the judges as the chief judge³⁴ to supervise the fiscal affairs and clerical operation of the court, make assignments, promulgate dockets, and preside at any session of the court which he attends.³⁵ The office of the court and official station of the judges is in New York City,³⁶ but the chief judge may direct judges to proceed to any port or place within the jurisdiction of the United States to preside at a trial or hearing. The chief judge may issue an order authorizing a judge of the court to preside at an evidentiary hearing in a foreign country³⁷ upon application of a party or upon his own initiative with a showing that the interests of economy, efficiency, and justice will be served.

The Customs Court has exclusive jurisdiction over all civil actions brought to contest administrative decisions by customs officers with regard to imported products. The jurisdiction of the court is set out in 28 U.S.C. § 1582 (Supp. I, 1971), and includes power to hear all charges of whatever character within the jurisdiction of the Secretary of the Treasury, exclusion of entry or delivery of articles, refusal of drawback claims, and refusal to reliquidate customs entries to correct alleged errors. Under the heading of charges a party could attack any action causing him to make a payment to the Treasury Department. Drawback claims arise when a manufacturer imports materials, pays the duty, and uses them to produce a finished product for export. Upon export he will apply for a return of the duty paid. "Liquidation" is the term given to the process the customs official uses to determine

²⁹ *Id.*

³⁰ Ch. 407, 26 Stat. 798. William McKinley, then a member of Congress and Chairman of the House Ways and Means Committee, sponsored the act.

³¹ Johnson, *Customs Court*, *supra* note 25, at 394.

³² 28 U.S.C. § 1581 (1970).

³³ Johnson, *Customs Court*, *supra* note 25, at 394.

³⁴ 28 U.S.C. § 251 (1970).

³⁵ 28 U.S.C. § 253 (1970).

³⁶ 28 U.S.C. § 251 (1970).

³⁷ 28 U.S.C. § 254(b) (Supp. I, 1971).

the amount of duty owed for a particular item. The primary administrative remedy an importer will pursue after an adverse liquidation is to try and get a redetermination by the customs official which is favorable to the importer (*i.e.*, reliquidation).

Most actions will arise at the instance of a party entertaining one of two conflicting interests, that is, either the importer trying for a more favorable rate or the domestic manufacturer, producer, or wholesaler who competes with the product and desires a high duty on competing imports. However, explicit in the jurisdictional grant is the stipulation that administrative protest procedures under 19 U.S.C. §§ 1515-16 must first be exhausted before one seeks recourse to the Customs Court.

B. *Court of Customs and Patent Appeals*

Prior to the establishment of the Court of Customs and Patent Appeals in 1909, the United States circuit courts had jurisdiction over appeals from the Board of General Appraisers.³⁸ The Court of Customs and Patent Appeals, created by the Payne-Aldrich Tariff Act, was designated the United States Court of Customs Appeals.³⁹ The Court was given exclusive jurisdiction over all appeals from final decisions of the Board.⁴⁰ When the Court's jurisdiction was expanded in 1929 to include appeals from decisions of the tribunals of the Patent Office, the name of the court was changed to the Court of Customs and Patent Appeals [hereinafter cited as C.C.P.A.].⁴¹

The C.C.P.A. has jurisdiction to review final decisions of the Customs Court in all cases.⁴² The Court also reviews decisions of the Patent Office,⁴³ certain findings of the Secretary of Commerce,⁴⁴ and decisions of the Plant Variety Protection Office.⁴⁵ More importantly, for purposes of the present discussion the C.C.P.A. has jurisdiction to review findings of law of the United States Tariff Commission relating to unfair practices in import trade as defined by 19 U.S.C. § 1337⁴⁶ which was Section 337 of the Tariff Act of 1930. These Section 337

³⁸ Customs Administrative Act of 1890, ch. 407, § 15, 26 Stat. 138.

³⁹ Payne-Aldrich Tariff Act of 1909, ch. § 29, 36 Stat. 105.

⁴⁰ *Id.*

⁴¹ Act of March 2, 1929, ch. 488, 45 Stat. 1475.

⁴² 28 U.S.C. § 1541 (1970). The 1970 amendment expanded jurisdiction from authority to review questions of law and fact in all final decisions of the Customs Court concerning classification of merchandise and questions of law in all final decisions of the Customs Court concerning collection of customs revenues, to authority to review all final judgments or orders of the Customs Court and to review interlocutory orders of the Customs Court under certain conditions.

⁴³ 28 U.S.C. § 1542 (1970).

⁴⁴ 28 U.S.C. § 1544 (1970).

⁴⁵ 28 U.S.C. § 1545 (1970).

⁴⁶ 28 U.S.C. § 1543 (1970).

cases⁴⁷ will be discussed following examination of cases arising under the Customs Court.

C. *Constitutional or Legislative Court?*

The debate over whether the Customs Court and the C.C.P.A. are "legislative" or "constitutional" courts was apparently settled by the United States Supreme Court in *Glidden Company v. Zdanok*.⁴⁸ However, the historical evolution leading to this decision is interesting. In 1929 the Supreme Court held in *Ex parte Bakelite Corp.*,⁴⁹ that the Court of Customs Appeals (later the C.C.P.A.) was a legislative court, and in so doing mentioned the Customs Court: "Formerly [the Customs Court] was the Board of General Appraisers. Congress assumed to make the Board a court by changing the name."⁵⁰ Justice Van Devanter, speaking for the Court, explained that it was a mistake to assume ". . . that whether a court is one class or the other depends on the intention of Congress, . . . the true test lies in the power under which the court was created and in the jurisdiction conferred."⁵¹ Congress set the stage for *Glidden* in 1956 and 1958 by declaring that the Customs Court and the C.C.P.A. were Article III courts.⁵² Only seven Justices participated in the *Glidden* decision, and the majority split as to the proper grounds on which to base the decision. Speaking for the majority, Justice Harlan, with Justices Brennan and Stewart concurring, concluded that *Bakelite* should be overruled. He considered the congressional declaration as persuasive rather than controlling.⁵³ Justice Clark spoke for the other faction of the majority which believed that the jurisdiction of the C.C.P.A. had been significantly transformed since the *Bakelite* decision: "In view of the evolution of its jurisdiction, I believe the court became an Article III court upon the clear manifestation of congressional intent that it be such."⁵⁴ Although the basis on which the C.C.P.A. is regarded as a "constitutional" court may be questionable, its status as such no longer seems to be in doubt. The same is probably now true of the Customs Court.⁵⁵ Therefore, both courts are limited by the case or controversy

⁴⁷ 19 U.S.C. § 1337 (1970).

⁴⁸ 370 U.S. 530 (1961).

⁴⁹ 279 U.S. 438 (1929).

⁵⁰ *Id.* at 457.

⁵¹ *Id.* at 459.

⁵² See 28 U.S.C. §§ 211, 251 (1970).

⁵³ 370 U.S. 530, 542 (1961).

⁵⁴ 370 U.S. 530, 588 (1961). Chief Justice Warren concurred with this opinion.

⁵⁵ See *Eastern State Petroleum Corp. v. Rogers*, 280 F.2d 611 (D.C. Cir. 1960).

requirements of Article III of the Constitution and cannot give advisory opinions.

D. *The Parties and Types of Cases*

As stated above, the parties interested in customs litigation come from two different categories and seek antithetical results. The majority of the cases involve classification or valuation of a particular product being cleared through customs. Importers desire classification of an item under a heading that gives them the lowest possible rate of duty and, since the rate is usually an ad valorem percentage, the lowest possible valuation of the product. Domestic businessmen who must compete with the imported product are obviously desirous of a higher rate and value decision. Although this type of litigation is the most common, various other situations generate customs litigation.

The Customs Court cases arising under Section 336 of the Tariff Act of 1930, as amended,⁵⁶ deal with Presidential action changing rates of duty or valuation of a particular item in conjunction with Tariff Commission findings. Dumping of foreign goods into the United States market is controlled by the Anti-dumping Act of 1921.⁵⁷ A specific form of dumping involving the imposition of countervailing duties is provided for in Section 303 of the Tariff Act of 1930, as amended.⁵⁸ Cases may arise with respect to the President's action under the Trade Expansion Act of 1962 to modify concessions enacted in trade agreements.⁵⁹ Similarly, Presidential action taken under Section 22 of the Agricultural Adjustment Act of 1933 to protect domestic agricultural programs may be a source of litigation.⁶⁰ Finally, actions arising under Section 337 of the Tariff Act of 1930 are handled in the C.C.P.A.⁶¹

E. *Judicial Review*

In examining judicial review of various trade laws the key factor is the scope of review. Because of the extensive delegation of power over foreign trade matters by Congress to the executive, the judiciary has tended to exercise a narrow scope of review in most of these areas.

1. *Section 336*

Under Section 336 of the Tariff Act of 1930, as amended, the Tariff

⁵⁶ 19 U.S.C. § 1336 (1970).

⁵⁷ 19 U.S.C. §§ 160, 162-66, 170-73 (1970); 19 U.S.C.A. §§ 161, 167-69 (Supp. 1973).

⁵⁸ 19 U.S.C. § 1303 (1970).

⁵⁹ 19 U.S.C. § 1981 (1970).

⁶⁰ 7 U.S.C. § 624 (1970).

⁶¹ 28 U.S.C. § 1543 (1970).

Commission advises the President of possible changes in the rate of duty or in the valuation basis to equalize the cost of similar domestic and foreign articles. Prior to rendering such advice, the Tariff Commission must hold hearings after giving public notice to afford reasonable opportunity for interested parties to be present, produce evidence, and be heard. The President makes the ultimate determination to increase or decrease duties, but he is limited to those changes recommended by the Commission.⁶² Section 336 represents a change from Section 315 of the Tariff Act of 1922,⁶³ which is superseded, to the extent that in the prior act the President was not limited to the recommendations of the Commission when exercising his discretionary power. However, the basic functions of the President and the Commission under the present statute are the same as under Section 315 of the old act. Therefore, case law under the Tariff Act of 1922 is still applicable to the revised procedure.

Judicial review of the administration of Section 336 is governed by Sections 501,⁶⁴ 514,⁶⁵ 515,⁶⁶ and 516⁶⁷ of the Tariff Act of 1930. If there is an increase in the rate of duty, the importer may appeal under Sections 514 and 515; where the action in question is a change in the basis of valuation, the appeal must be pursued under Section 501. The domestic producer may appeal decreases in the rate of duty under Section 516(b) and (c).

The scope of review which the Customs Court and the C.C.P.A. has exercised under Section 336 has vacillated. In light of the Supreme Court decision in *United States v. George S. Bush & Co.*,⁶⁸ the scope of judicial review is apparently quite narrow. Review should be limited to an examination of whether the Commission has conducted hearings with proper notice and whether the action taken by the President was within the prescribed statutory rate and value restrictions and within the scope of the notice.⁶⁹ *Bush* prohibited the lower courts from continuing the practice of looking beyond the notice and findings of the Commission. In so doing, the lower courts had been incorrectly examining the Commission's advice and substituting their

⁶² 19 U.S.C. § 1336(c) (1970).

⁶³ Act of Sept. 21, 1922, ch. 356, § 315, 42 Stat. 941.

⁶⁴ 19 U.S.C. § 1501 (1970).

⁶⁵ *Id.* § 1514.

⁶⁶ *Id.* § 1515.

⁶⁷ *Id.* § 1516.

⁶⁸ 310 U.S. 371 (1940).

⁶⁹ See Metzger & Musrey, *Judicial Review of Tariff Commission Actions and Proceedings*, 56 CORNELL L. REV. 285, 305 (1971) [hereinafter cited as Metzger & Musrey, *Judicial Review*].

judgment for that of the President.⁷⁰ The virtually unlimited power of Congress in foreign trade regulatory matters has within constitutional limits been delegated to the President. The judgment of the President that the facts indicate a need for a rate change "is no more subject to judicial review under [the] statutory scheme than if Congress itself had exercised that judgment."⁷¹

The significance of Section 336 has decreased.⁷² The Trade Agreement Act of 1934 made it applicable only to articles not covered in trade agreement concessions with other countries.⁷³ The number of such articles is now extremely small; however, litigation under this section is still considered important because of the functional similarity between Section 336 and other regulatory statutes administered by the Tariff Commission.⁷⁴

2. *Anti-dumping*

Judicial review provisions under the Anti-dumping Act of 1921 are the same as those just discussed. The essential elements of dumping are sales at less than fair value and injury to an industry in the United States.⁷⁵ The power delegated by Congress in this act differs from Section 336 power in that under Section 336 the decision to act upon the Commission's recommendation is within the discretion of the President, whereas under the Anti-dumping Act a determination of dumping makes the imposition of duties mandatory.⁷⁶

In addition to finding sale and injury, the Secretary of the Treasury and the Tariff Commission are required by statute to publish a statement of reasons.⁷⁷ Thus the Customs Court and the C.C.P.A. have a legitimate judicial function to perform in this area. The scope of this review should be limited to whether in light of the reasons promulgated, the determinations have a rational basis in law. If the court were to conclude that there is no rational basis in law for the determinations or that the reasons do not provide an adequate basis to render a determination, then it should set aside the value and price determinations of the appraisers and remand the case for further administrative

⁷⁰ *Id.*

⁷¹ *George S. Bush & Co. v. United States*, 310 U.S. 371, 380 (1940).

⁷² Metzger & Musrey, *Judicial Review*, *supra* note 69, at 306.

⁷³ 19 U.S.C. § 1352(a) (1970).

⁷⁴ Metzger & Musrey, *Judicial Review*, *supra* note 69, at 306.

⁷⁵ See generally Weeks, *Introduction to the Anti-dumping Law: A Form of Protection for the American Manufacturer*, 35 ALBANY L. REV. 182 (1971) [hereinafter cited as Weeks, *Anti-dumping*]. The elements of dumping will be explained in greater detail in section three.

⁷⁶ See Metzger & Musrey, *Judicial Review*, *supra* note 69, at 327.

⁷⁷ 19 U.S.C. § 160 (1970).

proceedings. Such proceedings would be for the purpose of making a new determination on the matter of injury or sale at less than fair value or for promulgating a more detailed or intelligible statement of reasons.⁷⁸

3. *Countervailing Duties*

A specific type of dumping has been singled out for special procedures termed countervailing duties.⁷⁹ Under Section 303 of the Tariff Act of 1930 imposition of countervailing duties is provided for when the foreign manufacturer or exporter is receiving what amounts to a subsidy.⁸⁰ An importer of merchandise covered by a countervailing duty order may challenge the administrative decision that a bounty or grant exists by filing a written protest under Section 514 of the Tariff Act of 1930 within 90 days after liquidation of the entry to which the protest applies.⁸¹ The protest is filed with the District Director of Customs. If he rejects the importer's claim, it is forwarded to the United States Customs Court for determination.⁸² Until 1971 it was thought that an American manufacturer, producer or wholesaler could make a similar challenge to a determination which he felt was contrary to his interest by filing a written protest under Section 516(b) of the Tariff Act.⁸³ However, in *United States v. Hammond Lead Products, Inc.*,⁸⁴ the C.C.P.A. recently ruled that the Customs Court lacked subject matter jurisdiction under Section 516(b) of the Tariff Act to entertain such a protest.⁸⁵ The court based its decision on what it considered to be the intent of Congress, discerned by comparing the language of the Section 516(b) grants with those bestowed on the importer under Section 514. The court found that although Congress had given the importer a right to protest all exactions of whatever character, it had granted the American manufacturer the right of protest only with respect to determinations concerning the rates of duty.⁸⁶ If the court correctly perceived the intent of Congress,

⁷⁸ See *FPC v. United Gas Pipe Line Co.*, 393 U.S. 71 (1968); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962); 2 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 16.12 (1958, Supp. 1965).

⁷⁹ Weeks, *Anti-dumping*, *supra* note 75, at 183.

⁸⁰ Feller, *Mutiny Against the Bounty: An Examination of Subsidies, Border Tax Adjustments, and the Resurgence of the Countervailing Duty Law*, 1 *LAW POL. INT'L BUS.* 17, 19 (1969) [hereinafter cited as Feller, *Mutiny*].

⁸¹ 19 U.S.C. § 1514 (1970).

⁸² Feller, *Mutiny*, *supra* note 80, at 31.

⁸³ *Id.*

⁸⁴ 440 P.2d 1024 (C.C.P.A. 1971), *cert. denied*, 404 U.S. 1005 (1971).

⁸⁵ This was the first case in which an American manufacturer claimed a statutory right to protest a negative determination by the Treasury Department as to the existence of a bounty or grant. 4 *LAW POL. INT'L BUS.* 146, 148 (1972).

⁸⁶ *Hammond Lead Products, Inc. v. United States*, 440 F.2d 1024, 1027 (C.C.P.A. 1971).

it discovered a unique chapter in the history of legislation characterized by a reluctant relaxation of trade barriers.

4. *Escape Clause*

The "escape clause" in the Trade Expansion Act of 1962 permits the President to impose or increase duties on any commodity which has been the subject of a negotiated tariff concession which resulted in increased importation of that commodity to such an extent as to cause or threaten to cause serious injury to a competing domestic industry.⁸⁷ Under previous legislation⁸⁸ there had been some question concerning the scope of review by the Customs Court in these cases. Although it was argued that the nature and function of the discretionary power granted to the Tariff Commission and to the President were the same as under Section 336 and therefore judicial review should be limited to the same type of determinations, the courts did not so hold. In *Schmidt Pritchard & Co. v. United States*,⁸⁹ the Customs Court invalidated a presidential proclamation imposing a duty less than that recommended by the Commission. The reason given was that the President has discretion only to make adjustments in accordance with the report of the Tariff Commission or to reject those recommendations; he does not have discretion to impose a lesser duty increase. On appeal, the C.C.P.A. upheld the reasoning but narrowed the holding to invalidate only that portion of the proclamation which did not adhere exactly to the recommendation of the Tariff Commission. The "escape clause" of the Trade Expansion Act of 1962 prohibits such an interpretation by clearly requiring the scope of judicial review to be the same as provided under Section 336 of the Tariff Act of 1930.

5. *Section 22*

Under Section 22 of the Agricultural Adjustment Act of 1933, the President is authorized to impose an import fee not to exceed 50 percent ad valorem or an import quota on commodities which he finds imported in such quantities and under such conditions as to interfere with or undermine the effectiveness of any price support or other agricultural program.⁹⁰ Judicial review of these actions has generally been limited to the same scope as under Section 336 and the escape

⁸⁷ 19 U.S.C. §§ 1901-02, 1981 (1970); see STAFF OF HOUSE COMM. ON WAYS AND MEANS, 90TH CONG., 2D SESS., SELECTED PROVISIONS OF THE TARIFF LAWS OF THE UNITED STATES AND RELATED MATERIALS, 67-63 (Comm. Print 1968) [hereinafter cited as TARIFF AND TRADE LAWS].

⁸⁸ Act of June 16, 1951, ch. 141, § 7(c), 65 Stat. 74.

⁸⁹ 167 F. Supp. 272 (Cust. Ct. 1958), *aff'd in part*, 47 C.C.P.A. (Customs) 152, *cert. denied*, 364 U.S. 919 (1960).

⁹⁰ 7 U.S.C. § 624 (1970). For history and status of action under this statute see TARIFF AND TRADE LAWS, *supra* note 87, at 64-86.

clause.⁹¹ The notable exception is found in *United States v. Best Foods, Inc.*,⁹² where the court refused to allow the President to both raise a quota and impose a fee by limiting the presidential discretion to a choice between the alternatives. This construction of the statute seems to be unduly restrictive.⁹³ By emphasizing the statutory use of "or" rather than "and," the court has created a constriction in the regulation of international trade, a complex area requiring flexibility.⁹⁴

6. *Classification and Valuation*

Cases involving issues of classification and value comprise the largest number of customs cases. The Customs Court assumes a more historically judicial role in these situations than it does in any of the previously discussed areas of litigation. Congress has passed legislation enumerating a number of categories into which imported merchandise must be classified.⁹⁵ In addition, statutes describe the determining factors to be used in ascertaining a product's value for customs purposes.⁹⁶ Normally in litigation involving these issues, the protesting party will introduce testimony from several expert witnesses.⁹⁷ The burden of proof falls upon the complaining party. He must not only overcome a presumption of correctness of the Custom Service, but also establish the correct classification or value. To overcome the former without establishing the latter is fatal.⁹⁸

7. *Unfair Competition*

Section 337 of the Tariff Act of 1930⁹⁹ vests the Tariff Commission with the power to conduct investigations and advise the President concerning "unfair methods of competition and unfair acts in the importation of articles into the United States"¹⁰⁰ which (1) effectuate or tend to effectuate destruction or substantial injury to an industry, or (2) prevent establishment of efficient and economical domestic industry, or (3) restrain or monopolize trade and commerce domestically.¹⁰¹ The judicial review provisions contained in this section provide for review of Tariff Commission action. Testimony in all

⁹¹ Metzger & Musrey, *Judicial Review*, *supra* note 69, at 331.

⁹² 47 C.C.P.A. (Customs) 163 (1960).

⁹³ Metzger & Musrey, *Judicial Review*, *supra* note 69, at 339.

⁹⁴ *Id.*

⁹⁵ 19 U.S.C. § 1202 (1970).

⁹⁶ 19 U.S.C. § 1402 (1970).

⁹⁷ Berry, *The Esoteric World of Customs Law*, 54 A.B.A.J. 975, 977 (1968).

⁹⁸ See, e.g., *Whitehall Shipping Co. v. United States*, 5 Cust. Ct. 422, 429 C.C.P.A. 126 (1941); *Anderson Organization v. United States*, 46 C.C.P.A. 47 (1958).

⁹⁹ 19 U.S.C. § 1337 (1970).

¹⁰⁰ Metzger & Musrey, *Judicial Review*, *supra* note 69, at 287.

¹⁰¹ *Id.*

Tariff Commission investigations conducted pursuant to this section must be transcribed, and the written transcript along with the findings and recommendation of the Commission constitute the official record of the case.¹⁰² Findings supported by any evidence are conclusive, with the exception that prior to submission to the President questions of law may be appealed to the C.C.P.A. by the importer or consignee of the merchandise involved.¹⁰³ The court may, if a satisfactory case is presented, order that additional evidence be taken by the Commission.¹⁰⁴ The new findings, if supported by evidence, are conclusive on the facts and further appeal to the C.C.P.A. may be had only upon questions of law.¹⁰⁵ Although the court's judgment is final as to Commission findings, the ultimate determination regarding exclusion of the merchandise is made by the President.¹⁰⁶ This presidential discretion to disregard the C.C.P.A.'s decision gave this review the appearance of an advisory opinion and was in the forefront of the "legislative—constitutional" court controversy previously discussed.¹⁰⁷

Section 337 of the Tariff Act of 1930 has been most frequently invoked in connection with patent suits. In the 1930's several producers were able to exclude competing products by claiming patent infringement without having to prove patent validity, an element that would certainly have been in issue if the cases had taken the normal route through the district court.¹⁰⁸ There followed a period of grace for importers of products covered by process patents as a result of the C.C.P.A.'s determination, in *In re Amtorg Trading Corp.*,¹⁰⁹ that the law did not apply to process patents. Congress closed this loophole in 1940 by requiring that process and product patents be treated alike.¹¹⁰ By 1955, the court was again deciding patent cases in accordance with the early 1930's formula,¹¹¹ but not without some criticism.¹¹² The situation has been further complicated by the congressional declaration in 1958 that the C.C.P.A. is a constitutional court,¹¹³ followed by the *Glidden* case¹¹⁴ in 1962 upholding this con-

¹⁰² *Id.* at 288.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ See text accompanying notes 48-55 *supra*.

¹⁰⁸ See *Frischer & Co. v. Bakelite Corp.*, 39 F.2d 247 (C.C.P.A.), *cert. denied*, 282 U.S. 852 (1930); *In re Orion Co.*, 71 F.2d 458 (C.C.P.A. 1934); *In re Northern Pigment Co.*, 71 F.2d 447 (C.C.P.A. 1934).

¹⁰⁹ 75 F.2d 826 (C.C.P.A.), *cert. denied*, 296 U.S. 576 (1935).

¹¹⁰ 19 U.S.C. § 1337(a) (1970).

¹¹¹ *In re Von Clemm*, 229 F.2d 441 (C.C.P.A. 1955).

¹¹² *Id.* at 445-46 (Cole, J., dissenting).

¹¹³ 28 U.S.C. § 211 (1970).

¹¹⁴ *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962).

stitutional court status. In the *Glidden* decision Section 337 was cited as a primary source of the controversy which has necessitated the determination of whether the C.C.P.A. is a "legislative" or "constitutional" court.¹¹⁵

Do patent infringement cases properly fall within the scope of Section 337?¹¹⁶ Can the 1958 declaration be construed as removing Section 337 review from the C.C.P.A., or will the jurisdiction be retained by the court; and if so, will the Supreme Court rule that it has been discarded?¹¹⁷ These questions do not appear to be satisfactorily resolved.

8. Summary

In summarizing the preceding material, several aspects of these laws as they relate to trade policy should be mentioned. Generally, United States tariff policy since World War II has been described as liberal. The example most often cited as evidencing this nation's liberal philosophy is its initiative in the formation of the General Agreement on Tariffs and Trade [hereinafter cited as GATT]¹¹⁸ and resulting trade negotiations implemented through the use of GATT. Whether such trade negotiations have in fact had a liberalizing effect on American trade has been questioned.¹¹⁹ In 1971 Tariff Commissioner Bruce E. Clubb asserted that the United States had not followed a liberal trade policy since 1934,¹²⁰ pointing out that while imports have increased in absolute terms, they have not increased relative to the GNP.¹²¹ Although there has been removal of some major trade barriers, offsetting barriers have been constructed.¹²²

The Escape Clause, the Anti-dumping Act, the Countervailing Duty Statute, and the Unfair Trade Practices Statute have received varying degrees of criticisms as they relate to four important concepts: (1) the

¹¹⁵ *Id.* at 582-83.

¹¹⁶ See Furazolidone Tariff Comm'n Inv. No. 337-21 (November 13, 1969).

¹¹⁷ See generally Metzger & Musrey, *Judicial Review*, *supra* note 69, at 306-20.

¹¹⁸ See generally K. DAM, *THE GATT LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* (1970). The General Agreement on Tariffs and Trade (GATT) is a multilateral economic agreement which became effective January 1, 1948. It was developed as part of the plan to reestablish the international economy following World War II. Today GATT members conduct over 80% of the total volume of trade outside of the Communist countries.

¹¹⁹ M. KREININ, *INTERNATIONAL ECONOMICS, A POLICY APPROACH* 270-80 (1971) [hereinafter cited as M. KREININ, *INTERNATIONAL ECONOMICS*].

¹²⁰ Clubb, *Conflicting Assumptions About International Trade: Neo-Protectionism or Reasonable Accommodation of National Interest?*, 65 AM. J. INT'L L. 192 (1971).

¹²¹ *Id.* at 193.

¹²² *Id.* at 193-94.

imports at issue, (2) causal relationship to alleged injury, (3) the domestic entity involved, and (4) the alleged injury.¹²³ It is charged that the issues are being defined in a protectionist way under these laws.¹²⁴ Failure to provide a meaningful standard in the Escape Clause to distinguish between legitimate and illegitimate import competition is cited as another example¹²⁵ along with evolution of fair value into a synonym for foreign market value under the Anti-dumping Act.¹²⁶ The pliability of the words "bounty or grant" under the Countervailing Duty Statute and the wording of the Unfair Trade Practices Statute permits twisting the language to fit practically any situation.¹²⁷

Failure of the Anti-dumping Act and Unfair Trade Practices Statute to adequately deal with causation requirements has a chilling protectionist aspect.¹²⁸ The Anti-dumping Act test is whether an American industry is being injured "by reason of" the foreign products being sold at less than fair value, but it ignores the degree of causation. Similarly, the Unfair Practices test can apparently be satisfied by any degree of causation. The ability to invoke the Anti-dumping Act because of effects on industries not directly competitive with the import give protection that is actually beyond the entity with which it should be concerned.¹²⁹ As for the injury itself, the Anti-dumping Act is construed in the most protectionist manner, requiring the injury to be merely greater than insignificant.¹³⁰

Having had some sampling of the legal aspects of protectionism, we turn now to an examination of the economic rationale upon which this legal structure has been erected.¹³¹

¹²³ Rehm, *How Protectionist Are Our Import Restriction Laws?*, 65 AM. J. INT'L L. PROCEEDINGS 198 (1971).

¹²⁴ *Id.*

¹²⁵ *Id.* "The Escape Clause does not distinguish legitimate from illegitimate import competition. . . . [T]he Escape Clause basically concerns itself with increased quantities of imports. However, it establishes no meaningful standard to determine when an increase is actionable, thus allowing a very modest increase to satisfy the law." *Id.* at 198.

¹²⁶ *Id.* ". . . [T]he critical issue of sales at less than fair value is left to the unbounded discretion of the Secretary of the Treasury. Over time, the concept of fair value has been aligned with the concept of foreign market value in the Act. Even so, the present anti-dumping regulations make it very difficult for a foreign manufacturer to know when he is selling at less than fair value. . . ." *Id.* at 198.

¹²⁷ *Id.* at 199.

¹²⁸ *Id.*

¹²⁹ *Id.* at 201.

¹³⁰ *Id.* This is the interpretation Mr. Rehm thinks the Tariff Commission is now following.

¹³¹ I do not want to leave the reader with the impression that I am inferring that economic reasons are the sole rationale for trade barriers. In fact, the next section should demonstrate that our trade policy must be controlled by something other than economic theories.

III. THE ECONOMIC VIEW

It has already been pointed out that tariffs were originally a primary source of revenue for the federal government.¹³² However, the main objective of the United States tariff schedule today is to provide protection for certain sectors of the national economy and to give leverage to American trade policy.

The two main types of tariffs are ad valorem duty and specific duty. Ad valorem duty is taxed at a fixed percentage of the value of the merchandise being imported, while special duty is a fixed sum taxed on each physical unit of merchandise. There is a third type called compound duty, but it is merely a combination of the two main types.

Ad valorem duty distinguishes between degrees of quality while specific duty makes no such quality differentiation and in this respect is a regressive tax. For example, with a specific duty on watches the tax on a fifteen-dollar watch would be the same as for a five-hundred dollar watch. The dynamic effects of ad valorem and specific duty are also in marked contrast. During periods of inflation or recession, the ad valorem duty maintains the same level of protection. The specific duty has a quite different effect. During inflationary periods, a specific duty remains static as the value of the commodity is rising; therefore, it becomes an increasingly ineffective barrier to importers. Recession produces the opposite effect, for as prices decline, the duty becomes a more significant proportion of the purchase price, making it an increasingly formidable trade barrier. A favorable feature of specific duty is the ease of administration. The ad valorem duty creates valuation problems,¹³³ since a customs official must establish the value of the product before the absolute amount of duty can be ascertained. Needless to say frequent differences of opinion occur with respect to the proper valuation.¹³⁴

In addition to the standard tariff other duties may be imposed to offset certain business practices, particularly dumping. This economic discourse on the subject of tariffs and other aspects of protectionism begins with a discussion of the effects of tariffs on a country's economy, thereby laying the foundation for examination of the various economic arguments concerning protectionism which are discussed in Part B below.

¹³² See note 27 *supra* and accompanying text.

¹³³ See note 96 *supra* and accompanying text.

¹³⁴ M. KREININ, *INTERNATIONAL ECONOMICS*, *supra* note 119, at 235-36.

A. *Protective Effects*

Starting from a point where no tariff exists, the following takes place when a tariff is introduced. Usually the tariff will be passed on to the consumer in the form of higher prices.¹³⁵ With the higher price, domestic companies that could not compete at the pre-tariff price will be able to enter the supply side of the market. Consumer demand for the higher priced commodity can be expected to fall. If the level of the tariff is not so high as to totally prohibit importation, there will be governmental revenue.¹³⁶

The amount of government revenue received will depend upon the level of the tariff. If the tariff does not decrease the quantity of the product imported, it has no protective effects for domestic producers since consumers are buying as many units of the product from foreign suppliers as they were before the tariff was imposed and therefore have not increased their purchases from domestic producers. As long as the tariff does not decrease the purchases from foreign sources, then the higher the tariff, the greater the government revenue. When the tariff reaches a level which causes consumers to reduce their purchases of the product, the tariff begins to exert a protective influence in favor of the domestic producer. If consumer demand for the product remains stationary, the domestic manufacturer has a larger market because the foreign supply has been decreased. What has actually happened is that the demand for domestic goods has increased because the price of the foreign competing goods has effectively excluded them from the market. Since the equilibrium price level of the product has been increased, the quantity consumers are willing to buy has decreased. This decrease in demand does not hurt the domestic producer because his price has not been raised, so any decrease in purchases will affect only foreign supplies. As the tariff level is raised, the government receives more tax per item, but because the demand for the imported product begins to decrease as the tariff level increases, a point will eventually be reached where the increased tax per unit received by raising the tariff will be offset by the decreased demand for the product at that higher price. At this point the revenue effects of the tariff have been maximized, and any further increase in the tariff will decrease total governmental revenues received. In-

¹³⁵ In some instances only a portion of the tariff will be passed onto the consumer, and the seller will absorb the remainder by lowering his prices as will be discussed in more detail later.

¹³⁶ For graphic analysis of these various effects see C. KINDLEBERGER, *INTERNATIONAL ECONOMICS* 106 (4th ed. 1968) [hereinafter cited as C. KINDLEBERGER, *ECONOMICS*].

creasing the tariff beyond this point is solely for the purpose of achieving greater protection for domestic producers at the cost of decreased governmental revenue. A further possibility is that the tariff may be so high that domestic consumers overwhelmingly turn to domestic suppliers, creating a demand greater than the domestic producer can supply. Faced with this market situation, the domestic producers will simply raise their prices until demand contracts to the level which can be supplied.

Today, the decision to levy tariffs has long since been made. The trend since World War II has generally been toward reduction of tariffs.¹³⁷ As the tariff approaches zero, companies which cannot compete at the world market price level will be forced out of the market.¹³⁸ Thus, there can be no reduction of tariffs without hurting some domestic producers.

Despite the effect on domestic manufacturers, most economists endorse, albeit guardedly, reduction of tariff barriers. The rationale for this position stems from the fact that most import-competing industries tend to be relatively inefficient.¹³⁹ The resources being used by these industries could be more effectively utilized by other sectors of the economy, particularly the export industries, considered the most economically efficient sector of the economy. Industries that export heavily are proven international competitors. They are able to produce domestically and still undersell foreign competitors in the foreign market, usually in the face of foreign trade barriers. This is essentially what economists are speaking of when they refer to the relative economic efficiencies of the various sectors of our economy. The industries that must fight against foreign competitors for a portion of the United States market are less efficient by comparison.

A number of empirical studies based on multilateral reductions of tariff rates made since the last world war indicate that one-third to one-half of any reduction in United States tariffs accrues to the benefit of foreign exporters. This results from the favorable terms of trade position

¹³⁷ M. KREININ, *INTERNATIONAL ECONOMICS*, *supra* note 119, at 268.

¹³⁸ The possibility does exist that an industry that has become lax behind the tariff barrier will be induced to improve productivity because of added competition.

¹³⁹ Care should be taken when using the term "inefficient." The term as it is used here is closely linked with the theory of comparative advantage. L. YEAGER & D. TUERCK, *TRADE POLICY AND THE PRICE SYSTEM* 45 (1966) [hereinafter cited as L. YEAGER & D. TUERCK, *TRADE POLICY*].

Praiseworthy management and technology are not the same as economic efficiency, which concerns how effectively resources are being used to meet the demands that prevail in the light of alternatives open to consumers. In the last respect, an unprofitable import-competing industry is "inefficient." But the word "inefficiency", used in this narrow sense, invites misunderstanding. *Id.*

of the United States which enabled it to originally pass a portion of the tariff on to foreign exporters.¹⁴⁰ It was also estimated that tariffs on manufactured products would raise imports by over \$2 billion. If this tariff reduction was reciprocal, United States exports would rise by an even higher margin. Employment increase in export industries would virtually offset unemployment in the import-competing sector.¹⁴¹ The overall effect of tariff abolition would be to increase the gross national product. It would not be a large increase, however, because foreign trade is a small part of the American economy. Nevertheless, a small increase in a trillion dollar economy is a great deal in absolute terms. Why then is this potential increase discarded?

B. *Arguments for Protection*

There are a number of arguments supporting tariffs which economists consider to merit serious consideration. This discussion shall begin with the more emotional pleas and conclude with the more serious arguments. Interestingly enough, in the foreign trade sector appeals to emotion have been better received than the more sophisticated and rational arguments.

1. *Cheap Foreign Labor*

One of the most widely accepted protectionist arguments is the plea to protect the job and wage level of the American worker from cheap foreign labor. For this concern to be valid, two factors should be present in the United States trade situation. First, those domestic industries which pay the highest wages would face the greatest threat from foreign competition and would have no chance of exporting. However, the opposite is true. The primary export industries of the United States generally have higher average wage levels than import competing industries.¹⁴² Secondly, the United States trade position would tend to show deficits in countries with lower wage levels and surpluses in countries with higher wage levels, but again the opposite is true. Statistics show that the United States has its greatest trade surpluses in the low wage areas of the Near East, Latin America,

¹⁴⁰ A favorable term of trade position is discussed later in this section. At this juncture it is sufficient to note that the United States has a favorable terms of trade position because of its vast buying power. A small country is forced to take or leave products at the world market price, and the consumers in that country bear the entire tariff burden.

¹⁴¹ M. KREININ, *INTERNATIONAL ECONOMICS*, *supra* note 119, at 251-52. These figures now serve primarily for demonstrative purposes and future predictions will have to make adjustments for significant changes in the monetary sector.

¹⁴² L. YEAGER & D. TUERCK, *TRADE POLICY*, *supra* note 139, at 137. See also LXXIV U.S. NEWS AND WORLD REPORT, Mar. 5, 1973, at 29.

and the Communist Bloc¹⁴³ and its largest trade deficits in the high wage countries of Japan, Canada, and West Germany.¹⁴⁴

Wage levels are important to industries in which labor is a very significant cost factor. From an international perspective the United States has an abundance of capital and a relative scarcity of labor; therefore, it should not be trying to compete in labor intensive industries.¹⁴⁵ For example, the textile industry of the United States, although highly mechanized in comparison with its Asian counterpart, still requires a significant input of man-hours to produce a finished product. Because of their relative scarcity, American workers can demand substantially higher wages than the Asian workers, and United States textiles continue to cost more to produce. However, industries in which a finished product is produced primarily by sophisticated machinery with only a small input of labor needed are ideally suited for the United States. Competition in these industries will come from other highly industrialized countries and not capital poor countries.

If the United States was unable to compete internationally with any product, it would mean that our currency was overvalued relative to foreign currencies. The obvious solution is devaluation of the dollar, not a tariff barrier that further distorts resource allocation.¹⁴⁶ Devaluation lowers the price of American products to buyers with foreign currency. Conversely, foreign products become more costly to purchasers using United States currency. Therefore, American products become more attractive in foreign markets, and foreign products become less appealing to Americans. Now that we no longer demand that the monetary world revolve totally around us, such adjustments are possible.

A more sophisticated argument is derived from the cheap labor specter. This theory involves changes in income distribution brought about by lowering tariff barriers and has been considered by some to "apply only on very special and unrealistic assumptions."¹⁴⁷ The fear is that free access to products from foreign countries will decrease the wage level of American labor. While this theory and the factors that make it implausible are complex, an important point can be drawn

¹⁴³ LXXIV U.S. NEWS AND WORLD REPORT, Feb. 26, 1973, at 19.

¹⁴⁴ *Id.*

¹⁴⁵ It should not be overlooked, however, that there is also a qualitative difference in labor and in this respect United States labor may be more productive than foreign labor by a greater degree than the wage level difference in a particular industry. See P. ELLSWORTH, THE INTERNATIONAL ECONOMY 106 (3d ed. 1967) [hereinafter cited as P. ELLSWORTH, INTERNATIONAL ECONOMY].

¹⁴⁶ See M. KREININ, INTERNATIONAL ECONOMICS, *supra* note 119, at 200; see generally D. SNIDER, INTERNATIONAL MONETARY RELATIONS 49-63 (1966).

¹⁴⁷ L. YEAGER & D. TUECK, TRADE POLICY, *supra* note 139, at 163.

from them. Theories that depend upon tariffs to achieve domestic economic goals are indirect and unnecessarily complicating. There are more direct internal taxing mechanisms available that can "preserve the gains from free trade and offset [unwanted effects]."¹⁴⁸ Such methods would be more appropriate because their ultimate effects can be more accurately controlled. Further, distributing our wealth by domestic taxes rather than raising tariff barriers is less likely to invoke foreign retaliation.

Protectionist's arguments such as tariffs to put foreign and domestic industries on equal footing, home markets for home industry, and tariffs to ward off depression are too spurious to warrant comment here except to note that all such appeals are ethnocentric emotionalism with no economic or logical foundation.¹⁴⁹

2. *National Defense*

Some commentators are still willing to accord the national defense argument a place of legitimacy in protectionist theorizing.¹⁵⁰ Trade barriers to protect strategic industries had merit when America was faced with a World War II situation; but today the argument is based on a non-existent premise, for the fear of a long war in which this country would be cut off from vital supplies is unwarranted. The United States is concluding the longest war in its history, and during that war trade with noncommunist countries was unrestrained and, in fact, trade with communist countries continued! The Vietnam war was not the all-out conflict of a major power struggle on the level of World War II, but should such a holocaust occur in today's nuclear age, the only certainty is its brevity.¹⁵¹

3. *Anti-dumping*

The term "dumping" was derived from the practice of manufacturers, left with an unsold supply, of "dumping" the excess in foreign markets in which they do not normally sell in order not to lower the price in their regular markets.¹⁵² The term has come to be synonymous with any practice which maintains different prices in different markets. Because of the indiscriminate use of this term, it is necessary that various "dumping" practices be distinguished at the outset.

Persistent dumping, true to its name, is a constant sale by a

¹⁴⁸ *Id.* at 166.

¹⁴⁹ *Id.* at 112-20.

¹⁵⁰ P. ELLSWORTH, *INTERNATIONAL ECONOMY*, *supra* note 145, at 225-26.

¹⁵¹ L. YEAGER & D. TUERCK, *TRADE POLICY*, *supra* note 139, at 121-30.

¹⁵² C. KINDLEBERGER, *ECONOMICS*, *supra* note 136, at 155.

foreign manufacturer at a price below the price he demands in his domestic market. This will normally arise when the producer has a monopoly in his domestic market but faces greater competition abroad. In order to compete in the foreign market prices must be lowered. Persistent dumping is harmful to producers in the country absorbing dumped goods, but benefits to the consumer in the form of lower prices may more than counteract any damage.¹⁵³

Sporadic dumping occurs when a producer disposes of occasional surplus or overstock in a foreign market. This is similar to a domestic supplier having a sale, and its effects are usually minimal.¹⁵⁴

The form of dumping that draws the greatest criticism is predatory dumping which is selling at a price below average cost (but not marginal cost) with the intent of driving all competition from the market. After gaining a monopolistic position, the producer can introduce monopolistic pricing to the detriment of the consumer.¹⁵⁵ In order for predatory dumping to succeed, the monopolist must be able to maintain his prices at the higher level. Although the manufacturer may have been successful in closing down a competing plant, there is no guarantee that competitors will not be encouraged to resume production when prices rise to a profitable level.¹⁵⁶ However, these potential rivals may be deterred by fear of repetition of the previous practice by the monopolist.¹⁵⁷ The producer cannot be content with merely driving domestic competition out of business, since foreign producers will be encouraged by the high prices to enter this market. If the monopolist maintains his low price to discourage entrance of foreign competitors, persistent dumping exists and consumers benefit through lower prices.¹⁵⁸ Therefore, a producer can be assured of success only by achieving a worldwide monopoly,¹⁵⁹ which would be difficult to establish and maintain.¹⁶⁰ The danger of successful predatory dumping must then be weighed against the "obnoxious" measures taken against dumping which "reduce the flexibility and elasticity of international markets and reduce the potential gain from trade."¹⁶¹

¹⁵³ M. KREININ, *INTERNATIONAL ECONOMICS*, *supra* note 119, at 295.

¹⁵⁴ *Id.*

¹⁵⁵ C. KINDLEBERGER, *ECONOMICS*, *supra* note 136, at 156.

¹⁵⁶ Barcelo, *Antidumping Laws as Barriers to Trade—The United States and the International Antidumping Code*, 57 *CORNELL L. REV.* 491, 502 (1972) [hereinafter cited as *Barcelo, Antidumping Laws*].

¹⁵⁷ M. KREININ, *INTERNATIONAL ECONOMICS*, *supra* note 119, at 294.

¹⁵⁸ C. KINDLEBERGER, *ECONOMICS*, *supra* note 136, at 158.

¹⁵⁹ de Jong, *The Significance of Dumping in International Trade*, 2 *J. WORLD TRADE L.* 162, 171-72 (1968).

¹⁶⁰ Barcelo, *Antidumping Laws*, *supra* note 156, at 502.

¹⁶¹ C. KINDLEBERGER, *ECONOMICS*, *supra* note 136, at 158.

4. *Developing Nations*

There are two arguments that, although they have some merit, have no application to the United States economic situation. They are the infant industries argument and the argument for diversification of industry. Because their application is mainly confined to developing countries these positions will not be discussed here.¹⁶²

5. *Terms of Trade*

As previously noted,¹⁶³ because of the large import market in the United States,¹⁶⁴ this country can shift the tariff burden to foreign suppliers to a certain extent, forcing them to absorb a portion of the increase by lowering their prices. The producer is willing to do this in order to maintain his position in the American market, since he has no alternative market in which to sell such large quantities of goods.¹⁶⁵

While this reduction in price gives every indication of resulting in a gain to the United States, offsetting factors must be considered. The consumer does not receive the benefit of this price reduction and will actually be paying more for the product to the extent that the foreign exporter or importer is not willing to absorb the tariff increases. In addition, the increase in the price level encourages domestic companies not capable of competing at the lower price level to enter this market as a supplier, thereby causing misallocation of resources in the domestic economy. If an overall benefit still exists after these negative elements are considered, there remains the potential for retaliation by other nations. The ultimate result of tariff increase may be an overall economic loss for the country.¹⁶⁶

The final facet to be considered in conjunction with "terms of trade" is that it is an entirely nationalistic approach to trade policy, since any gain derived will be at the expense of another country. Such a policy will be most effective against poorer and less developed countries and becomes the antithesis of foreign aid.¹⁶⁷ The complete picture is a policy whose benefits are at best questionable and whose drawbacks manifest themselves in the form of being branded an international exploiter of the poor.

6. *Tariffs for Bargaining*

A country may use tariffs as a means of obtaining concessions from

¹⁶² See P. ELLSWORTH, *INTERNATIONAL ECONOMY*, *supra* note 145, at 220-24.

¹⁶³ See note 140 *supra* and accompanying text.

¹⁶⁴ Here we are talking in absolute terms because compared to the total domestic market the import market is small.

¹⁶⁵ L. YEAGER & D. TUERCK, *TRADE POLICY*, *supra* note 139, at 182-93.

¹⁶⁶ P. ELLSWORTH, *INTERNATIONAL ECONOMY*, *supra* note 145, at 224.

¹⁶⁷ L. YEAGER & D. TUERCK, *TRADE POLICY*, *supra* note 139, at 192-93.

other countries on its exports, as has taken place on a multilateral level in the GATT negotiations.¹⁶⁸ The threat of tariff increase or the creation of some other type of trade barrier has been considered. As long as this strategy brings about further lowering of trade barriers on a reciprocal basis, then it is successful. However, to actually carry out the threat by increasing trade barriers to obtain a stronger bargaining position will create interests which will oppose the use of the barriers for the original bargaining purpose intended.¹⁶⁹ The result will be an overall loss due to misallocation of resources rather than an economic gain.

CONCLUSION

This overview of United States trade laws has hopefully shed light on certain elements of our foreign trade sector. As demonstrated by the section on classification, the laws are difficult to apply, primarily as a result of attempts to protect vested interests that thrive under trade protectionism. Laws have sometimes been enacted to protect a specific industry from a specific threat. Incorporating such laws into the general trade laws expands their scope, sometimes causing unforeseen problems because of overlap into areas not anticipated when the law was formulated.

Turning to the courts for resolution of such conflicts has created even more controversy, as witnessed by the historical outline of the Customs Court and C.C.P.A. The courts' role in administration of customs laws has been characterized by uncertainty, and their constitutional nature has been questioned.

Amid all of this conflict is the irony that there is very little economic justification for the whole structure—the laws, the courts, or the administrators. Therefore, why do we maintain this structure? The answer is embroiled in politics and misconceptions. Transformation to a free trade position will involve economic hardship to some sectors of the economy. Interests that have survived in an artificially contrived environment are not healthy enough to thrive in the rough and tumble of a free trade economy. These sectors shall continue to implore their political representatives to lead the fight for protectionism. This fight will succeed until the majority of the public is able to grasp the realities of the situation and persuade Congress to lift the trade barriers. As long as the average American is persuaded by emotional appeals to side against foreign competition, he will continue to subsidize these vested interests through higher prices.

Levi Daniel Boone, III

¹⁶⁸ See note 118 *supra*.

¹⁶⁹ P. ELLSWORTH, INTERNATIONAL ECONOMY, *supra* note 145, at 224-25.