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Linda M. Weinberg

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# ON WHOSE BEHALF? UNDERLYING CONFLICTS OF THE ANTIDUMPING STANDING RULES

## I. INTRODUCTION

The desire to protect American industry from foreign competition has a long history, and the specific concern with the “dumping” of foreign products onto the American market dates back to 1916.<sup>1</sup> Although the early Tariff Acts and Trade Agreements Acts attempted to encourage free trade by reducing tariffs, later amendments have imposed higher tariffs because of the belief that foreign importers are not competing fairly with United States industries.<sup>2</sup> To this day, the two priorities of free trade and protection for industry shift constantly because of conflicts not only between foreign and domestic manufacturers but among domestic producers as well.<sup>3</sup>

One method through which foreign importers allegedly deal unfairly in United States markets is by “dumping” products. The statutory definition of “dumping” is the sale, in the United States, of foreign merchandise “at less than its fair value” resulting in or likely to result in material injury to a United States industry.<sup>4</sup> The remedy prescribed by the present antidumping statute is the imposition of antidumping tariffs, in addition to any normal tariffs, on the dumped goods.<sup>5</sup> Ideally, this statutory scheme would equalize import and domestic product prices. However, other factors such as multilateral trade agreements often affect the ability

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1. Mattice & Cunningham, *High Technology Imports and the U.S. Countervailing Duty and Antidumping Laws*, 10 RUTGERS COMPUTER & TECH. L.J. 189, 206 n.72 (1984). Countervailing duty laws, which will not be the focus of this discussion, involve subsidies by foreign governments on imports to the United States. See 19 U.S.C. § 1671(a) (1982) for a description of the countervailing duty laws.

2. H. PIQUET, *THE TRADE AGREEMENTS ACT AND THE NATIONAL INTEREST* 15-17 (1958). According to Mr. Piquet, the policy of the original Trade Agreements Act of 1934 was to achieve a *reciprocal* exchange of tariff reductions as a form of relief for domestic industries affected by foreign competition. *Id.* at 13.

3. See, e.g., *Gilmore Steel Corp. v. United States*, 585 F. Supp. 670 (Ct. Int'l Trade 1984) (a sole steel manufacturer, which lacked the support of its industry, could not bring a suit to impose antidumping duties “on behalf of” its industry); *Jewel Foliage Co. v. Uniflora Overseas Fla., Inc.*, 497 F. Supp. 513 (M.D. Fla. 1980) (domestic *importing* firm had standing to sue another domestic *importer* for antidumping duties).

4. 19 U.S.C. § 1673 (1982 & Supp. III 1985). The countervailing duty statute contains the same material injury requirement and is on the whole very similar to the antidumping statutes. See 19 U.S.C. § 1677(7) (1982) for a description of the injury requirement under the countervailing duty statute.

5. 19 U.S.C. § 1673. The foreign importers may petition to substitute a different remedy for antidumping duties. See *infra* note 120.

of domestic manufacturers to obtain relief from what they believe to be unfair foreign competition.<sup>6</sup>

An important limitation on a domestic manufacturer's right to bring suit for antidumping relief is the standing requirement. The standing rules require an individual firm to bring an action "on behalf" of an American industry.<sup>7</sup> Because "[t]he standing rules for . . . antidumping investigations are still in the process of development," this requirement is problematic.<sup>8</sup> However, the fundamental cause of problems concerning standing is the foreign/domestic and domestic/domestic firm tension. The Trade Agreements Act of 1979 mandates that in order to file a petition requesting the imposition of tariffs, a domestic firm must be "an interested party" and must file "on behalf of" an industry.<sup>9</sup> Although the 1979 statute defines some of these terms, the meaning of "on behalf of" an industry is not explained in the statute. The "representative nature of the petitioner" is "[a] factor which has recently gained significance."<sup>10</sup> Other statutes, such as the Revenue Act of 1916, do not include such stringent standing requirements. Judicial attempts to interpret the standing provisions are few and incomplete,<sup>11</sup> leaving American industries with an uncertain remedy.

One of the effects of the 1979 Act has been that it discourages suits by individual firms as a result of its requirement that they represent their industry. This requirement causes competition and conflicts between large and small *domestic* firms. If courts interpret the "on behalf of" an industry clause to require the support of a *majority* of the industry, then a single manufacturer would be unable to protect itself without the approval of the entire industry.<sup>12</sup> Similarly, where a majority of the indus-

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6. L. A. Times, Nov. 2, 1985, pt. IV, at 1, col. 5. The *Times* article concerned European Economic Community (EEC) steel producers who by agreement were bound to limit their share of the United States market to 5.4%. Despite the agreement, the EEC had captured 6.6% of the American steel market.

7. 19 U.S.C. § 1673a(b)(1) (1982); see also 15 U.S.C. § 72 (1982) for the unfair competition statute which provides both criminal and civil remedies, requires a showing of intent to injure an industry, but does not require a petition on behalf of an industry.

8. Certain Textile Mill Products and Apparel from Malaysia, 50 Fed. Reg. 48,9852, 48,9853 (1985) (*Gilmore* did not stand for the proposition that a plaintiff must prove that at least 51% of the industry supports the plaintiff's position). See *infra* note 11.

9. 19 U.S.C. § 1673a(b)(1). The countervailing duty statute contains the same standing requirement. See 19 U.S.C. § 1671a(b)(1) (1982).

10. J. PATTISON, 3 ANTIDUMPING AND COUNTERVAILING DUTY LAWS 2-7 (1984).

11. See, e.g., *Gilmore*, 585 F. Supp. 670 (single domestic steel plate manufacturer brought an antidumping petition as an interested party and on behalf of the steel plate industry). For a discussion of *Gilmore*, see *infra* text accompanying notes 98-108.

12. See, e.g., *Gilmore*, 585 F. Supp. 670. The adoption of this interpretation was urged by the United States Commerce Department. See *infra* text accompanying note 103.

try signs an agreement with importers promising to bar *all* American antidumping petitions in exchange for an increase in import prices, an individual firm within that industry which did not sign the agreement may have no recourse.<sup>13</sup> In addition, conflicts may occur *within* a single manufacturing firm such as one where both domestic and foreign divisions exist, where products are partially made in the United States and partially made abroad, or where a firm relies on foreign parts which are incorporated into domestically produced goods.<sup>14</sup>

These conflicts raise policy questions: should each individual firm be protected regardless of impact on the entire United States market, or should agreements between importers and domestic firms be favored?

This Comment will focus on the standing requirements of the Trade Agreements Act of 1979 and the Revenue Act of 1916. Specifically, it discusses the history, statutory language and procedures of United States antidumping laws and how courts have interpreted standing requirements relating to those laws. In addition, this Comment discusses other possible remedies for individual firms harmed by the dumping of products into their markets. Finally, this Comment proposes a solution to the standing problems created by legal ambiguities and market conflicts.

## II. ANTIDUMPING LAW

### A. Introduction to Antidumping Law

“Dumping” is a practice by which importers sell imported goods in the United States at less than their fair value.<sup>15</sup> This practice concerns American industries because it is viewed as unfair competition which undercuts notions of free trade. Fair value is ordinarily determined by comparing the net factory price in the United States with the net factory

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13. See, e.g., *Gilmore*, 585 F. Supp. at 672. For a similar example relating to the memory chip industry, see *infra* note 135 and accompanying text.

14. In order to understand the potential for conflict within a single firm, one need only look to the large American car manufacturers which have both domestic and Japanese or German operations. The foreign division might object to an antidumping suit brought by its domestic counterpart. The Trade Agreements Act of 1979 provides for this situation by excluding such firms from the “industry headcount.” See *infra* text accompanying notes 90-91 for further discussion of the “headcount” exclusion. Although the Act excludes from the “industry headcount” importing firms or firms related to importers or exporters, the 1979 Act does not deny *standing* to firms excluded from the “headcount.” For an example of how an importer was granted standing under the Antidumping Act of 1916, see *Jewel Foliage*, 497 F. Supp. at 516-17.

15. 19 U.S.C. § 1673 (1982 & Supp. III 1985). For a thorough discussion of dumping and the procedures used in an antidumping case, see CUSTOMS SERVICE, U.S. DEP'T OF THE TREASURY, IMPORTING INTO THE UNITED STATES 28-30 (1986) [hereinafter IMPORTING INTO THE U.S.].

price in the home market or in other countries.<sup>16</sup> An antidumping duty is a special tariff imposed on goods in order to make up the difference between the importer's selling price and the domestic manufacturer's price for a similar product.<sup>17</sup>

## B. Pre-1979 Standing Requirements

### 1. Revenue Act of 1916

The Revenue Act of 1916 (1916 Act) is the first United States antidumping legislation.<sup>18</sup> Congress passed the 1916 Act because of its concern that, at the end of World War I, European cartels would overwhelm nascent American industries by selling stockpiled merchandise at very low prices.<sup>19</sup> The 1916 Act is a criminal statute requiring "intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States."<sup>20</sup>

The 1916 Act also provides for private party lawsuits in which the remedies are treble damages and attorney's fees rather than tariff imposition.<sup>21</sup> This private remedy is limited to injuries resulting from a violation of the 1916 Act; the private party plaintiff must show the importer's intent to injure an industry.

Although treble damages are an appealing remedy to prospective plaintiffs, the 1916 Act has rarely served as the basis for an antidumping

16. IMPORTING INTO THE U.S., *supra* note 15, at 29-30.

17. *Id.* at 29. The fundamental concern is that unfair trade practices increase American unemployment. For example, employment in the steel industry "has fallen 20 percent in recent years . . ." N.Y. Times, Dec. 6, 1985, § 1, at 15, col. 2. Yet the low prices of imports are not necessarily the cause of industry failure. Rather, "the steel industry's problems could be traced to slow growth of demand and rising productivity, not merely to imported steel . . ." *Id.* at col. 2-3 (referring to statements made by Robert Z. Lawrence, senior fellow at the Brookings Institution). In addition, "imports provide substantial numbers of jobs in the United States . . ." *Id.* at col. 3.

18. 15 U.S.C. § 72 (1982). For a discussion of the 1916 Act, see Victor, *United States Antidumping Rules*, 10 ST. MARY'S L.J. 217, 218-20 (1978).

19. Victor, *supra* note 18, at 218-19.

20. *Id.* at 219 (citing 15 U.S.C. § 72 (1970) (emphasis added)). The statute was probably framed in terms of intent because of the purposeful dumping by the German dye industry that served as an impetus for the creation of the 1916 Act. Since the dye dumping involved intent to injure an industry, legislators at the time probably focused their concerns on intentional injury. *Id.* at 218 n.9.

21. *Id.* at 219. Compare Trade Agreements Act of 1979, 19 U.S.C. § 1673 (1982 & Supp. III 1985), which prescribes antidumping duties as a remedy for dumping, *with* the Revenue Act of 1916, 15 U.S.C. § 72 (1982).

claim.<sup>22</sup> This appears to be changing, as one author notes that “despite [the 1916 Act’s] past obscurity, more and more companies are becoming aware of its existence and instituting lawsuits seeking treble damages . . . .”<sup>23</sup> While the intent requirement might be a drawback,<sup>24</sup> the 1916 Act is attractive because it provides a private cause of action, treble damages and less stringent standing requirements. The 1916 Act allows suit by “[a]ny person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, this section.”<sup>25</sup> Thus, the 1916 Act focuses on the individual producer rather than on an entire industry. An individual producer is able to sue for damages as long as it can prove the importer’s intent to injure an industry.<sup>26</sup> Furthermore, no language in the statute suggests that the plaintiff must represent an industry.

Courts have considered a variety of standing claims under the 1916 Act. In *Bywater v. Matsushita Electronic Industries Co.*,<sup>27</sup> the United States district court refused to confer standing upon former *employees* of a firm which Japanese dumping had allegedly forced out of business. The court concluded that while the firm had suffered “direct” injury, the employees had suffered only “incidental” injury. Therefore, the employees did not have standing to sue.<sup>28</sup> The district court in *Schwimmer v. Sony Corp.*,<sup>29</sup> denied standing to domestic *sellers* of a like product because the plaintiff was not a manufacturer. The court suggested that the 1916 Act “was passed to shield local *manufacturers*”<sup>30</sup> even though the statute does not require plaintiff to be a manufacturer.

However, a different result was reached by the district court in *Jewel*

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22. Since 1916, the United States has never instituted a criminal proceeding under the 1916 Act, and there have been only nine private actions brought. *Victor*, *supra* note 18, at 219.

23. *Id.*

24. “The intent standard of the 1916 Act, adopted due to the criminal aspects of the statute, poses a major obstacle to many possible petitioners under the law.” J. PATTISON, *supra* note 10, at 15-9. The courts have recognized various ways to prove intent. *See, e.g.*, *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 696 n.12, 703-04 (1967) (defendant’s radical price cuts, drastically declining price structure, persistent unprofitable sales below cost and related economic circumstances are all evidence of intent); *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 319, 328-30 (3d Cir. 1983) (home market price stabilization agreements, agreements to export surplus production at depressed prices, export cartels focusing on the United States, and concealment of dumping through secret rebating constitute proof of intent).

25. 15 U.S.C. § 72 (1916), *amended by* 15 U.S.C. § 72 (1982) (emphasis added).

26. *Id.*

27. 1971 Trade Cas. (CCH) ¶ 73,759, 91,201 (S.D.N.Y. 1971).

28. *Id.* at 91,202-03.

29. 471 F. Supp. 793 (E.D.N.Y. 1979).

30. *Id.* at 797 (emphasis added).

*Foliage Co. v. Uniflora Overseas Florida, Inc.*<sup>31</sup> The court held that a domestic importing firm had standing to sue another importer under the 1916 Act. According to the court, “[t]he term ‘manufacturer’ is not even contained in the Act. . . . The literal language of the Act would appear to allow persons other than the domestic manufacturers to seek redress under the Act.”<sup>32</sup> Finally, in *Western Concrete Structures Co. v. Mitsui & Co.*,<sup>33</sup> the Ninth Circuit decided that a domestic reinforced concrete manufacturer did *not* have standing to sue its competitor. Here, the firm’s competitor bought “dumped” steel reinforcement, which allowed the competitor to sell its finished product at a lower price than the plaintiff.<sup>34</sup> The court explained that the injured industry in that case was the steel industry, not the concrete industry.<sup>35</sup>

A survey of the case law illustrates that parties other than manufacturers do have standing to sue as long as the defendant engaged in dumping, intended to injure plaintiff’s industry and directly injured plaintiff.

## 2. Antidumping Act of 1921

By enacting the Antidumping Act of 1921 (1921 Act),<sup>36</sup> Congress responded to “unfairly low prices on sales to the United States.”<sup>37</sup> The 1921 Act was an administrative rather than a judicial proceedings statute and did not require intent to injure.<sup>38</sup> Because of their differing approaches, the 1916 and 1921 Acts co-existed for many years. The 1921 Act contained comparatively simple standing requirements.<sup>39</sup> The 1921 Act required a petitioner to merely show “injury” rather than “material injury.”<sup>40</sup> Like the 1916 Act, the 1921 Act allowed petitions by “any

31. 497 F. Supp. 513 (M.D. Fla. 1980).

32. *Id.* at 516.

33. 760 F.2d 1013 (9th Cir. 1985).

34. *Id.* at 1019-20.

35. *Id.* at 1019.

36. 19 U.S.C. §§ 160-171, *repealed by* Trade Agreements Act of 1979, 19 U.S.C. §§ 2501, 2585 (1982).

37. THE COMMERCE DEPARTMENT SPEAKS ON DUMPING AND COUNTERVAILING DUTIES 11 (S. Unger ed. 1982) [hereinafter COMMERCE SPEAKS].

38. *Victor*, *supra* note 18, at 220.

39. Barcelló III, *The Antidumping Law: Repeal it or Revise it*, 1 MICH. Y.B. INT’L LEGAL STUD. 53, 55 (1979).

40. *Id.* Mr. Barcelló, in comparing the 1921 Act to other types of laws which protect against antidumping, states that “safeguard” provisions require “serious” injury *and* proof that the imports were a “substantial cause” of the injury. *Id.* The safeguard provisions to which he refers are the escape clause and adjustment assistance in trade legislation. *Id.* at 53. The escape clause allowed the United States to evade its obligations under a trade agreement when it became clear that the terms of the agreement were injurious to United States industries. Domestic subsidization is a scheme in which the United States government would subsidize American industries in order to compensate industries injured by dumping.

person.”<sup>41</sup>

The 1921 Act, as amended, continued as the United States antidumping law until it was expressly repealed by the Trade Agreements Act of 1979.<sup>42</sup>

### 3. Tariff Act of 1930

The Tariff Act of 1930 (1930 Act) still exists today as the basic tariff law framework.<sup>43</sup> Although no antidumping provision appeared in the 1930 Act, it did contain an “Unfair Practices in Import Trade” provision.<sup>44</sup> The Unfair Practices section does not contain any standing requirements but simply states that: “The [International Trade] Commission shall investigate any alleged violation of this section on complaint under oath or upon its initiative.”<sup>45</sup> The remedy for unfair practices under the 1930 Act is to exclude from the American market the goods in question.<sup>46</sup> Section 1337 does *not* apply to “foreign unfair trade practices specifically addressed by other statutes, such as . . . dumping.”<sup>47</sup>

### 4. Amendments to the Tariff Act of 1930: the Trade Agreements Act program

Since 1934, Congress has periodically amended the 1930 Act by implementing Trade Agreements Acts.<sup>48</sup> Trade Agreements Acts develop out of the General Agreements on Tariffs and Trade (GATT).<sup>49</sup> The first amendment to the 1930 Act, the Trade Agreements Act of 1934, was to increase United States exports by way of a “reciprocal lowering of tariffs and other trade barriers.”<sup>50</sup> At the time the 1934 Act was passed, tariffs

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41. Wasserman, *Injury from Dumping: The Problem of the “Regional Industry,”* 9 GA. J. INT’L & COMP. L. 470 (1979) (quoting 19 C.F.R. § 153.26(a) (1977)). Compare *infra* text accompanying note 96 (the 1979 Act has stringent standing requirements for petitioners) with 19 C.F.R. § 153.26(a) (1977).

42. Trade Agreements Act of 1979, Pub. L. No. 96-39, § 106(a), 93 Stat. 193 (codified at 19 U.S.C. §§ 2501-2582 (1982)).

43. 19 U.S.C. § 1202-1677e (1982 & Supp. III 1985). The 1930 Act contains rules regarding tariff levels on specific products, administrative procedure and unfair competition. The 1930 Act is a comprehensive tariff scheme.

44. 19 U.S.C. § 1337 (1982 & Supp. III 1985).

45. 19 U.S.C. § 1337(b)(1) (1982).

46. *Id.* § 1337(d) (1982).

47. Comment, “*Domestic Industry*”—*The Definition Applied by the International Trade Commission in Considering Relief Under Section 337 of the Tariff Act of 1930*, 7 GEO. MASON L. REV. 263, 263 (1984).

48. H. PIQUET, *supra* note 2, at 12-13.

49. See *infra* note 53 and accompanying text.

50. H. PIQUET, *supra* note 2, at 13.



were at their highest levels in United States history.<sup>51</sup> As a consequence, other countries retaliated by raising their import barriers. The 1934 Act reflected Congress' attempt to strengthen the United States export market which had been weakened by trade barriers and the Depression.<sup>52</sup>

### C. Trade Agreements Act of 1979: Legislative History

#### 1. Result of multilateral negotiations

The Trade Agreements Act of 1979 (1979 Act) resulted from a round of multilateral trade negotiations called the General Agreements on Tariffs and Trade Tokyo Round.<sup>53</sup> The goal of the Tokyo Round was the reduction of non-tariff barriers to trade, such as import quotas and product standards.<sup>54</sup> Despite this focus, the Tokyo Round also negotiated a reduction in tariff rates.<sup>55</sup>

American industry had a voice in the Tokyo Round in two important respects. First, the Trade Act of 1974<sup>56</sup> established technical and policy advisory committees that were composed of representatives from domestic industry, labor and agriculture.<sup>57</sup> The function of these committees was to report to Congress on whether any of the proposed agreements under the Tokyo Round would promote domestic interests and achieve trade reciprocity.<sup>58</sup> Thus, representatives from domestic industry could alert Congress to any agreements that were in conflict with industry's best interests. In addition, the Advisory Committee for Trade Negotiations, a composition of private sector company officials, repre-

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51. *Id.*

52. *Id.* at 12. The 1934 Act restricted tariff reduction to 50% of 1934 levels. *Id.* at 13.

53. U.S. IMPORT WEEKLY, INTERNATIONAL TRADE REPORTER, TRADE AGREEMENTS ACT OF 1979 AND MTN ANALYSIS (1979), [hereinafter MTN ANALYSIS]. These negotiations took place under the General Agreements on Tariffs and Trade (GATT) program. GATT is an international, multilateral trade agreement which has been in existence since 1947. GATT also embodies negotiation rules. Parties to GATT, including the United States, periodically negotiate specific trade agreements. The Tokyo Round was such an agreement. *See* H. PIQUET, *supra* note 2, at 14.

54. MTN ANALYSIS, *supra* note 53, at 1-2.

55. *Id.* at 4. The United States proposed a tariff rate cut of up to 60%, but the final rate cut was 33%. *Id.* Although "more open and equitable market access," was a congressional negotiating objective, Congress was concerned that the international trade rules were stacked against the interests of the United States. *Id.* at 3.

56. The Trade Act of 1974 was created to give the President authority to negotiate as well as to establish objectives for United States negotiations in the Tokyo Round. *Id.* at 2, 4-5.

57. *Id.* at 2-3.

58. *Id.* Resulting agreements regulated, for example, aircraft, steel, beef, and dairy products. Procedural agreements included a countervailing duty and subsidies code, rules on dispute settlement, import licensing rules, and a government procurement code (for the purpose of opening up previously closed world markets). *Id.* at 5.

sented United States agriculture, industry and labor.<sup>59</sup>

Second, the United States negotiated towards "Sectoral Agreements."<sup>60</sup> The idea behind such agreements was to create the same opportunities for both importers to the United States and United States exporters abroad within the same sector of the market.<sup>61</sup> For example, under these sectoral agreements, an Italian firm importing shoes to the United States would have the same access to the United States market as an American firm exporting shoes to Italy would have to the Italian market. For the steel sector, the International Steel Arrangement (ISA) was created in 1978.<sup>62</sup> The objectives of the ISA were to assure free steel trade, reduce trade barriers and facilitate crisis management between governments.<sup>63</sup> One of the reasons given for the formation of the ISA is that "individual attempts to respond to domestic steel problems 'can aggravate the problems of other [nations].'"<sup>64</sup> This reflects the policy of multilateral rather than individual solutions embraced by the Tokyo Rounds.

When the Tokyo Rounds concluded in 1979, twenty-three countries including the United States were signatories to all of the resulting agreements.<sup>65</sup> The United States, as a signatory, implemented the Tokyo Round Multilateral Trade Negotiations by way of the 1979 Act.<sup>66</sup>

In addition to implementing the agreements of the Tokyo Round, the 1979 Act responded to criticism of the 1921 Antidumping Act by changing the law.<sup>67</sup> Manufacturers cited two problems with the old law. First, foreign importers complained that the United States, unlike any other major trading partner, did not have an injury requirement for im-

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59. *Id.* at 3. The Advisory Committee also played an important role in obtaining industry support for the agreements of the Tokyo Round. *Id.*

60. *Id.* at 5-6.

61. *Id.*

62. *Id.*

63. *Id.* at 6.

64. *Id.* See *infra* text accompanying notes 135-36 for a discussion of how the multilateral trade agreement involved in the *Gilmore* case would have been abrogated had *Gilmore* been allowed to bring its suit.

65. MTN ANALYSIS, *supra* note 53, at 5. The other signatories were: Argentina, Australia, Austria, Bulgaria, Canada, Czechoslovakia, the European Economic Community (EEC), Finland, Hungary, Japan, New Zealand, Norway, Sweden, and Switzerland. Although the Tokyo Round aimed at bringing developing countries more equally into the trade process, most of the developing nations were dissatisfied with the concessions made by developed countries. As a result, most developing countries signed only isolated agreements or none at all. *Id.*

66. *Id.* at 11. The 1979 Act came into being on July 26, 1979. *Id.*

67. *Id.* at 12-13.

position of countervailing duties.<sup>68</sup> Second, foreign and domestic firms alike complained about the length of United States antidumping proceedings.<sup>69</sup> Changes in the proceedings included shorter deadlines.<sup>70</sup> Thus, the 1979 Act amended the Tariff Act of 1930, added antidumping language to it and repealed the Antidumping Act of 1921.<sup>71</sup>

Language in GATT strongly suggests that parties to GATT are concerned about possible abuses of antidumping laws.<sup>72</sup> GATT's standard for antidumping duties is that:

No contracting party shall levy any anti-dumping . . . duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping . . . is such as to cause or threaten material injury to an established domestic industry, or is such as to prevent or materially retard the establishment of a domestic industry.<sup>73</sup>

The terms contained in the foregoing are the terms Congress adopted in the 1979 Act.<sup>74</sup> Thus, the requirement of injury to a domestic industry originated in GATT.<sup>75</sup>

## 2. Congressional history and judicial interpretation

### *a. interested party*

Congress wished to define which "person[s]" under the 1921 Act and 1930 Act had "sufficient interest [in the industry] to always be considered interested parties."<sup>76</sup> The Congressional history does not illus-

68. Even for antidumping, the injury requirement was easily satisfied. *See supra* note 40.

69. MTN ANALYSIS, *supra* note 53, at 12.

70. *Id.*

71. Trade Agreements Act of 1979, *supra* note 42. Congress' purposes in adopting the Trade Agreements Act of 1979 were:

- (1) to approve and implement the trade agreements negotiated [under the Tokyo Round];
- (2) to foster the growth and maintenance of an open world trading system;
- (3) to expand opportunities for the commerce of the United States in international trade; and
- (4) to improve the rules of international trade and to provide for the enforcement of such rules, and for other purposes.

*Id.* at 19 U.S.C. § 2502 (1982).

72. General Agreement on Tariffs and Trade, Oct. 30, 1947, T.I.A.S. No. 1700, 61 Stat. A23 [hereinafter GATT].

73. GATT, *supra* note 72, pt. I, art. VI(5).

74. *See* 19 U.S.C. §§ 1671-1677 (1982 & Supp. III 1985).

75. GATT, *supra* note 72, pt. I, art. VI(5). The GATT arrangements were "directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce." GATT, *supra* note 72, preamble.

76. S. REP. NO. 249, 96th Cong., 1st Sess. 89-90, reprinted in 1979 U.S. CODE CONG. & ADMIN. NEWS 381, 475-76.

trate why Congress thought this definition was necessary. Interestingly, Congress provided that “[t]he definition should not be interpreted as limiting the authority of the administering authority or the [International Trade Commission] to permit participation in antidumping . . . duty proceedings by other persons with an appropriate interest unless the provisions of the bill require such an interpretation.”<sup>77</sup> From this statement, it appears that Congress intended to establish a *presumption* that certain categories of petitioners would always be considered interested parties,<sup>78</sup> while keeping the door open for other parties who could prove their interest.

The “interested party” requirement became an issue in *Zenith Radio Corp. v. United States*,<sup>79</sup> where the Court of International Trade required that the petitioner be a producer, union or trade association *within* the industry. Therefore, groups, which had only a general interest in the issue but not a specific interest in the specific product, would not be interested parties.<sup>80</sup>

#### *b. representation*

Even though the 1930 Act did not define “industry,”<sup>81</sup> Congress included in the 1979 Act practices which the International Trade Commission (ITC) had been following. Apparently Congress saw the need to narrow the definition of an industry.<sup>82</sup> In the legislative history, Congress established three categories of parties that would satisfy the “industry” requirement:

- (1) *All* the domestic producers who produce products like the imported articles subject to the investigation . . . ;
- (2) domestic producers, whenever located in the United States, who comprise less than the entire group of producers of like products, if the total output of this smaller group of producers constitute a *major proportion* of the total domestic production of that product; or

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77. *Id.* at 90.

78. *Id.* at 89. Among the categories with a presumption of interest are the importer or manufacturer of the goods in question; the government of the country where the goods are produced; the United States manufacturer, producer or wholesaler of a like product; a representative union; or a trade or business association. *Id.*

79. No. 83-32, slip op. 39, 39-40 (Cust. B. & Dec. May 11, 1983).

80. *Gilmore Steel Corp. v. United States*, 585 F. Supp. 670, 676 (Ct. Int'l Trade 1984).

81. S. REP. NO. 249, 96th Cong., 1st Sess. 82, reprinted in 1979 U.S. CODE CONG. & ADMIN. NEWS 381, 468.

82. *Id.* at 83. Congress stated that the new language in the 1979 Act “delineates important concepts with respect to the definition and treatment of the term ‘industry.’” *Id.*

(3) a regional industry.<sup>83</sup>

Congress explained that, in category (2), "a major proportion of total domestic production will vary from case to case depending on the facts, and no standard minimum proportion is required in each case."<sup>84</sup> Thus, Congress left the representation question open to a case-by-case determination.

#### D. Language of the 1979 Act

Section 1673 of the 1979 Act states the circumstances under which antidumping duties will be imposed on importers. Its language compels two preliminary determinations by two separate bodies. First, the statute includes requirements that the "administering authority" (the International Trade Administration (ITA))<sup>85</sup> must determine whether a "class or kind of foreign merchandise" is sold or is likely to be sold in the United States "at less than its fair value."<sup>86</sup> Second, the ITC must find that: (a) an *industry* in the United States is either materially injured or threatened with material injury; or (b) the establishment of an industry in the United States is materially retarded by the importation.<sup>87</sup>

The statute defines "industry" as "the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product."<sup>88</sup> The statute also provides that smaller, *regional* industries may exist in addition to national industries.<sup>89</sup>

In addition, under appropriate circumstances the statute excludes certain firms when determining the extent of industry support for an antidumping petition. The excluded firms are those related to exporters or

83. *Id.*

84. *Id.*

85. Under 19 U.S.C. § 1677(1) (1982), the administering authority is actually the Secretary of the Treasury. In 1980, the Secretary delegated this responsibility to the Department of Commerce.

86. *Id.* § 1673(1). For an explanation of "less than fair value," see *supra* text accompanying note 16. Under § 1677(4)(D), the "class or kind" of merchandise must be "like" a class of merchandise manufactured in the United States.

87. 19 U.S.C. § 1673(1). Unfortunately, the statute does not define "establishment of an industry," nor does it specify who would be eligible to petition in the case of an industry which is not yet established.

88. 19 U.S.C. § 1677(4)(A) (1982 & Supp. III 1985).

89. 19 U.S.C. § 1677(4)(C) (1982). The test for a regional industry is as follows:

(i) the producers within such market sell all or almost all of their production of the like product in question in that market, and

(ii) the demand in that market is not supplied to any substantial degree, by producers of the product in question located elsewhere in the United States.

*Id.*

importers who are themselves importers of the goods in question.<sup>90</sup> The purpose of this exclusion is to prevent United States manufacturers that have an interest in the imported goods from skewing the ITC's industry determination. However, this provision is discretionary because it states that it "may" be applied and because there is no definition of "appropriate circumstances."<sup>91</sup>

The language of the 1979 Act prescribes two separate procedures for the initiation of an antidumping duty investigation.<sup>92</sup> First, the statute mandates that such an investigation "*shall* be commenced" when the ITA has information that warrants an investigation into whether duties should be imposed under section 1673.<sup>93</sup> Second, the investigation may be initiated by petition.<sup>94</sup> The two key phrases regarding the petitioner are "interested party" and "on behalf of an industry."<sup>95</sup> The statute further defines the phrase "interested party" as a "manufacturer, producer, or wholesaler" of a product like the imported product or a union or business association interested in the product.<sup>96</sup> The statute does not define the language "on behalf of" an industry.

In *Gilmore Steel Corp. v. United States*,<sup>97</sup> the United States Court of International Trade (CIT) defined the phrase "on behalf of" an industry. Gilmore Steel brought an antidumping petition, on behalf of a national industry, against several European steel plate manufacturers.<sup>98</sup> Gilmore stood alone in its national complaint and "was the only producer of this

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90. *Id.* § 1677(4)(B).

91. *Id.* The discretionary language is as follows: "[T]he term 'industry' may be applied in appropriate circumstances by excluding such producers from those included in that industry." *Id.* The legislative history does provide an example:

[W]here a U.S. producer is related to a foreign exporter and the foreign exporter directs his exports to the United States so as not to compete with his related U.S. producer, this should be a case where the ITC would not consider the related U.S. producer to be a part of the domestic industry.

S. REP. NO. 249, 96th Cong., 1st Sess. 83, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS 381, 469.

92. 19 U.S.C. § 1673a (1982 & Supp. III 1985).

93. *Id.* § 1673a(a) (emphasis added).

94. *Id.* § 1673a(b) (1982). Since the initiation by petition approach has more potential for conflict, this discussion will focus on it rather than on the initiation by administering authority approach. The Commerce Department rarely initiates investigations. For instance, on December 6, 1985, the Commerce Department filed its first self-initiated action since 1981. L.A. Times, Dec. 7, 1985, pt. IV, at 1, col. 5. The moral is that if domestic industries desire relief from antidumping, they must take action themselves.

95. 19 U.S.C. § 1673a(b) (1982).

96. *Id.* § 1677(9)(C), (D), (E) (1982 & Supp. III 1985).

97. 585 F. Supp. 670 (Ct. Int'l Trade 1984).

98. *Id.* at 672. Gilmore alleged that it had been injured by Belgian and West German imports of steel plate. *Id.*

merchandise to testify in support of the petition."<sup>99</sup> In addition, many large steel plate producers expressly denied support for Gilmore's petition.<sup>100</sup>

Gilmore argued that the phrase "on behalf of" an industry "refers to the scope of relief being sought by the petitioner."<sup>101</sup> The government argued that "the plain language of that phrase refers to the extent of producer *support* within an industry."<sup>102</sup> In order to justify this argument, the government pointed out that "the relief sought under an antidumping petition automatically inures to the benefit of the affected industry if that petition is ultimately sustained."<sup>103</sup> The CIT accepted the government's definition, and established a "two-step sifting process" in which the petitioner must prove status as an interested party *and* prove "that a majority of that industry backs its petition."<sup>104</sup> To Gilmore's contentions that this interpretation resulted in "tyranny of the majority," the court responded that "the Trade Agreements Act of 1979 is drafted throughout in terms of relief to an industry, not to individual manufacturers or producers."<sup>105</sup> Considering the lack of support for Gilmore's petition,<sup>106</sup> the court determined that Gilmore could not bring its petition on behalf of a national industry. The court remanded Gilmore's regional claim, however, in order to establish the "existence of a regional industry."<sup>107</sup> This left open the question of whether Gilmore could validly bring a petition on behalf of a regional industry.

### *E. Petitioning Procedure*

When a firm believes that its business has been injured by the dumping practices of a foreign industry, the firm may petition the ITA. The petitioner must allege that a class of foreign goods is or is likely to be sold in the United States at less than its fair value *and* that a domestic indus-

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99. *Id.* at 673.

100. The firms which opposed the petition were: Bethlehem Steel Corp.; Inland Co.; Jones and Laughlin Steel Inc.; Lukes Steel Co.; National Steel Corp.; Phoenix Steel Corp.; U.S. Steel Corp.; Armco Inc.; and Republic Steel Corp. *Id.*

101. *Id.* at 675.

102. *Id.* (emphasis added).

103. *Id.* at 676.

104. *Id.*

105. *Id.* According to the court, if the standing requirement creates any unfairness, that unfairness is reduced by the provision excluding from the "industry headcount" those manufacturers who are either related to importers or who are importers themselves. *Id.* at 676-77. *See supra* notes 90-91 and accompanying text.

106. *Gilmore*, 585 F. Supp. at 676-77.

107. *Id.* at 677. The ITA interpreted the ITC's inaction on the regional claim as a negative finding. *Id.*

try is materially injured or threatened with injury.<sup>108</sup> In addition, the petitioner must supply any "reasonably available" information which supports the allegations.<sup>109</sup>

The ITA will investigate the validity of the allegations by comparing the United States price of the imported goods with "either prices in the foreign home market, prices to third countries, or constructed value, which is the cost of production plus overhead and profit."<sup>110</sup> If the ITA decides that an investigation is in order, it will advise the ITC to make a preliminary injury investigation.<sup>111</sup>

However, if the ITA and the ITC make positive preliminary findings, the United States Customs Service will suspend liquidation of the merchandise until a final determination is made.<sup>112</sup> The importer will then be required to post a cash deposit or bond for the estimated difference between the foreign market value and the United States price.<sup>113</sup> The ITA then has seventy-five days in which to make its final determination. If it makes an affirmative final decision, it will convey its findings to the ITC.<sup>114</sup>

Part of the ITA's standing evaluation is to send questionnaires to domestic firms within the industry.<sup>115</sup> The purpose of the questionnaires is to determine the existence and extent of support for and opposition to

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108. 19 U.S.C. § 1673 (1982 & Supp. III 1985).

109. 19 U.S.C. § 1673a(b)(1) (1982).

110. COMMERCE SPEAKS, *supra* note 37, at 11. The preferred measure of comparison, the home market price, is adjusted in order that the comparison be fair.

111. 19 U.S.C. § 1673a(d) (1982). See *Gilmore Steel Corp. v. United States*, 585 F. Supp. 670, 672 (Ct. Int'l Trade 1984). The ITA will also publish notice of the investigation in the *Federal Register* and will obtain other necessary information. If the ITA decides that the petition does not meet the requirements, the ITA will dismiss the petition with notice to petitioner and the *Federal Register*. COMMERCE SPEAKS, *supra* note 37, at 64. If the trade agreement restricts the quantity of goods that may enter the United States, a pending antidumping petition may not be terminated unless the ITA determines that "termination on the basis of that agreement is in the public interest." 19 U.S.C. § 1673c(2)(A) (Supp. III 1985). The public interest factors to be considered are:

- (i) whether, based upon the relative impact on consumer prices and the availability of supplies of the merchandise, the agreement would have a greater adverse impact on United States consumers than the imposition of antidumping duties;
- (ii) the relative impact on the international economic interests of the United States; and
- (iii) the relative impact on the competitiveness of the domestic industry producing the like merchandise, including any such impact on employment and investment in that industry.

19 U.S.C. § 1673c(a)(2)(B).

112. COMMERCE SPEAKS, *supra* note 37, at 67.

113. *Id.* at 68.

114. *Id.* at 70-72.

115. See *Certain Textile Mill Products and Apparel from Malaysia*, 50 Fed. Reg. 48,9852, 48,9853 (1985); *Gilmore*, 585 F. Supp. at 673.



the petition.<sup>116</sup> The ITC also performs a standing check in the form of public conferences at which firms may express support for or opposition to the petition.<sup>117</sup> If the ITC also makes an affirmative final determination, the ITA will issue an antidumping order to Customs.<sup>118</sup> Customs' responsibility at that point is to assess a duty equal to the difference between the foreign and the United States price.<sup>119</sup> From the petitioner's viewpoint, the imposition of antidumping duties is the ultimate goal of the process. A *negative* final or preliminary determination by the ITC automatically terminates the petition upon publication of the determination.<sup>120</sup> Even so, the petitioner still has recourse to the judiciary in the United States Court of International Trade.<sup>121</sup>

### III. ANALYSIS OF PROBLEMS IN THE STANDING REQUIREMENT

#### A. Protection for Individual Firms

At issue is whether Congress intended to provide relief for individual firms when there is a conflict within the industry as a whole. The standing requirement of the 1979 Act can keep a party with no real interest in the case from dictating a rule to those who have a vital interest in the outcome. However, the requirement may also prevent a firm with a valid complaint from obtaining relief simply because that firm lacks industry support.

As *Gilmore Steel Corp. v. United States*<sup>122</sup> reveals, the phrase "on behalf of" an industry was not fully defined by the statute.<sup>123</sup> The *Gilmore* court determined that industry support was essential to an antidumping petition brought on behalf of a national industry, and that despite *Gilmore's* complaint of "tyranny of the majority," the 1979 Act

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116. Certain Textile Mill Products and Apparel from Malaysia, 50 Fed. Reg. at 48,9853 (holding that "[n]othing in the statute or its legislative history indicates that Congress intended that anyone wishing to file a petition be required to poll *all* of the domestic industry"). *Id.* (emphasis added).

117. *Gilmore*, 585 F. Supp. at 673.

118. COMMERCE SPEAKS, *supra* note 37, at 74. However, even after both the ITA and ITC have made positive determinations, these authorities may still rescind their decisions. *See, e.g., Gilmore*, 585 F. Supp. at 672-73 (ITA can rescind its affirmative finding on the standing issue even after ITC returned an affirmative preliminary injury determination).

119. COMMERCE SPEAKS, *supra* note 37, at 74. Importers may suspend the antidumping investigations by agreeing to revise United States prices or by agreeing to cease the imports. *Id.* at 75-77. In either case, the agreements must include importers "who account for substantially all of the imports of that merchandise." *Id.* at 75-76.

120. *Id.* at 75.

121. *Id.* at 257.

122. 585 F. Supp. 670 (Ct. Int'l Trade 1984).

123. The dispute in *Gilmore* arose because "on behalf of" is not defined. The court resorted to interpretation of the clause. *Id.* at 675-76.

“is drafted throughout in terms of relief to an industry, not to individual manufacturers.”<sup>124</sup> The validity of the court’s statement is not clear, however, because an examination of the Act’s historical background illustrates an ongoing exchange of priorities between protecting the needs of both individual firms *and* the entire industry.<sup>125</sup>

The position of the individual manufacturer in the scheme of things is unclear. Considering the 1979 Act added the interested party and representation language, it appears that Congress made a conscious decision to favor whole industries over individual firms at least where tariff imposition is concerned. On the other hand, certain provisions of the statute suggest that Congress was also concerned with fairness towards individuals. For example, the provision which excludes manufacturers who are also importers or who are related to importers from the determination of “industry”<sup>126</sup> tends to support the latter concept.

The congressional history indicates that despite the more stringent definitions, Congress left both the representation and interested party questions open to a case-by-case analysis.<sup>127</sup> The history shows that Congress recognized the difficulties that the 1979 Act posed for firms lacking the support of a majority of the industry.<sup>128</sup>

The problem with a loose interpretation of the 1979 standing requirements is that the remedy of tariff imposition “inures to the *benefit* of the affected industry”<sup>129</sup> but may in certain circumstances inure to the *detriment* of the industry.<sup>130</sup> The advantage of the 1916 Act over the 1979 Act is that the 1916 Act grants treble civil damages, thus compensating the plaintiff without affecting the tariff system or other firms that oppose the tariffs.

### *B. The Role of Trade Agreements between Domestic Firms and Foreign Importers*

One congressional purpose in passing the 1979 Act was to “approve and implement the trade agreements negotiated under the [Tokyo Round].”<sup>131</sup> The Commerce Department attaches importance to agree-

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124. *Id.* at 676.

125. *See supra* text accompanying notes 37-75.

126. *See supra* text accompanying note 90.

127. *See supra* text accompanying notes 76-84.

128. *Id.*

129. *Gilmore*, 585 F. Supp. at 676 (emphasis added).

130. In *Gilmore*, there was a clear possibility of detriment to the industry as the EEC could abrogate its arrangement with the United States as a result of *Gilmore*’s petition. *See infra* text accompanying note 136.

131. 19 U.S.C. § 2502(1) (1982).

ments between domestic and foreign firms. In *Gilmore Steel Corp. v. United States*,<sup>132</sup> the Commerce Department was a party to the agreement in question.<sup>133</sup> A major issue in *Gilmore* was the role which a trade agreement between other domestic producers and the European Economic Community (EEC) played in the denial of Gilmore's petition. One year before Gilmore brought its petition, the Department of Commerce, the major United States steel producers and the EEC agreed that the EEC would restrict steel imports in exchange for the United States steel producers' promise to drop all pending antidumping proceedings against the EEC steel manufacturers.<sup>134</sup> The agreement could be abrogated if any United States steel producer, including those which did not take part in the agreement, brought antidumping proceedings against the EEC.<sup>135</sup> Gilmore, a non-signatory of the agreement, alleged that the reason the International Trade Administration denied Gilmore's petition was because of pressure from signatories of the agreement.<sup>136</sup>

The unusual history of this case tends to support Gilmore's claim on this point. The ITA initially found that Gilmore's petition satisfied the requirements of the statute and published notice of investigation.<sup>137</sup> The ITA then notified the ITC that an investigation was in order, and the ITC made a preliminary finding of injury to the national industry while remaining silent on the regional industry issue.<sup>138</sup> However, two months later, the ITA rescinded its decision in Gilmore's favor on the grounds that the other firms in the industry did not support the petition.<sup>139</sup> The

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132. 585 F. Supp. 670 (Ct. Int'l Trade 1984).

133. *Id.* at 672.

134. 47 Fed. Reg. 49,058 (1982). On July 31, 1986, the United States and Japan came to an agreement regarding the dumping of Japanese memory chips onto the American market. L.A. Times, Aug. 1, 1986, pt. I, at 1, col. 6. The United States Commerce Department had filed its own dumping complaint against Japanese importers in December, 1985. L.A. Times, Dec. 7, 1985, pt. IV, at 1, col. 5. The settlement of the complaint included an agreement by the Commerce Department to suspend two pending antidumping cases in return for Japan's agreement to establish dumping monitoring systems and to help American memory chip manufacturers gain 20% of the Japanese market. L.A. Times, Aug. 1, 1986, pt. I, at 1, col. 6. In addition, Japan agreed to a price increase on its memory chips. Ironically, American computer manufacturers that use Japanese memory chips in the production of computers complained that the new higher price of Japanese chips will force American computer firms to take their manufacturing work abroad. L.A. Times, Aug. 31, 1986, pt. IV, at 1, col. 2. This recent example exemplifies: (a) how trade agreements can have an affect on pending antidumping suits; and (b) how such trade agreements can have a detrimental effect on other American industries and ultimately on the American economy.

135. *Gilmore*, 585 F. Supp. at 672.

136. *Id.* at 678.

137. *Id.* at 672.

138. *Id.*

139. *Id.* The court disagreed with Gilmore's argument that the ITA can reverse its prelimi-

ITA determined that the ITC's silence on the regional issue represented a negative finding and dismissed Gilmore's entire petition.<sup>140</sup> Gilmore alleged that the EEC had influenced the ITA's decision by threatening to abrogate the agreement.<sup>141</sup>

Although Gilmore's claim raised questions regarding the proper role of separate importer/domestic producer agreements in antidumping proceedings, the court did not address that issue.<sup>142</sup> It ignored the conflict between Gilmore's need to protect its business from the effects of dumping, and the United States/EEC agreement, which benefitted the entire United States steel industry by restricting steel imports to the United States. A federal circuit judicial conference<sup>143</sup> shed more light on the role of the agreement in this case:

It was perceived by the Department of Commerce that this case, if it had gone through the administrative process, would have led to the demise of the steel arrangement between the United States and the European community. Yet the Department of Commerce could not find any basis not to initiate the investigation. . . . When the ITC determination was referred back to the Department of Commerce for its investigation, Commerce terminated the case despite the ITC affirmative determination.<sup>144</sup>

Since the United States/EEC arrangement applies to *any* United States producer, it could still play a role in Gilmore's remanded regional claim.<sup>145</sup> The question of whether Gilmore Steel could bring a petition on behalf of a *regional* industry was not decided by the court. Rather,

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nary finding only if there is a negative injury or Less Than Fair Value (LTFV) decision. *Id.* at 673-74.

140. *Id.* at 673.

141. *Id.* at 678. Gilmore claimed that there had been certain *ex parte* communications between the ITA and the EEC, but the court rejected this claim as irrelevant because Gilmore was not harmed by such communications. The court's justification for such a ruling was that Gilmore did not have standing as a national industry in any case, and that Gilmore's regional industry claim was being remanded.

142. *Id.* at 679. The court dismissed any communications between the ITA and the EEC as irrelevant because Gilmore could not establish a claim on behalf of a national industry and because Gilmore's regional claim was being remanded. "If there were unrecorded *ex parte* communications, the prejudice to Gilmore flowing from them have now been cured." *Id.*

143. 104 F.R.D. 207 (1984). These are annual conferences held to discuss recent decisions and developments in the federal circuit courts. This particular session was the International Trade Breakout Session in which the International Trade Law section of the Federal Circuit Courts and the Court of International Trade participated.

144. *Id.* at 285.

145. The United States/European Economic Community Agreement states that "[i]f such petitions are filed or litigation commenced by petitioners other than [parties to the agreement], the [EEC] shall be entitled to terminate the Arrangement . . ." 47 Fed. Reg. 49,058, 49,061.

the case was remanded to the ITC on the issue of the existence of a regional industry.<sup>146</sup>

The decision in *Gilmore* was discussed by the ITA in the *Malaysia Textile* decision, which was a subsequent countervailing duty proceeding.<sup>147</sup> There, the ITA distinguished *Gilmore* because "a majority of the U.S. industry affirmatively *opposed* *Gilmore's* petitions,"<sup>148</sup> while in the *Malaysia Textile* case the petitioner had the support of a substantial percentage, though not a majority, of the industry.<sup>149</sup> The ITA stated that the *Gilmore* holding "does not amount to a requirement that a petitioner somehow prove, when a petition is filed, that at least 51% of an industry has expressed itself in support of a petition. To the extent that language in *Gilmore* suggests such a requirements [sic], such language is *dictum*."<sup>150</sup> The ITA concluded that "[n]othing in the statute or its legislative history indicates that Congress intended that anyone wishing to file a petition be required to poll all of the domestic industry."<sup>151</sup> The *Malaysia Textile* case left unresolved the issue of whether an agreement between the importing nation, the United States Commerce Department, and American manufacturers is itself evidence of affirmative opposition to antidumping petitions. This issue will no doubt resurface as a result of the recent United States-Japan settlement on the memory cases.<sup>152</sup>

The 1979 Act grew out of the Tokyo Round trade agreements.<sup>153</sup> The GATT, whose language the 1979 Act adopted,<sup>154</sup> recognized the importance of multilateral trade agreements. The difference between the 1930 Act and the 1979 Act is enormous and illustrates the trend towards compliance with the GATT and increased trade cooperation.<sup>155</sup>

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146. 585 F. Supp. at 677-78.

147. Certain Textile Mill Products and Apparel from Malaysia, 50 Fed. Reg. 48,9852 (1985). Recall that the standing requirements in the countervailing duty laws are quite similar to those in the antidumping laws. See *supra* note 4.

148. Certain Textile Mill Products and Apparel from Malaysia, 50 Fed. Reg. at 48,9853 (emphasis in original).

149. *Id.*

150. *Id.*

151. *Id.*

152. See *supra* note 134 for a discussion of the memory chip settlement.

153. See *supra* text accompanying notes 53-75.

154. See *supra* text accompanying note 75.

155. The changes resulted from the addition of antidumping language into the 1979 Act that had not existed in the Tariff Act of 1930. See *supra* text accompanying notes 42 and 67-71 for an explanation of the relationship between the Antidumping Act of 1921 and the 1979 Act.

## IV. PROPOSAL FOR MODIFICATIONS

A. *The Need for Change*

Given the current climate in foreign trade, it is reasonable to assume that more firms will be filing antidumping petitions. To require domestic firms to go through administrative or judicial proceedings in order to change the law will only slow the process and perhaps cause further injury to petitioners. Since the Commerce Clause<sup>156</sup> expressly grants Congress the power to regulate trade between the United States and foreign nations, Congress should clarify the standing requirements of the 1916 and 1979 Acts. Congress should also determine the role that multilateral trade agreements play in antidumping procedures.

B. *Proposals*

## 1. Congress should define "on behalf of" an industry

Although the 1979 Act seems to clearly require representation of an industry, this Act does not prescribe *how much* representation is required. For example, a firm with the support of 49% of the industry might very well be viewed as representing its industry, even though it does not represent an absolute majority. Surely, it would be undesirable for the government to ignore such a large portion of the industry solely because it fails to attain a majority. Congress should establish guidelines for the courts to determine when substantial support by the industry is enough to satisfy the "on behalf of" an industry clause.

## 2. Civil damages should be preferred to tariffs

When an individual firm clearly fails to attain the support of a majority of the industry, the 1979 Act seems to foreclose any remedy for the firm. The imposition of tariffs is a remedy which has industry-wide repercussions. For that reason, allowing an individual firm to impose tariffs which the majority of the industry opposes is not an appropriate remedy.

A more appropriate remedy would require an individual firm to file suit under the 1916 Act. Under the 1916 Act, the individual firm could recover civil damages rather than interfere with a whole system of tariffs. The problem with this approach is that it requires a showing of intent on the part of the defendant to injure the industry, and the intent requirement has barred many individual firms from obtaining the only form of relief available to them. To alleviate this problem, Congress should elim-

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156. U.S. CONST. art. I, § 8, cl. 3.

inate the intent requirement from the civil portion of the 1916 Act. This would not violate the spirit of the Act, because the intent requirement more appropriately applies to the criminal portion of the statute.

Another alternative would be to preserve treble damages for intentional injury but to provide compensatory damages for *unintentional* injury. Additionally, Congress should amend the 1979 Act to incorporate the 1916 Act's private cause of action. The civil damages approach is the most appropriate because it preserves tariff systems and trade agreements among importers, domestic industries, and governments while providing a civil remedy for individual firms which have been harmed.

### 3. Exclusion of parties to an agreement from the industry "headcount"

The 1979 Act excludes from the definition of "industry" those domestic firms which also act as importers of the product in question or which are "related to" the importers. This restrains those domestic firms which have an interest in defeating the antidumping petition from being considered as part of the industry. Domestic firms which are signatories to agreements with importers are in a similar situation to domestic firms that are related to the importers; both would have an interest in defeating the petition. Therefore, Congress should explicitly expand the definition of "related to" to include those who are involved in such agreements.

This alternative, however, should not be preferred to the approach of awarding civil damages, because this approach would severely discourage trade agreements which benefit the American economy. The Commerce Department and many firms recognize the benefits of trade agreements which assist in settling trade disputes. Allowing individual relief in the form of tariffs is no replacement for a comprehensive agreement as a solution to trade problems.

## V. CONCLUSIONS

The history of antidumping law reveals that antidumping legislation is an attempt to balance the rights of firms to protect themselves with the desire to improve foreign trade by removing trade barriers. The antidumping standing requirements balance the interests of the industry with the interests of the individual producers and other interested parties. Finally, the case law attempts to balance the interests of those who have signed trade agreements with those parties who are nonsignatories. Congress' goal should be to encourage maximum participation between the various domestic firms in an industry and between foreign and domestic firms. By more precisely defining the standing requirements of

the 1979 and 1916 Acts, Congress can protect the interests of all parties in the dumping cases.

*Linda M. Weinberg\**

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