Tulsa Journal of Comparative and International Law

Volume 8 | Issue 1 Article 10

9-1-2000

Save Domestic Oil, Inc.'s Crude Oil Market Dumping Petition: Domestic and International Political Considerations

William C. Smith

Follow this and additional works at: http://digitalcommons.law.utulsa.edu/tjcil

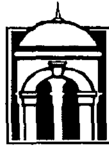
Part of the Law Commons

Recommended Citation

William C. Smith, *Save Domestic Oil, Inc.'s Crude Oil Market Dumping Petition: Domestic and International Political Considerations*, 8 Tulsa J. Comp. & Int'l L. 147 (2000).

Available at: http://digitalcommons.law.utulsa.edu/tjcil/vol8/iss1/10

This Casenote/Comment is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Journal of Comparative and International Law by an authorized administrator of TU Law Digital Commons. For more information, please contact daniel-bell@utulsa.edu.



SAVE DOMESTIC OIL, INC.'S CRUDE OIL MARKET DUMPING PETITION: DOMESTIC AND INTERNATIONAL POLITICAL CONSIDERATIONS

William C. Smith[†]

I. INTRODUCTION

In June 1999, the United States Department of Commerce (Commerce) received a petition from the Committee to Save Domestic Oil, Inc. (SDO)[1] for protection against market dumping of crude oil. The petition was filed under section 701 (countervailing duty)[2] and section 731 (anti-dumping) of the United States Tariff Act of 1930 (Act), alleging market dumping of crude oil by Venezuela, Mexico, Iraq, and Saudi Arabia.[3] Despite the backing of over thirty crude oil producing associations,[4] Commerce found that SDO did not have sufficient industry

† Associate in Arts, Freed-Hardeman College (1972); Bachelor of Science in Commerce, University of Louisville (1978); Masters in Hospital and Healthcare Administration, Ohio State University (1988); Masters in International Relations, Troy State University (1998); Juris Doctor, University of Tulsa College of Law (Dec. 2000).

1. The Committee to Save Domestic Oil, Incorporated, was formed as an association of independent oil producers from the mid-west region of the United States. Interview with Harold Hamm, Founder and Chairman of Save Domestic Oil, Inc., in Enid, Okla. (Sept. 16, 1999).

2. "[A] countervailing duty is a customs levy designed to offset the effect of government payments and other extraordinary economic benefits, generically referred to as 'subsidies,' granted to foreign producers or exporters which distort competition in international trade." RALPH H. FOLSOM ET AL., INTERNATIONAL BUSINESS TRANSACTIONS: A PROBLEM-ORIENTED COURSEBOOK 383 (2d ed. 1991).

3. Dismissal of Antidumping and Countervailing Duty Petitions: Certain Crude Petroleum Oil Products From Iraq, Mexico, Saudi Arabia, and Venezuela, 64 Fed. Reg. 44,480 (Aug. 16, 1999).

4. Gerald Karey, *Anti-Dumping Group Appeals Decision*, PLATT'S OILGRAM NEWS, Sept. 8, 1999, *available at* LEXIS, News Group File.

support to continue the investigation, and the petition was dismissed on August 16, 1999.[5]

SDO's petition alleged that

> [i]n accordance with section 732(b) of the Act, . . . imports of crude oil from Iraq, Mexico, Saudi Arabia, and Venezuela are being, or are likely to be, sold in the United States at less than fair value within the meaning of section 731 of the Act and that such imports are materially injuring, or threatening material injury to, a regional industry in the United States. In addition, in accordance with section 702(b)(l) of the Act, the petitioner alleges that producers or exporters of crude oil from Iraq, Mexico, Saudi Arabia, and Venezuela received countervailable subsidies within the meaning of section 701 of the Act.[6]

This particular petition is the first to request anti-dumping protection and countervailing duties by the petroleum producing industry of the United States.[7] With petroleum, more commonly known as "crude oil," being the world's premier naturally occurring raw material, investigation is merited.

Part II provides general background information on the importance of crude oil, its market pricing and recent reasons for declining prices. From the background, the discussion in Part III will turn to market dumping generally and the investigation process of an alleged market dumping incident. Part IV examines a party's standing and the determination of industry support for a party's petition. Consideration of political pressure upon the reviewer to dismiss the petition follows in Part V. And finally, the impact of recent developments that may have lessened the petitioner's urgency in this matter will be given in Part VI.

---

5. Dismissal of Antidumping and Countervailing Duty Petitions: Certain Crude Petroleum Oil Products From Iraq, Mexico, Saudi Arabia, and Venezuela, 64 Fed. Reg. at 44,480. SDO appealed to the U.S. Court of International Trade on September 7, 1999. *See infra* note 111. The case was heard September 19, 2000, and the court held that "ITA's dismissal of SDO's petition . . . was not in accordance with law." Save Domestic Oil v. U.S., 116 F. Supp. 2d 1324, 1343 (Ct. Int'l Trade 2000). The case was remanded to Commerce to consider having ITA commence a preliminary investigation. *Id. See also* Save Domestic Oil v. U.S., 122 F. Supp. 2d 1375 (Ct. Int'l Trade 2000) (denying defendant's motion for an extension of time and for a stay pending appeal). The court's action supports this author's contention that Commerce's dismissal was based on political influences. Save Domestic Oil, 116 F. Supp. 2d at 1332 & n.17.

6. *Id.*

7. Rossella Brevetti & John Nagel, *Dumping, Countervailing Duties: Petition Alleges Four Countries Are Dumping Crude Oil Imports*, INT'L TRADE REP., July 7, 1999.

II. GENERAL BACKGROUND

A. *Save Domestic Oil, Inc.*

The market price for a barrel of oil fell below $10 in December 1998 after a long and steady decline from approximately $32 a barrel in 1981.[8] The abrupt fall of 50% from November 1997 to December 1998[9] was a siren's warning to the American independent oil producers that their viability to remain in the crude oil production business was in jeopardy. Responding to this warning, a group of American independent producers from the American mid-west region formed an association. Conveniently, they named the new association "Save Domestic Oil, Inc." These producers felt a need for a collective effort in regard to their shared difficulties encountered by the very low price of a barrel of oil.[10] SDO, comprised of more than 5,000 companies,[11] took a bold step by filing an anti-dumping and countervailing duty petition with Commerce.

B. *Importance of Crude Oil*

Availability of abundant and cheap petroleum is a major contributor to the high standard of living achieved by the industrialized nations. The derivatives of crude oil are wide-ranging and include such products as fertilizers that enable farmers to increase yields, cheap fuels that enable mobility and power industries, and building materials for homes, offices and factories.[12] More significantly, for the last 150 years, it has been central to the quest for power and wealth by individuals and by sovereigns. Sovereigns devote considerable time and energy toward economic and diplomatic effort to secure access to petroleum. When these efforts fail, sometimes they will resort to armed conflict. World-encompassing military campaigns have been fought and their outcomes sometimes rested on which sovereign had sustainable sources and supply of petroleum.

The latest example, where the importance of crude oil was at the center of armed conflict, was the Persian Gulf Crisis of 1990-1991. Thirty-three sovereigns, unlikely alliances in some cases, came together to save

---

8. Jody M. Perkins, Economic State of the U.S. Oil and Natural Gas Exploration and Production Industry: Long-Term Trends and Recent Events 2 (Apr. 30, 1999) (unpublished paper, on file with the American Petroleum Institute).

9. *Id.*

10. Interview with Harold Hamm, *supra* note 1.

11. Russell Ray, *Ruling Due on Claims of 'Dumped' Oil*, TULSA WORLD, Aug. 7, 1999, at E1, *available at* 1999 WL 5409469.

12. *See generally* DANIEL YERGIN, THE PRIZE: THE EPIC QUEST FOR OIL, MONEY, AND POWER (1992).

Kuwait from the grip of Iraq. Central to this massive effort was the quest for access to one of the world's leading oil-producing fields.[13]

The dance of sovereigns in their quest for power and wealth seems unlikely to end anytime soon. Though the major industrialized nations are working to reduce their dependence upon petroleum, their efforts are largely offset by the economic development of the industrializing nations. With the world's population projected to grow by one billion in the next decade and all likely to be demanding consumers, the mad quest for petroleum is not likely to take a second seat to anything, including the pursuit for the fastest and most efficient computing chip.[14]

Though the United States was once the world's greatest producer of petroleum, the major U.S. oil producing companies have turned their interests to the major foreign oil fields.[15] The many "American independent oilmen" now work those same fields by utilizing new, but more costly, techniques to bring up the residual oil left in the old fields. The "independents" can profit as long as the market price for crude oil remains above their production costs.[16] It follows, then, that when world prices for oil are depressed, the independent producer may suffer. But when the world oil prices are high, they can profit.

C. *Historical World Market Oil Prices*

The price of a barrel of crude oil can be influenced by a variety of reasons. The economic law of supply and demand is the basic driver. If supply is up or demand is down, then prices go down. If supply goes down or demand goes up, then prices go up. For example, the Organization of Petroleum Exporting Countries (OPEC) was formed to stop unilateral cuts in oil prices by the major oil companies and to stabilize world prices at a high level.[17] Also, the U.S. government has offered crude oil at public sale from its Strategic Petroleum Reserve in an effort to stabilize rising oil prices.[18]

Even though the price of crude oil fluctuates in response to various stimuli, an independent producer can plan based upon an average price.

---

13. *Id.*
14. *Id.*
15. Perkins, *supra* note 8, at 6.
16. *Id.* at 7.
17. YERGIN, *supra* note 12.
18. Jay Hakes, EIA Marks 25th Anniversary of 1973 Oil Embargo, Presentation by the Department of Energy (Sept. 3, 1998), *available at* http://www.eia.doe.gov/neic/speeches/25thann/sld009.htm (last visited Dec. 18, 1999).

> In the post World War II era oil prices have averaged $19.27 per barrel in 1996 dollars. Through the same period the median price for crude oil was $15.27 in 1996 prices. That means that only fifty percent of the time from 1947 to 1997 have oil prices exceeded $15.26 per barrel. . . . Since 1869 US crude oil prices have averaged $18.63 per barrel. Fifty percent of the time prices were below $14.91. If long term history is a guide, those in the upstream segment of the crude oil industry should structure their business to be able to operate, hopefully with a profit, below $15.00 per barrel half of the time.[19]

D. Reasons for Recent Lower Prices

When worldwide demand for crude oil falls and adjustments in production to counter the over-supply are not made, the overall world price for crude oil should fall. The following occurrences are possible contributors to the recent events.

The recent economic downturn in the Far East contributed to a decrease in demand.[20] Perhaps, more to the point, an expected increase in demand from this region did not materialize.[21] Demand for crude oil was expected to increase by one million barrels per day. But instead, it is expected to fall by almost 100,000 barrels per day.[22]

In the face of lower world prices, OPEC decided to increase production quotas in November 1997. OPEC, after ignoring the economic signals with the increased production quotas, delayed in responding to the supply glut until April 1998.[23] Even then, their response was weakened by not fully complying with pledged cuts.[24] World crude oil supplies have been increased through the efforts of Iran and Iraq to "rebuild their oil sectors after many years of warfare and hardship [and] ineffectual U.S. policy . . . [and] trade sanctions . . . have done little to reverse the prospect for still more growth in oil supplies from these two OPEC giants."[25]

But, perhaps the most interesting possibility is the implementation of a strategic initiative by a state-owned major oil producer—Petroleos de

19. James L. Williams, *Oil Price History and Analysis*, WTRG Economics, *at* http://www.wtrg.com/prices.htm (last visited Oct. 24, 1999).

20. Bob Williams, *Oil Producers Face Key Question: How Long Will Prices Stay Low?*, OIL & GAS J., Dec. 28, 1998, at 18, 19.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

Venezuela S.A. (PDVSA).[26] Faced with a declining world market and its own increased production to maintain revenues, PDVSA conceived a plan that "could slow the development and introduction of alternative energy sources" and "force some high-cost producers, particularly in the United States, out of business."[27] If successful, the measure would reduce the threat to the profitability of its future oil production.[28] The ground work for increased future production was laid with implementation of "Apertura Petrolera" (the opening). "[T]he central goal of the policy was to increase Venezuela's productive capacity through . . . the development of its huge resources of extra-heavy crude oil and the discovery of new fields of medium and light crude outside of the traditional producing regions."[29] "[B]ut, to sustain a decline it [PVDSA] would need help from other producers with excess capacity."[30]

If true and if successful, the Venezuelan initiative could prove to be economically disastrous for high-cost producers, i.e., the American independent oil producer. "[E]conomic warfare had been declared on our industry, the U.S. domestic producers. . . . Their plan was to drive the price of oil down and hold it down as long as it took to plug those stripper wells. They know that once those strippers are plugged they're gone forever."[31] It appears Venezuela may have initiated a "compact" with Mexico, Iraq, and Saudi Arabia to increase production, to suffer in the short-term the resulting decrease in oil revenues, and to eventually benefit in the long run.

E. Subsidies Generally

The market forces of supply and demand underpin the philosophy of commercial freedom among buyers and sellers.[32] "Government

---

26. PDVSA (Petroleos de Venezuela) is wholly owned by the Republic of Venezuela. This state-owned petroleum company is involved in the exploration, production, refining, distribution, and exploration of petroleum and petroleum products. It has 48,109 employees. *PDVSA*, 1999, LEXIS, Company & Financial, The Major Companies Database, Reference No: L00608.

27. Jason Feer, *PDVSA Officials Back Driving Down Prices; Petroleos de Venezuela S.A.*, OIL DAILY, Dec. 3, 1997, *available at* LEXIS, Publications Group.

28. *Id.*

29. Jay G. Martin, *Venezuela as an Opportunity for Investment in the Petroleum Industry,* 20 ENERGY L.J. 325, 328 (1999) (citing BAKER & MCKENZIE GAS NEWSL., Mar. 1999, at 1).

30. Feer, *supra* note 27.

31. Chris Holly, *Anti-Dumping Complaint Could Roil Oil Politics*, ENERGY DAILY, July 1, 1999, *available at* LEXIS, News Group File (quoting Harold Hamm, CEO of Continental Resources).

32. Sangham Wang, *U.S. Trade Laws Concerning Nonmarket Economies Revisited for Fairness and Consistency,* 10 EMORY INT'L L. REV. 593, 595 (1996).

intervention is viewed as a distortion of free trade that causes a misallocation of resources. Government sponsorship of specific industries can stifle imports as well as promote exports beyond their unsubsidized levels. In other words, government subsidies can act as a form of trade barrier."[33] In the world of international trade, "a subsidy shall be deemed to exist if ... there is a financial contribution by a government or any public body within the territory of ... [said] government."[34]

III. INVESTIGATION PROCESS

A. *Market Dumping Generally*

Market dumping is defined as the introduction of products by one country into the commerce of another country where that product is priced below its normal value. A product, to be considered as introduced at less than its normal value, must be priced at a lower level than the price of that product when offered for consumption within the exporting country. When there is an absence of a market of such product within the exporting country (therefore, no comparable domestic price), a determination may be made by comparing the price in a third market or by comparing the cost of production of the product. Where third market pricing or the cost of production is less than the price in the importing country, then pricing at less than normal value may be found.[35] Market dumping is not prohibited, *per se*. It "is to be condemned if it causes or threatens material injury to an established industry ... or materially retards the establishment of a domestic industry."[36]

The petitioner in a market dumping allegation must show injury or threatened injury and that such injury was, or will be, caused by the dumping. It follows, then, that a domestic producer can be injured while

---

33. *Id.*

34. Agreement on Subsidies and Countervailing Measures, pt. I, art. 1.1, Apr. 15, 1994, Agreement Establishing the World Trade Organization, Annex 1A, *available at* LEXIS, International Trade, Treaties & International Agreements.

35. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, pt. I, art. 2, Apr. 15, 1994, Agreement Establishing the World Trade Organization, Annex 1A, *available at* LEXIS, International Trade, Treaties & International Agreements.

36. General Agreement on Tariffs and Trade 1994, art. 6.1, Apr. 15, 1994, Agreement Establishing the World Trade Organization, *available at* LEXIS, International Trade, Treaties & International Agreements, GATT/WTO B.I.S.D. The General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-3, 55 U.N.T.S. 188, *reprinted in* GATT B.I.S.D. (4th Supp.) at 1 (1969) was modified extensively by the agreements reached in the Uruguay Round and signed by the contracting parties in Marrakesh, Morocco, on April 15, 1994. These agreements created GATT 1994 which includes the original GATT 1947.

market dumping is occurring, but, unless it is demonstrated that dumping caused the injury, there is no basis to impose an anti-dumping duty.[37]

B. Authority to Act Upon Dumping

Article 5 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 sets out the general procedure for the initiation and subsequent investigation of an alleged dumping practice.[38] The allegation must be made in writing "by or on behalf of the domestic industry."[39] The application "shall include evidence of *(a)* dumping, *(b)* injury . . . and *(c)* a causal link between the dumped imports and the alleged injury."[40] Simple assertions are not sufficient to meet the test as there must be supporting evidence.[41]

C. Investigation Initiation

There are two ways to initiate an anti-dumping investigation: Commerce may self-initiate an investigation, or an interested party may file a petition alleging the elements for imposing an anti-dumping duty.[42] "To initiate an investigation in response to a petition, Commerce must 'determine whether the petition alleges the elements necessary for the imposition of a duty . . .' and 'determine if the petition has been filed by or on behalf of the industry,' i.e., whether the domestic industry supports the investigation."[43]

In the SDO case, Commerce did not self-initiate the investigation. SDO filed its petition on June 29, 1999 and made subsequent "supplemental submissions during June, July, and August 1999."[44]

Upon receipt of a petition by Commerce, there are

---

37. *Id.* art. 6.6.

38. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 art. 5.

39. *Id.* art. 5.1. Domestic industry refers to domestic producers "as a whole of the like products or to those . . . whose collective output of the products constitutes a major proportion of the total domestic production of those products." Exceptions are to be made in the case of "related" producers. *Id.* art. 4.1.

40. *Id.* art. 5.2. An injury is determined by examining the volume of the dumped imports, their effect on prices for like products in the domestic market, and their impact on domestic producers of the products. *Id.* art. 3.1.

41. *Id.* art. 5.2.

42. 19 U.S.C. § 1673a(a)-(b) (1999). *See also* 19 C.F.R. § 351.201 (1999).

43. Mitsubishi Heavy Indus. v. United States, 21 Ct. Int'l Trade 1227, 1229 (1997) (quoting 19 U.S.C. § 1673a(c)(1)(A)(i)-(ii) (1999)).

44. Dismissal of Antidumping and Countervailing Duty Petitions: Certain Crude Petroleum Oil Products From Iraq, Mexico, Saudi Arabia, and Venezuela, 64 Fed. Reg. 44,480 (Aug. 16, 1999).

> distinct roles for [the] International Trade Administration and [for the] International Trade Commission, such that [the] Administration must determine [the] scope of investigation by determining class or kind of merchandise subject to investigation, and if [the] Administration finds that class or kind of merchandise is being sold at less than fair value, [the] Commission then must determine whether [the] U.S. industry is being injured, threatened with injury, or materially retarded by reason of imports of that merchandise . . . .[45]

"[A]n antidumping order can be issued only where the ITA's [Administration] and the ITC's [Commission] determinations are both affirmative."[46] With SDO's petition, the investigation did not reach injury determination by the Commission because the Administration did not find that dumping had occurred.

IV. STANDING

A. *Standing*

The initial consideration is whether SDO, as a trade association, has standing. The first rule is: "Parties lacking a real stake in the outcome of antidumping litigation do not have standing."[47] Analysis begins with a determination as to whether the filing party can be considered an "interested party." "The term 'interested party' is defined to include inter alia: a foreign manufacturer, producer, or exporter, or the United States importer, of merchandise which is the subject of an investigation under this subtitle . . ."[48]

The first test that Commerce applied was whether the petition qualified as an interested party. The term "interested party" as defined by statute is a rather broad term that encompasses a wide spectrum of entities. Among the entities are domestic or foreign manufacturers and producers of subject goods; foreign exporters and domestic importers of subject goods; foreign governments where subject good is manufactured, produced, or exported; wholesalers; unions and business associations where a majority of the membership is engaged in the production, manufacture, or wholesale of the subject goods; and agricultural producers, processors, and growers.[49]

---

45. 19 U.S.C.S. § 1673a, at n.1 (1999).
46. Badger-Powhatan v. United States, 9 Ct. Int'l Trade 213, 216 (1985).
47. Brother Indus. v. United States, 16 Ct. Int'l Trade 150, 152 (1990).
48. *Id.*
49. 19 U.S.C. § 1677(9) (1999).

> [U]nless a petition[er] is either a producer, union, or trade association within that industry, it cannot acquire "interested party" status in an antidumping proceeding [citation omitted]. This fairly narrow circumscription closes the door on groups such as, for example, the U.S. Chamber of Commerce, the National Association of Manufacturers, and the American Association of Exporters and Importers – groups which could conceivably muster majority support within a specific industry for an antidumping petition, but which could not attain "interested party" status under section 1677(9).[50]

If there is opposition to a petition from within the industry, Commerce follows a prescribed procedure. For example, the North Atlantic Fisheries Task Force (NAFTF), an unincorporated association representing fishermen, fishermen's cooperatives, and processors located in the northeastern United States, filed a petition for countervailing duties on imports of fresh Atlantic groundfish from Canada.[51] Commerce received telephone calls and telexes from domestic processors who objected to NAFTF's petition.[52] Because of those objections, Commerce examined the question of whether NAFTF's petition was filed "on behalf of" a United States industry.[53] Commerce then confirmed that almost all of the firms expressing opposition to the petition were importers of the subject merchandise from Canada.[54] The opposition from those producers and wholesalers logically stems from their position as importers because they might be faced with a countervailing subsidy payment if the investigation resulted in a finding of dumping.[55] Commerce, claiming its right of discretion, chose to exclude those objecting importers in its determination of standing for NAFTF.[56]

So, too, with SDO's petition, domestic importers of crude oil objected. But, Commerce found SDO to qualify as an interested party under section 771(9)(E) of the Act despite such objections.[57]

---

50. Gilmore Steel Corp. v. United States, 7 Ct. Int'l Trade 219, 226 (1984).

51. Preliminary Affirmative Countervailing Duty Determination; Certain Fresh Atlantic Groundfish From Canada, 51 Fed. Reg. 1010, 1011 (Jan. 9, 1986).

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. Dismissal of Antidumping and Countervailing Duty Petitions: Certain Crude Petroleum Oil Products From Iraq, Mexico, Saudi Arabia, and Venezuela, 64 Fed. Reg. 44,480 (Aug. 16, 1999).

B. Industry Support

Until the Uruguay Round agreements, Commerce allowed a presumption of petitioner's standing, that is, that the petition was filed on behalf of the industry. It was not until a majority of the domestic companies affirmatively opposed the petition that the presumption was discarded. The burden of proof fell upon those opposing the petition to prove that the opponents represented more than 50% of the domestic production. The Uruguay agreement, however, challenged that presumption by requiring that:

> [i] the domestic producers or workers who support the petition account for at least 25 percent of the total production of the domestic like product, and
>
> [ii] the domestic producers or workers who support the petition account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for or opposition to the petition.[58]

An interesting problem arises when determining how to calculate industry support. In an industry such as the petroleum industry, the industry members range from large producers such as Chevron, at 118 million barrels of domestic production per year,[59] to small producers like Kincaid Oil Producers, which produces less than 25,000 barrels per year.[60] The question that arises is should each business entity get one vote or should the votes be weighted according to production.

There are domestic producers who "directly or indirectly control joint ventures with PDVSA in the production of crude oil in Venezuela."[61] For example, Conoco joined PDVSA in a joint investment venture to develop

---

58. Tariff Act of 1930 § 702, 19 U.S.C.S. § 1673a(c)(4)(A)(i)-(ii) (1999).

59. Press Release, *Chevron Opposes Oil Import Duty and Anti-Dumping Petitions* (July 22, 1999), *at* http://www.chevron.com/newsvs/pressrel/1999/1999%2D07%2D22.html (last visited Dec. 21, 1999).

60. Memorandum from The Industry Support Team, U.S. Dep't of Commerce, to Richard W. Moreland, Deputy Assistant Secretary, U.S. Dep't of Commerce attachment A, chart 1 (Aug. 9, 1999) (on file with U.S. Dep't of Commerce, discussing Calculation of Industry-Support Percentages).

61. Letter from Charles Verrill, Jr., Counsel to Petitioners, Wiley, Rein & Fielding, to The Honorable William M. Daley, U.S. Secretary of Commerce (Aug. 3, 1999) (on file with author).

a portion of the Orinoco Heavy-Oil Belt.[62] Conoco has a controlling interest of 50.1% of the joint venture.[63] "[I]n 2000, 64,000 bbl/d will be sent to Conoco's refinery in Lake Charles, Louisiana."[64] Another example is a "joint venture among PDVSA (41.67%), Mobil (41.67%), and Veba Oel (16.66%)."[65] This project "was designed to produce, upgrade, and market 120,000 b/d of extra-heavy crude. . . . [U]pgrading of heavy oil from this project is expected to occur largely in the United States at a refinery in Chalmette, Louisiana, jointly owned by Mobil and Citgo."[66] And lastly, there is the Petrolera Ameriven project that "is a heavy crude upgrading partnership . . . between PDVSA (30%) and several U.S. companies, including Atlantic Richfield Co. (ARCO) (30%), Phillips Petroleum Co. (20%) and Texaco Inc. (20%)."[67]

It can be complicated even further by considering that many oil companies may have ownership or partnership interests that are shared. For example, PDVSA owns 50% of UNO-VEN Co.,[68] a refiner and marketer in the mid-west United States.[69] Should such companies be excluded in the calculation due to their interests in the foreign production that they import into the United States? Whose support or non-support should be considered and used in the industry support calculation? Could some large multi-faceted producers be getting more than one vote because of control relationships or business ties?

These considerations become pivotal when one looks at the methodology in which Commerce conducted its industry support analysis. In order to make an industry support determination, Commerce surveyed the "domestic" producers. For the survey, Commerce created two groupings: group A which consisted of the top 410 producers by volume of crude oil production and group B which consisted of all remaining

62. The Orinoco Heavy-Oil Belt is a 270-mile by 40-mile strip that has the largest heavy oil reserves in Venezuela. The Venezuelan government has encouraged the development of numerous strategic associations consisting of joint ventures between PDVSA and private sector companies to increase production in this lucrative region. Martin, *supra* note 29, at 331.

63. *Id.* at 332.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 333.

68. *PDVSA*, *supra* note 26.

69. Worldwide Operations: UNO-VEN, *at* http://www.pdv.com/english/filiales_unoven_en.html (last visited Jan. 4, 2000).

producers.[70] All producers in group A were sent a survey. However, for group B, a sampling by production stratum was performed. Group B companies were grouped into ten strata by production increments of 25,000 barrels.[71] The number of surveys sent out by stratum was determined by the relative production of each stratum over total production.[72]

The outcome of this analytical approach was that the major oil companies were all given an opportunity to voice their support or non-support for the petition. In contrast, only a percentage of independent producers were given such opportunity. To confound the analysis further, for the non-responding companies in group A, Commerce projected support or opposition based upon the percentages of support or opposition from the responding companies.[73] It seems rather more appropriate to presume such non-responding companies to be neutral on the issue. Hence, with approximately three-quarters of the group A responding major producers voicing opposition,[74] approximately three-quarters of the non-responding and presumably neutral companies were additionally counted as being in opposition to the petition.

This same calculation was applied to group B companies. In this group, 99% of the responding companies supported the petition.[75] As in group A, 99% of the production in this group was then considered to be in support of the petition. However, because it is the volume of production that is used as a standard of measure for industry support, the greater production numbers of group A prevailed over the production numbers of group B.

The support or opposition of workers within the industry is to be accounted for, as well as the support or opposition of management. The test for industry support is whether "the domestic producers *or workers* who support the petition account for" domestic production of like product.[76] In cases where management and workers disagree, Commerce should make the industry support calculation in a manner that does not negate the expression of workers.

---

70. Memorandum from The Industry Support Team to Richard Moreland, *supra* note 60, at 2.

71. *Id.*

72. *Id.*

73. *Id* at 3.

74. *Id.* at chart 3.

75. *Id.*

76. 19 U.S.C.S. § 1673a(c)(4)(A)(i)-(ii) (1999) (emphasis added).

The Paper, Allied-Industrial, Chemical & Energy Workers International Union (PACE), representing 320,000 workers, supported SDO's petition.[77] PACE represents workers with "Vastar, Permian, Occidental, Rayburn Oil, Teavee Oil and Gas, Union Oil, BP/Amoco, ARCO, Mobil Oil, and Texaco."[78] In these instances, the support of the workers was negated where the opposition of the oil companies was considered in the industry support calculation.

The inclusion of the domestic companies that are also importers of crude oil could be questioned. In determining standing, Commerce claims to have discretion in excluding domestic industry opposition in its consideration.[79] For this reason, with domestic importers objecting to the NAFTF petition, Commerce did not go on to consider whether NAFTF had sufficient industry support to continue the investigation. However, with SDO's petition and with domestic importers objecting, Commerce did go on to calculate industry support. This seems inconsistent.

One might think that Commerce is obliged to suspend an investigation once it finds insufficient industry support. In Commerce's analysis of industry support in *Gilmore Steel*, the court stated "the 'interested party' criterion . . . is thus the first in a two-step shifting process - not only must a petitioner be a member of the affected industry, i.e., be an 'interested party,' it must also show that a majority of that industry backs its petition."[80] However, Commerce has recognized that

> there is nothing in the statute, its legislative history, or our regulations which requires that petitioners establish affirmatively that they have the support of a majority of their industries. In many cases, such a requirement would be so onerous as to preclude access to import relief under the antidumping and countervailing duty laws.[81]

---

77. Letter from Charles Verrill, Jr., Counsel to Petitioners, Wiley, Rein & Fielding, to The Honorable William M. Daley, U.S. Secretary of Commerce attachment 1 (July 30, 1999) (on file with author). Attachment 1 is a letter dated July 29, 1999 from Robert E. Wages, Executive Vice President of PACE to The Honorable William M. Daley indicating PACE's support of SDO's petition.

78. *Id.* at 2.

79. Preliminary Affirmative Countervailing Duty Determination; Certain Fresh Atlantic Groundfish From Canada, 51 Fed. Reg. 1010, 1011 (Jan. 9, 1986). *See* discussion *supra* Part IV.A regarding NAFTF petition.

80. Gilmore Steel Corp. v. United States, 7 Ct. Int'l Trade 219, 226 (1984).

81. Frozen Concentrated Orange Juice From Brazil: Final Determination of Sales at Less Than Fair Value, 52 Fed. Reg. 8324, 8325 (Mar. 17, 1987).

Is Commerce required to dismiss a petition that has failed to demonstrate the support of the majority of a domestic industry? The court in *Citrosuco Paulista, S.A. v. United States* declined to impose such a requirement and cited *Gilmore Steel* and *Oregon Steel Mills* in support of its position.[82] In the 1988 *Citrosuco Paulista* case, involving frozen concentrated orange juice, Commerce excluded opposition from firms where each of such firm's imports exceeded 50% of that firm's total production.[83] Commerce relied upon the "related parties" statute for its decision to exclude such firms.[84] The statute read: "When some producers are related to the exporters or importers, or are themselves importers of the allegedly subsidized or dumped merchandise, the term 'industry' may be applied in appropriate circumstances by excluding such producers from those included in that industry."[85]

Citrosuco then argued "that Commerce acted *ultra vires* in using this statute."[86] The argument, suggesting that "the provision was intended for the [International Trade] Commission rather than Commerce,"[87] was based upon legislative history. The court refused this argument because "Commerce has taken the position that firms with large imports of the allegedly dumped or subsidized merchandise may be excluded from the definition of the domestic industry, because they inherently lack the stake in the final investigation being pursued by the petitioner."[88] The court found "it reasonable for Commerce to apply 19 U.S.C. § 1677(4)(B) (1982) to exclude producers who derive a majority of their production from the imports under investigation."[89]

In a case where a company was a domestic producer as well as an importer, Commerce stated that it had authority to disregard its position against a petition filed for an anti-dumping investigation. The Coalition for Fair Preserved Mushroom Trade (CFPMT) filed a petition in 1998 wherein it alleged that imports of preserved mushrooms from Chile, India, Indonesia, and the People's Republic of China were, or were likely, to be sold in the United States at less than fair market value.[90] Commerce found

---

82. Citrosuco Paulista, S.A. v. United States, 12 Ct. Int'l Trade 1196, 1205 (1988).

83. *Id.*

84. *Id.*

85. *Id.* (quoting 19 U.S.C. § 1677(4)(B) (1982)).

86. *Id.* at 1206.

87. *Id.*

88. *Id.*

89. *Id.*

90. Initiation of Antidumping Investigations: Certain Preserved Mushrooms from Chile, India, Indonesia, and the People's Republic of China, 63 Fed. Reg. 5360, 5361 (Feb. 2, 1998).

CFPMT to be an interested party with industry support. Giorgio Foods Inc., a domestic producer as well as an importer of the subject merchandise, expressed opposition to the investigation with respect to preserved mushrooms from India.[91] Commerce side-stepped a decision on whether to include or exclude Giorgio's position in its determination of industry support by noting that supporters of the petition, including Giorgio, accounted for over 50% of the production of the domestic producers expressing an opinion.[92] It appears Commerce recognized the legitimacy of excluding a domestic producer of the subject merchandise of an investigation when that producer is also an importer of the subject merchandise.

The major oil companies have been shifting more of their exploration and production activities to locations outside the United States. They have reduced domestic development expenditures from about $20 billion in 1985 to roughly $8.5 billion in 1995.[93] At the same time, their foreign investment increased from $7 billion to about $8.5 billion.[94] Should these domestic companies, who have lessened their domestic crude oil exploration and production operations and have substantial domestic operations that use imported crude oil in their refining and distribution functions, be included in the analysis?

The petitioner suggests that such parties should be discounted[95] from the analysis because they are (1) not crude oil producers within the region of producers on whose behalf SDO has petitioned, and (2) such parties are related parties[96] to the foreign importers. In the end, though, section

91. *Id.* at 5362.

92. *Id.*

93. Perkins, *supra* note 8, at 6.

94. *Id.*

95. Memorandum from The Industry Support Team, U.S. Dep't of Commerce, to Richard W. Moreland, Deputy Assistant Secretary, U.S. Dep't of Commerce 1 (Aug. 9, 1999) (on file with U.S. Dep't of Commerce, discussing Antidumping and Countervailing Duty Petitions Regarding Crude Oil). *See* 19 U.S.C.S. § 1677(4)(C) (1999). The United States may be divided up into two or more market regions where (1) the producers within such market sell all or almost all of their production of the domestic like product in that market, and (2) the demand in that market is not supplied, to any substantial degree, by producers outside of the region.

96. Memorandum from The Industry Support Team to Richard Moreland, *supra* note 95, at 2. *See* 19 U.S.C.S. § 1677(4)(B) (1999). If a regional producer of the domestic like product is also an importer of the product, the producer may be excluded from the industry as a related party where (1) the producer directly or indirectly controls the exporter or importer, (2) the exporter or importer directly or indirectly controls the producer, (3) a third party directly or indirectly controls the producer and the exporter or importer, or (4) the producer and the exporter or importer directly or indirectly control a third party and

732(c)(4)(B)(i) requires Commerce to disregard related producers who oppose the petition unless such producers "demonstrate that their interests as domestic producers would be adversely affected by the imposition of an antidumping duty order."[97] Where producers are also importers, subsection (B)(ii) allows Commerce to disregard them as interested *parties*.[98] Commerce chose, however, to poll such domestic producers. These producers expressed to Commerce that they opposed the petition. The suggestion is that these included producers had interests in maintaining a cheap supply of imported oil. Commerce's leeway to either include or disregard the related parties allowed it to disregard producers who have moved away from their domestic production of crude oil and now rely heavily upon cheap imported oil. Is it "possible for large integrated producers who import to have a common stake with the petitioner?"[99]

For example, the petitioners argued that "Conoco, Total, Arco, Texaco, Phillips, and Mobil Oil" owned shares with PDVSA.[100] The petitioner argued that these companies have become related parties because of their current business pursuits. These pursuits have moved such major domestic companies away from domestic exploration and production toward greater dependence on their refining capacities. Their interests are better furthered, as a refiner and not as a producer of crude oil, in maintaining a supply of imported crude oil. The petitioner supported this notion by noting that Mobil has stated that it "refines imported crude because its refining capacity is substantially greater than its domestic crude production capacity."[101]

To illustrate further the impact of the movement by domestic majors from exploration of domestic crude oil to refining imported crude oil, the petitioner noted that one of Mobil's subsidiaries, Mobil Exploration and Producing U.S. Inc. (MEP), had recently "filed a 'Certification Eligibility Request: Worker Adjustment Assistance,' with the Department of Labor on July 7, 1994."[102] The petitioner further noted that MEP itself stated that "increased imports have caused a decline in sales and production of

there is reason to believe that the relationship causes the producer to act differently than a non-related producer.

97. Memorandum from The Industry Support Team to Richard Moreland, *supra* note 95, at 1.

98. *Id.*

99. *Id.* at 2.

100. Letter from Charles Verrill to The Honorable William Daley, *supra* note 61, at 1.

101. *Id.* at 2.

102. *Id.*

Companies's [sic] products."[103] MEP, as quoted by the petitioner, "blamed 'imported natural resources' pricing advantages' for worker separations and revenue declines."[104]

In this case we see that Mobil's overall interests may be better served if the crude oil supply from imports is not disturbed by anti-dumping protection and countervailing duties as requested by SDO. However, Mobil's domestic crude oil production subsidiary, MEP, might be benefited if the petitioner is correct in its assertions and the protective measures are carried out. In keeping with its overall interests, Mobil, along with other similarly situated large companies, has elected not to support the petitioner. However, under this scenario, it seems proper for Commerce to exclude Mobil and other similarly situated companies as related parties in the determination of industry support and not include them as members of the domestic crude oil production industry.

C. *American Petroleum Institute's View (API)*[105]

An Ad Hoc Free Trade Committee[106] (Committee) weighed in on the related party issue by arguing that the larger companies should not argue whether there is a control relationship between them and the countries alleged to be dumping. Rather, the Committee stated that the companies should stand on their positions as domestic producers of crude oil and their other interests should not be considered. By taking this position, API attempts to avoid argument over such terms as "designated customers" and potentially the other forms of their business relationships.[107]

Commerce avoided that issue with its declaration that SDO did not have industry support. It would seem more logical that Commerce should have inquired into the related party issue in order to determine who should be included and excluded in the determination of industry support.

---

103. *Id.*

104. *Id.* at 3.

105. The American Petroleum Institute is a major national trade association that was formed in 1919. It claims to represent the entire petroleum industry. It is headquartered in Washington, D.C. and has petroleum councils in thirty-three states. *API in Brief, at* http://www.api.org/about/aboutindex.htm (last modified Sept. 9, 1999).

106. ARCO, BHP Petroleum, BP Amoco, Burlington Resources, Chevron, Conoco, Exxon, Fina, Kerr-McGee, Marathon Oil, Mobil, Murphy Oil, Occidental Petroleum, Phillips Petroleum, Shell Oil and Texaco are members of the Committee. *See* Memorandum from The Industry Support Team to Richard Moreland, *supra* note 95, at 2.

107. *Id.*

V. POLITICAL PRESSURES

Section 732 of the Act allows Commerce to "disregard the position of domestic producers of a domestic like product who are importers of the subject merchandise."[108] Why did Commerce not disregard the opposition to SDO's petition from those producers who were also crude oil importers when section 732(c)(4)(B)(ii) clearly allows the administering agency to do so? Political considerations may have influenced Commerce's decision.

SDO alleged unprecedented official opposition from the Executive Branch by the U.S. Department of Energy (DOE).[109] Though DOE has no role in an anti-dumping investigation, Secretary Bill Richardson involved DOE with news releases, telephone calls, meetings with representatives of the governments of the nations from which the dumping was alleged to have occurred, and discussions with representatives from SDO.[110] In SDO's appeal to the U.S. Court of International Trade, it claimed that the DOE Secretary, Bill Richardson, "played an 'informal role in adjudicating these petitions since he publicly promised the Saudi government that the US government did not support the petitions and they [sic] he personally was trying to 'fix' the problem.'"[111]

A few months later, SDO, without fanfare or stating a reason, decided to drop its allegation of improper influence by Secretary Richardson in its appeal to the U.S. Court of International Trade.[112] It is curious that a leading Washington law firm would suggest an angle of attack in its appeal to the court only later to withdraw it. There is no foul in changing tactics if

---

108. Tariff Act of 1930 § 732, 19 U.S.C.S. § 1673a(c)(4)(B)(ii) (1999).

109. Letter from Charles Verrill, Jr., Counsel to Petitioners, Wiley, Rein & Fielding, to Leo Gordon, U.S. Ct. of Int'l Trade, Appellant's Compl. ¶ 9 (Sept. 7, 1999) (on file with author).

110. News Release, U.S. Dep't of Energy, *Statement of Energy Secretary Bill Richardson Following His Meeting with Save Domestic Oil, Inc.* (July 20, 1999), *at* http://www.doe.gov/news/releases99/julpr/pr99188.htm. *See also* News Release, U.S. Dep't of Energy, *Statement of Energy Secretary Bill Richardson* (July 15, 1999), *at* http//www.doe.gov/news/releases99/julpr99179.htm; News Release, U.S. Dep't of Energy, *Statement of Secretary of Energy Richardson on Anti-Dumping Petition Filed by Save Domestic Oil, Inc.* (June 29, 1999), *at* http://www.doe.gov/news/releases99/junpr/pr99167.htm; Karey, *supra* note 4; Gerald Karey, *U.S. Oil Group Opposes DOE Head's Role*, PLATT'S OILGRAM NEWS, Aug. 5, 1999, *available at* LEXIS, News Group File; Gerald Karey, *U.S. DOE Chief to Attempt to Mediate Dumping Row*, PLATT'S OILGRAM NEWS, July 16, 1999, *available at* LEXIS, News Group File.

111. Cathy Landry, *Anti-Dumping Appeal Filing Set for Sep 7*, PLATT'S OILGRAM NEWS, Sept. 7, 1999, *available at* LEXIS, News Group File.

112. Eric Kronenwetter, *SDO Drops Complaint About U.S. from Appeal*, OIL DAILY, Oct. 18, 1999, *available at* LEXIS, News Group File.

a better one is found or an objective changes. However, objectives can be changed by political pressure. The Clinton Administration may have applied such pressure directly to SDO and/or its legal representative to drop the issue.

As an alternative motive for the Clinton Administration to quash investigation by Commerce in deference to the major oil producing companies, it could have been a matter of avoiding the predicament of announcing simultaneously two separate opposing findings from two different agencies within Commerce.[113] The Administration had launched "an inquiry under Section 232 of the Trade Expansion Act to determine how rising crude and product imports are affecting U.S. energy security."[114] It was reported that "Commerce . . . plans to expedite the Section 232 study and issue a report by July 26 [1999]."[115] "Similar investigations in 1975, 1979, 1988, and 1995 determined that rising imports threatened national security."[116] With imports even higher today, why should we expect a dissimilar conclusion this time? "It would have been embarrassing for one commerce department agency to declare that growing oil prices were a national security threat while another asserted that producers were not being harmed by low-priced imports."[117]

After SDO's announcement that it would drop its allegation of improper influence by Secretary Richardson in its appeal to the U.S. Court of International Trade, the Clinton Administration apparently felt free to be more open in its attentiveness to the matter. Secretary Richardson made plans to visit Saudi Arabia, Venezuela, Mexico, Kuwait, and Norway.[118] During his visit in Saudi Arabia, Secretary Richardson stated that the current world's production of crude oil is approximately seventy-three million barrels per day, which is about two million barrels short of the world's daily consumption rate.[119] While noting this shortfall, the current high price of a barrel of oil, and the importance of price stabilization, he urged, "[u]nless action is taken, the situation will get worse."[120] He also noted that low prices discourage investment in

---

113. Patrick Crow, *Imports Study,* OIL & GAS J., Jan. 17, 2000, at 22, *available at* 2000 WL 14255918.

114. Patrick Crow, *IPAA Backs Petition Alleging Crude Oil Dumping*, OIL & GAS J., May 17, 1999, *available at* 1999 WL 9723870.

115. *Id.*

116. Crow, *supra* note 113.

117. *Id.*

118. The Saudi Arabian Information Resource, *U.S. Energy Secretary Visits Saudi Arabia, at* http://www.saudinf.com/main/y1104.htm (Feb. 27, 2000).

119. *Id.*

120. *Id.*

production and create hardships for American small producers.[121] Though the Clinton Administration appears to oppose the anti-dumping petition, it does acknowledge the hardships currently faced by the American independent producer.

Lastly, the Under-Secretary of Commerce, David Aaron, verbalized another reason for Commerce's apparent ease for dismissing the SDO petition. He "acknowledged that the petition had the capacity to set precedent."[122] In this case, if the petition were successful, it would be "the first extension of the dumping law to a non-agricultural commodity."[123] The prospect of setting this precedent by extending protection to crude oil producers "provoked considerable discomfort at the Commerce Department."[124]

VI. RECENT DEVELOPMENTS

A. *Successful Petition Might Have Opposite Effect of Petitioner's Desire*

The opponents of the petition argued that ultimately it would be the American consumer who would suffer due to the increased price in crude oil. "The result [by imposing stiff tariffs] would have been higher gas and energy prices . . . ."[125] But, the end result could be the opposite. SDO has requested anti-dumping duties "up to 84.37 percent on Saudi Arabian crude, 33.37 percent duty on Mexican imports, 177.52 percent on Venezuelan imports and 102.61 percent on Iraqi crude."[126] In addition, it seeks "a countervailing duty of $6.18 per barrel . . . to offset average subsidies . . . paid [by the governments of each country] to help produce and bring the oil to market."[127]

The magnitude for the U.S.'s market of such unilateral action of imposing remedial tariffs on crude oil from the alleged offending countries is demonstrated by the following data. Total U.S. crude oil imports rose steadily over the 1990s to 10.7 million barrels per day in 1998.[128] "In recent years, the collective shares of Saudi Arabia, Mexico, and Venezuela have

121. *Id.*

122. Agence France-Presse, *U.S. Dismisses Anti-Dumping Petition on Crude Oil*, Aug. 10, 1999, *available at* 1999 WL 2651939.

123. *Id.*

124. *Id.*

125. Russell Ray, *Domestic Oil Group Trips Over Hurdle*, TULSA WORLD, Aug. 10, 1999, at E1 (citing Gary Hutbauer, a trade expert at the Institute for International Economics).

126. Holly, *supra* note 31.

127. *Id.*

128. PETROLEUM INDUS. RESEARCH FOUND., MARKET IMPACTS OF "DUMPING" AND "COUNTERVAILING" DUTIES 2 (Aug. 1999).

been approximately stable at about 45% of total imports . . . ."[129] These three alone account for almost 50% of total U.S. imports of crude oil.

Though imports of crude oil to the United States from Iraq ceased in the early 1990s as a result of United Nations sanctions,[130] those sanctions have been relaxed to allow Iraq to sell oil in order to raise revenues to be used for humanitarian purposes.[131] Consequently, "[i]n the first four months of 1999, imports of Iraqi oil reached 7% of the total . . . and pushed the combined share of imports for the four countries to just under 50%."[132] "In volumetric terms, the four countries supplied 4.4 MMB/D [million of barrels per day] of U.S. total crude oil imports of 8.7 MMB/D in 1998."[133] Accordingly, SDO's petition could have directly impacted over 50% of the crude oil now imported by the United States.

Though the crude oil flow potentially affected by the petition is significant for the United States, it represents a much lesser impact in terms of world flows. "[T]he total volume of internationally traded oil is about 40 MMB/D."[134] Therefore, the U.S. crude oil imports from the named countries represent approximately 11% of oil traded internationally. Though the affected imports could still enter the U.S. market, in theory it could also be re-routed to other world markets where it would not be subjected to increased tariffs or duties.

If Venezuela and Mexico chose to re-route their exports to other markets to avoid the increased tariffs and duties, these countries would probably incur increased costs to transport the crude oil to those more distant markets. So, whether Venezuela and Mexico re-routed their production or continued to market in the United States, they will face increased costs and will probably have to substantially increase production to maintain their budgeted crude oil revenues. Additionally, the United States would have to find replacement imports. Though the American independent producers would like to fill that vacuum with their production, they may not be able to fill the entire vacuum if it were created. The sources for the replacement imports would undoubtedly be more distant than the Venezuelan and Mexican producers and, therefore, would be more expensive due to transportation costs.

A possibility exists that the other Persian Gulf crude oil exporting countries could increase their exports to the United States. In 1998, these

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. PETROLEUM INDUS. RESEARCH FOUND., *supra* note 128.

"producers exported about 5.2 MMB/D, of which only about 6% went to the U.S. . . . [and] [m]ost of this group's oil was moving to long-haul destinations in Asia."[135] Therefore, these countries could switch markets with Saudi Arabia. Their production could move from Asian markets to U.S. markets, and Saudi Arabia's production could move to Asian markets. This switch would involve very little difference in transportation costs.[136]

But Venezuela's and Mexico's situation is much different. "In 1998, 89% of Mexico's exports went to the U.S., as did 61% of Venezuelan exports."[137] Should they decide to avoid the increased U.S. tariffs and send their exports elsewhere, it means substituting a short-haul market for long-haul markets. A consequential increase in transportation costs and corresponding erosion of their net revenues would result.

> This erosion in revenue could encourage them to increase supplies in an attempt to protect their revenue. This could undermine the unity and effectiveness of OPEC, and non-OPEC producers by adding incremental supply to the market. This in turn would lower prices, which is the last thing any producer (domestic or otherwise) wants to see. Thus, ironically the plaintiffs might be able to achieve what consumers and consumer countries have been unsuccessful at achieving, that is driving a wedge between the effectiveness of the current producer cartel.[138]

Perhaps, then, from a consumer point of view, the petition should be supported. However, it would be a gamble. Attraction or aversion to risk varies with each individual. Whatever the outcome might have been, it would surely have caused some anxiety to both producers and consumers.

B. It May be a Moot Issue Now

As noted in Part II, world oil prices seem to dictate whether American independent oil producers operate profitably or at a loss. When world prices are below the independents' cost of production, the independent operator loses money. When the world prices are higher than the independents' cost of production, the independent operator makes money. Because OPEC members together produce a significant percentage of the world's crude oil supply, it has opportunity to cause the

135. *Id.* at 3.
136. *Id.*
137. *Id.*
138. *Id.*

world price of crude oil to rise and to remain at a relatively higher level. However, history shows that OPEC has at times had difficulty in maintaining successful outcomes in such endeavors. Accordingly, any group of American independent oil producers would have little effect in changing world prices.

"[T]he price of crude oil has more than doubled . . . from $11" a barrel that was posted earlier in 1999.[139] The reason might be due to an initiative of the Mexican Energy Minister, Luis K. Tellez.[140] When Dr. Tellez began his initiative, "he was worried about the devastating impact that falling oil prices were having on the economy in Mexico, which in 1997 relied on oil for 38 percent of its revenues."[141] Quietly, "within a year he was able to persuade a few key oil ministers and officials from Saudi Arabia and Venezuela to form a new coalition of oil-producing nations."[142] "Tellez managed to break through the wall of paralysis—mainly with what he called 'gentlemen's agreements' among Saudi Arabia, Venezuela and Mexico."[143] "Despite skepticism that the new group would be able to stick together, oil prices began to recover quickly, from $14.65 a barrel in March [1998] to $17 a month later."[144] Though the Asian economic downturn reversed much of this success, the group held together and coordinated another round of production cuts in 1999. The cuts totaled 5.3 million barrels a day, and the price rose to $23.45 a barrel.[145] "If the oil exporters stay with their cuts, inventories of oil will run down hard and push the price up to close to $30."[146] At these higher prices, SDO members can operate profitably, rendering the issue moot in reality. However, the issue may not be moot legally, as SDO may hold their appeal for use in the near future.

---

139. New York Times, *Mexico Helps Unite OPEC Cartel,* TULSA WORLD, Nov. 14, 1999, at E1.

140. Dr. Tellez is a graduate of the Massachusetts Institute of Technology where he received a Ph.D. in Economics. Having occupied various high level positions in the Mexican government and serving as Chief of Staff to Mexican President Ernesto Zedillo, he was then appointed Minister of Energy in October 1997. Introduction at the Council of the Americas Conference, U.S. State Department, Washington, D.C., (May 2, 2000) *in* Federal News Service. *See also* Andrew Downie, *Zedillo Picks Close Aide to be New Energy Minister,* HOUSTON CHRONICLE, Oct. 23, 1997, *available at* LEXIS, News Group File.

141. New York Times, *supra* note 139, at E1.

142. *Id.* at E5.

143. *Id.*

144. *Id.*

145. *Id.* at E1, E5.

146. *Id.* at E1 (quoting Frederick Leuffer, an oil analyst at Bear Stearns).

C. Commerce's Determination is Appealable

Commerce's determination to dismiss SDO's petition was a final action and could then be appealed. "[A]n interested party who is a party to . . . [either a countervailing or anti-dumping duty] proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade . . . ."[147] SDO exercised its option and filed an appeal on September 7, 1999.[148] SDO Chairman, Harold Hamm, and SDO President, Michael Cantrell, gave several reasons for the decision to proceed with an appeal.[149] First, federal judges receive lifetime appointments and are not susceptible to political pressure.[150] Second, Commerce decisions are often overturned.[151] Third, attorneys for SDO advised there was an 80% chance of winning the appeal, and if successful, the petition would be returned to Commerce for a review on the petition's merits.[152] Last, since the appeals process consumes considerable time (about a year), the pending matter would act to pressure the foreign producers into keeping their crude oil production in check.[153] The estimated cost of $150,000 to proceed with the appeal[154] was apparently considered to be a worthy investment because the appeal was filed.

D. Alternatives

If supporting the independent oil producers is not possible, or at least not likely, with relief under the anti-dumping and countervailing duty provisions, what then, if anything, can the American government do to provide further support for this significant sector of the American economy?

1. Trade Expansion Act of 1930, Section 232 Consideration

In this century, petroleum has always been a vital resource for the world's industrialized nations. Its importance is great enough to warrant its consideration as a strategic resource. Dependence upon imported petroleum can be a weakness easily targeted by an opposing country. The

---

147. 19 U.S.C.A. § 1516a(a)(1) (1999).

148. Letter from Charles Verrill to Leo Gordon, *supra* note 109.

149. Eric Kronenwetter, *U.S. Independents Group Claims 80% Odds of Success in Appeal of Anti-Dumping Ruling (Save Domestic Oil Inc. May Appeal Dismissal of Anti-Dumping Petition)*, OIL DAILY, Aug. 30, 1999, *available at* 1999 WL 10014077.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

United States has had the good fortune for most of the past century to have sufficient domestic oil fields to meet the needs of the country. However, as the domestic fields have been depleted, dependence upon imported petroleum has become significant. One has only to think back to the 1973 OPEC oil embargo to see the immediate impact of a shortage of oil.

One might question why SDO did not argue for an investigation under section 232 of the Trade Expansion Act of 1962 to determine the effects on the national security by petroleum imports.[155] Section 232 does not state the criteria in which to judge the impact of an imported item on national security. It seems, though, that a compelling argument could be made that maintaining a domestic oil production industry is a reasonable consideration in the overall scheme of national security.

2. Royalty Relief

Several billion dollars in royalties shared with the federal and state governments have been under consideration since 1995 when the Minerals Management Service announced its intention to change the rules for how oil and natural gas produced on federal lands is valued.[156] Subsequently, Congress and President Clinton promulgated the Federal Oil and Gas Royalty Simplification and Fairness Act.[157] Since then, the Minerals Management Service, the oil industry, and Congress have grappled over how to develop the governing regulations.[158] Speaking for the American independent crude oil producers, the Chairman of the Independent Petroleum Association of America's Land and Royalty Committee, Mr. Diemer True, stated before the U.S. House of Representatives Committee on Resources, Subcommittee on Energy and Mineral Resources, that there was much needed improvement in the Minerals Management Services' rule-making. Reduction in regulatory burdens on the independents could be realized by "[s]implifying the royalty collection process . . . [p]roviding

---

155. *See generally* Trade Expansion Act of 1962 § 232 (b)(l)(A), 19 U.S.C.A. § 1862 (2000). "Upon request of the head of any department or agency, upon application of an interested party, or upon his own motion, the Secretary of Commerce . . . shall immediately initiate an appropriate investigation to determine the effects on the national security of imports of the article which is the subject of such request, application, or motion." *Id.*

156. Am. Geological Inst., *Oil Royalty and Valuation Update* (Jan. 27, 2000), *at* http://www.agiweb.org/gap/legis106/oilvalue.html (last visited Mar. 8, 2000).

157. Statement of President William J. Clinton upon Signing H.R. 1975, 32 WEEKLY COMP. PRES. DOC. 1448 (Aug. 13, 1996).

158. Am. Geological Inst., *supra* note 156.

certainty in the royalty valuation system . . . [and] [m]aximizing taxpayer dollars."[159]

Congress presently has three house bills and two senate bills under consideration to provide fair valuation of oil and gas royalties. The Strategic Reserve Replenishment Act of 1999 allows for the replenishment of the Strategic Petroleum Reserve (SRP) by accepting royalty-in-kind oil. It calls for at least 100,000 barrels per day be accepted until the SRP capacity is reached.[160] However, this bill may be more of an effort to restore the SRP than to address the fairness of oil and gas royalties in general. The Federal Oil and Gas Reform Act of 1999 seeks to improve compliance of the Federal Oil and Gas Royalty Management Act of 1982 through stronger sanctions for violations relating to oil and gas royalties.[161] The Federal Oil and Gas Lease Management Improvement Act of 1999 takes a broad approach in that it would transfer oil and gas industry regulation of exploration and production on federal lands. This measure would remove the federal government's conflicted interests of being both oil and gas owner and industry regulator.[162] The Federal Royalty Certainty Act adds a proviso to the Outer Continental Shelf Lands Act addressing the payments of royalties whether due in value or due in amount.[163]

3. Emergency Oil and Gas Guaranteed Loan

Congress has already acted to provide relief to the oil industry by passing the Emergency Steel Loan Guarantee and Emergency Oil and Gas Guaranteed Loan Act of 1999 (P.L. 106-51).[164] Signed into law by President Clinton on August 17, 1999, the bill was intended by Congress "to help . . . oil/gas firms that were impacted by the . . . oil and gas import cris[i]s."[165] By the February 28, 2000 deadline, twenty-three loan

---

159. Press Release, Indep. Petroleum Ass'n of Am., *America's Oil and Natural Gas Producers Call on Congress to Adopt the Royalty Enhancement Act of 1998: A Win-Win-Win for the Federal Government, Taxpayer and America's Oil and Natural Gas Industry* (Mar. 19, 1998), *at* http://www.ipaa.org/departments/communications/PR1998/PR031998_2.htm (last visited Mar. 8, 2000).

160. H.R. 498, 106th Cong. (1st Sess. 1999).

161. H.R. 1269, 106th Cong. (1st Sess. 1999).

162. H.R. 1985, 106th Cong. (1st Sess. 1999). *See also* S. 1049, 106th Cong. (1st Sess. 1999).

163. S. 924, 106th Cong. (1st Sess. 1999).

164. 15 U.S.C.S. § 1841 (2000).

165. U.S. Dep't of Commerce, *The Emergency Steel Loan Guarantee and the Emergency Oil and Gas Guaranteed Loan Act of 1999*, *at* http://204.193.246.62/public.nsf/docs/4ADD963B76BB1B298525682E004F31EE (last visited Mar. 8, 2000).

applications totaling over $68 million in requests had been received by the Emergency Oil and Gas Loan Guarantee Board.[166]

4. Alternative Minimum Tax Adjustment

The Alternative Minimum Tax (AMT) is a heavy burden to the American independent petroleum producer. Although "[t]he AMT was enacted to make sure that companies reporting large financial income also paid at least the prescribed minimum tax," it has increased "taxes on companies that are . . . struggling financially or [it has] exacerbate[d] the financial impact of falling commodity prices."[167] "[T]he independent petroleum producers of today . . . face historically low market prices for the products they sell . . ." while facing "numerous preference items under the AMT."[168] Certain provisions under AMT, such as specified preferences, could be phased down when prices fall below $23.50 a barrel and perhaps completely eliminated when the price falls below $18.50 a barrel.[169] Such measures could be helpful to the American domestic industry.

VII. CONCLUSION

When the price of crude oil fell below $10 a barrel in December 1998, after a steady decline over eighteen years from $32 a barrel in 1981, the businesses associated with the U.S. domestic crude oil production were faced with potential extinction. Hundreds of thousands of U.S. domestic jobs and a large sector of the U.S. economy were at stake. As is true with most situations in life when one is seemingly at the end of the rope, one sometimes will look for means that may have not been attempted previously. This is what some of the American independent oil producers did in 1999. Many of them came together, evaluated their operating environment, and thought they found an inappropriate trade practice aimed directly at them. They found a collusive effort by crude oil producers who had excess capacity. The collusion, spawned by a strategic initiative by Venezuelan-owned PDVSA and facilitated by the Mexican Minister of Energy, was between Venezuela, Mexico, Iraq, and Saudi

---

166. U.S. Dep't of Commerce, *Emergency Oil and Gas Loan Guarantee Board Receives Applications for $68 Million*, *at* http://204.193.246.62/public.nsf/docs/AF9B678C419BBBB585256896005BB0F9 (last visited Mar. 8, 2000).

167. *Oil and Gas Production Incentives: Hearing Before the House Oversight Subcomm., Ways and Means Comm.*, 106th Cong. (1999) (statement of Mitchell Solich, President, The Chandler Company).

168. *Id.*

169. *Id.*

Arabia. They began flooding the market with crude oil at a price which would drive the American independents to plug their stripper wells.

The American independents saw this as an unfair trade practice and decided to attack it. However, market dumping concepts had never been applied to a commodity such as crude oil. So SDO was formed by the independents to make their case in the established system of resolving trade disputes, the mechanisms set up by the Agreement on Tariffs and Trade. SDO passed the hat and collected funds among themselves to hire legal representation which would assist in petitioning Commerce for an investigation.

However, from almost the beginning, the petition was apparently not well received. Many commented that market dumping should not be applied to crude oil production. The major oil producers had interests in foreign oil production. The Clinton Administration was concerned about international relations. So legal challenges to the petition were mounted. Commerce, as it should, looked at SDO's standing and support from the oil production industry. It appears that SDO's petition was given short shrift. Finding ways to manipulate the support analysis, Commerce arrived at the conclusion that pleased the Clinton Administration, the major American oil producing companies, and the officials of the countries named in the petition. The analysis was swift, and the decision rendered promptly.

SDO's filing of a market dumping petition was unique. Though the petition did not gain an official sanction, perhaps because of political considerations, it did cause sufficient attention to the situation whereby the involved oil producers changed their tactics. The use of an international agreement apparently was a good avenue pursuit for the independents. Oil prices are back up, and the independents' near-term survival is no longer in question.