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United States Countervailing Duty Law: Renewed, Revamped and Revisited -- Trade Act of 1974

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COMMENTS

UNITED STATES COUNTERVAILING DUTY LAW: RENEWED, REVAMPED AND REVISITED— TRADE ACT OF 1974

Since shortly before the turn of this century, the United States has included countervailing duties in its customs arsenal of protective instruments with which to neutralize unfair foreign trade practices.[1] Trade-distortion in the United States caused by foreign export subsidy schemes,[2] which often give rise to *artificial* economic advantage in the penetration of domestic markets, can be effectively offset by this potent retaliatory device. Yet, use of countervailing duties has been greatly tempered by the nature of the decision to impose them, as it implicitly involves our unilateral condemnation of the internal economic policies of a foreign sovereign.[3] Indeed, countervailing duties have been characterized recently as "strong medicine, well calculated to arouse violent resentment in countries whose trade practices are branded . . . as unethical."[4] International political considerations have, accordingly, played a significant role in the past administration of the countervailing duty statute.[5]

With changes in international trade patterns occasioned, at least

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[1] Under the General Agreement on Tariffs and Trade, October 30, 1947, 61 Stat. A11 (1947), "the term countervailing duty [is] understood to mean a special duty levied to counteract any bounty or subsidy granted, directed or indirectly, upon the manufacture, production or export of any merchandise." *Id.* at A24.

[2] Export subsidization schemes usually involve payments or remission of charges, conferred in an attempt to penetrate markets at a lower product cost than would be possible in the absence of such payments or remissions. *See* Butler, *Countervailing Duties and Export Subsidization: A Re-emerging Issue in International Trade*, 9 VA. J. INT'L L. 82, 82-83 (1969) [hereinafter cited as Butler]. *See also* J. JACKSON, WORLD TRADE AND THE LAW OF GATT 382-87 (1969). For a summary of practices which are generally considered as subsidies under international standards, see Marks & Malingren, *Negotiating Non-Tariff Distortions to Trade*, 7 LAW & POL. INT'L BUS. 327, 344 n.74 (1975).

[3] *See* Feller, *Mutiny Against the Bounty: An Examination of Subsidies, Border Tax Adjustments, and the Resurgence of the Countervailing Duty Law*, 1 LAW & POL. INT'L BUS. 17, 64 (1969) [hereinafter cited as Feller].

[4] United States v. Hammond Lead Prods., Inc., 440 F.2d 1024, 1031 (C.C.P.A. 1971).

[5] *See id.*; Butler, *supra* note 2, at 145; King, *Countervailing Duties–An Old Remedy With New Appeal*, 24 BUS. LAW. 1179, 1191 (1969) ("The Countervailing Duty Statute vests jurisdiction in Treasury, but it remains very much a concern of the State Department . . . ."). *See also* S. REP. NO. 1298, 93d Cong., 2d Sess., *reprinted in* 93 U.S. CODE, CONG. & AD. NEWS 7186, 7318 (1974) (legislative history of countervailing duty amendments to the Trade Act of 1974). Even after the 1974 amendments, it appears that the State Department will continue to take cognizance of countervailing duty problems. *See, e.g.*, the discussion in the N.Y. Times, Feb. 27, 1976, at 2, col. 5 (city ed.), reporting on Secretary Kissinger's talks with the Brazilian government over the United States' imposition of countervailing duties on Brazilian leather goods.

in part, by subsidization practices, domestic industries have shown renewed interest in the effective imposition of countervailing duties on imports.[6] American manufacturers, producers and labor organizations have perceived the continued influx of subsidized imports into this country as a threat to domestic market and job interests.[7] As a result of enforcement attempts, a fundamental conflict developed between those seeking to mitigate, through discretionary administrative practices, the counterproductive political effects of the imposition of countervailing duties, and those domestic interests seeking to invoke the statute's *compulsory* protection.[8] This conflict has recently been resolved through legislative compromise in section 331 of the Trade Act of 1974.[9]

This comment will initially trace the legislative development of United States countervailing duty law prior to the 1974 amendments. Problems in the administrative and judicial enforcement history of this law will next be identified and explored to serve as a framework for analyzing the significance and probable efficacy of section 331. The substantive and procedural changes made in the countervailing duty statute by the Trade Act of 1974 will then be addressed. Finally, observations on the likely effects of these amendments will be offered, and shortcomings as well as expanded remedial opportunities for domestic manufacturers under the new Act will be exposed.

I. DEVELOPMENT OF UNITED STATES COUNTERVAILING DUTY LAW PRIOR TO THE 1974 TRADE ACT

A. *Legislative Evolution*

United States countervailing duty legislation originated with the Tariff Acts of 1890[10] and 1894,[11] which imposed additional[12] duties on imports of sugar from countries paying direct or indirect

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[6] See *Hearings on H.R. 6767 Before the House Ways & Means Comm.*, 93d Cong., 1st Sess., pt. 15, at 5246-53 (1973) [hereinafter cited as *House Hearings on the Trade Act of 1974*] for a summary of positions advanced by American manufacturers, producers and labor.

[7] Through the Trade Act of 1974, 19 U.S.C.A. § 2101 *et seq.* (Supp. 1976), Congress explicitly sought "to provide adequate procedures to safeguard American industry and labor against unfair or injurious import competition, and to assist industries, firms, workers, and communities to adjust to changes in international trade flows . . . ." *Id.* § 2102(4).

[8] Tariff Act of 1897, ch. 11, § 5, 30 Stat. 205. See discussion in text at notes 16-17 *infra*.

[9] 19 U.S.C.A. §§ 1303, 1516 (Supp. 1976).

[10] Ch. 1244, § 237, 26 Stat. 584.

[11] Ch. 349, § 182, 28 Stat. 521.

[12] Prior to the amendments under the Trade Act of 1974, only goods subject to customs duties were covered by the countervailing duty statutes. *Compare* 19 U.S.C. § 1303 (1970), *with* 19 U.S.C.A. § 1303(a)(3) (Supp. 1976). Traditionally, then, countervailing duties have been duties added to those otherwise applicable.

bounties[13] upon exportation.[14] Congress expanded the coverage of countervailing duties to all dutiable imports in section 5 of the Tariff Act of 1897.[15] This general countervailing duty statute required the Secretary of the Treasury to impose countervailing duties whenever a foreign country "shall pay or bestow, directly or indirectly, any *bounty or grant* upon the exportation of any article . . . ."[16] In all such cases, the Secretary was instructed to levy, "in addition to the duties otherwise imposed by this act, an additional duty equal to the net amount of such bounty or grant . . . ."[17] Section 5, then, was principally characterized by its mandatory nature. The section was further characterized by the extended latitude of its provisions resulting from the addition of the word "grant,"[18] and by the absence of any required finding of injury to a domestic producer or industry as a precondition to the imposition of a countervailing duty. While section 5 did expand the application of countervailing duties to all dutiable goods, retention of the "otherwise dutiable" requirement also represented a limitation on the scope of the countervailing duty statute, since nondutiable goods were thereby excluded from its coverage. These basic elements remained intact as the cornerstones of United States countervailing duty law for over three-quarters of a century.

The policy underlying section 5 provisions has been viewed as essentially "protectionist" in nature.[19] A functional analysis of the Tariff Act of 1897 suggests that it was designed to serve basically as a repair mechanism insuring the integrity of United States tariff walls.[20] While foreign export bounties and grants could neutralize regular protective duties by lowering costs and prices, imposition of countervailing duties on imports equal in amount to such foreign subsidies effectively reestablished the amount of protection originally accorded. Protection of domestic industries, then, was to be accomplished through a combination of high tariffs—imposing duties on those imports thought to pose a threat to American interests—and by the use of countervailing duties to offset attempted circumvention of our tariff barriers. As such, there was no need for proof of injury in countervailing duty determinations, for a presumption of injury, or the threat of injury, arose from the very fact that tariff duties were

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[13] For judicially adopted constructions of this term, see text at notes 133-35, 142 *infra*.

[14] Until 1922, the language of our countervailing duty statute was limited to bounties or grants paid upon exportation. *Compare* Ch. 356, § 303, 42 Stat. 935-36, *with* Ch. 16, § IV(E), 38 Stat. 193. While the statutory language was changed in 1922, see text at note 26 *infra*, the historic application of the statute has continued to reach only subsidies directed at exportation, particularly those conferring a trade advantage. *See* King, *supra* note 5, at 1180-81, 1190.

[15] Ch. 11, §5, 30 Stat. 205.

[16] *Id.* (emphasis added).

[17] *Id.*

[18] See text at note 142 *infra* for a judicial construction of this term.

[19] *See* Feller, *supra* note 3, at 21-22.

[20] *Id.* at 22.

charged against the imported merchandise.[21] Since duty-exempt status, on the other hand, demonstrated that such imported merchandise was either non-competitive, or threatened no domestic interest, bounties or grants provided to such goods by their countries of origin posed no concern.[22] Foreign subsidies, per se, were not viewed as inherently threatening. The section 5 countervailing duty provisions were simply designed as remedial instruments to implement a *selectively* "protectionist" foreign trade policy.

Section 5 provisions were retained virtually unchanged in the Tariff Acts of 1909[23] and 1913,[24] and it was not until the Tariff Act of 1922 that the next significant enlargement in the scope of countervailing duty protection was provided. In section 303 of that Act,[25] Congress extended the countervailing duty law's reach to include bounties or grants on manufacture or production, thereby foreclosing potential circumvention of the remedy which previously had explicitly proscribed only subsidies on exportation.[26] This amendment had the significant practical effect of rendering the countervailing duty law applicable to *any* foreign bounty or grant, regardless of whether such subsidization was specially designed to encourage exportation, or arose out of legitimate domestic production or fiscal concerns which only incidentally impacted upon exports.[27] In addition, the 1922 act broadened the statute to reach bounties or grants provided by a "person, partnership, association, cartel, or corporation."[28] In over a half century of practice, however, no countervailing duty has ever been levied on such private bounties or grants.[29]

The last significant change in American countervailing duty law prior to the 1974 Act was in section 303 of the Tariff Act of 1930.[30] The 1930 Act, while substantially the same as the 1922 Act, permitted the Secretary of the Treasury to *estimate* the amount of bounty or grant. As a result of this explicit statutory grant of power, courts have felt constrained from reviewing the secretary's estimates once a

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[21] *Id. See* Note, *The Michelin Decision: A Possible New Direction for U.S. Countervailing Duty Law*, 6 LAW & POL. INT'L BUS. 237, 242 (1974).

[22] *See* Feller, *supra* note 3, at 22.

[23] Ch. 6, § 6, 36 Stat. 85. This statute added the phrase "provinces and other political subdivisions," thus extending the statute's reach to bounties or grants provided through these sources. *Id.*

[24] Ch. 16, § IV(E), 38 Stat. 193-94.

[25] Ch. 356, § 303, 42 Stat. 935-36.

[26] See text at note 16 *supra*.

[27] The imposition of countervailing duties depends upon international trade effects, regardless of the fact that the foreign actions producing these results were motivated from valid *internal* economic concerns. Yet, "[i]t should be recognized that countervailing duty actions amount to a public reproach to the affected government for promoting 'unfair' competition. . . . [O]ne can readily imagine that countervailing on the basis of a production subsidy might be viewed as interference in the domestic affairs of the exporting country, particularly if the production subsidies neither yield an appreciable increase in exports, nor were intended to do so." Feller, *supra* note 3, at 64.

[28] Ch. 356, § 303, 42 Stat. 935.

[29] *see* Feller, *supra* note 3, at 33.

[30] 19 U.S.C. § 1303 (1970), *as amended*, 19 U.S.C.A. § 1303 (Supp. 1976).

bounty or grant is found to exist,[31] although they have been willing to entertain challenges as to the *existence* of a subsidy.[32] In close cases, then, the lack of mathematical certitude as to the exact amount of foreign subsidization does not of itself prevent a countervailing duty determination. This permissible imprecision provided by the power to estimate serves in practice to broaden the discretion available to the Secretary of the Treasury in making findings as to the existence of a bounty or a grant.[33]

Section 303 of the 1930 Tariff Act retained existing provisions under which countervailing duty impositions were applicable regardless of whether the merchandise was in a different condition when imported than when exported, and regardless of whether such goods were imported directly from the producing country or otherwise.[34] Although these provisions offered little guidance as to when the imposition of countervailing duties was appropriate, they did evidence the breadth of situations reached by the statute.[35] They also served to foreclose potential avenues through which countervailing duty protection might otherwise be circumvented. Finally, the 1930 Act maintained the pre-existing requirement that the Secretary of the Treasury "declare" the net amount of bounties or grants as estimated.[36] No similar declaratory requirement was imposed, however, with respect to how such estimates were computed.[37] As a result of the narrowness of this statutory publication mandate, the reasons supporting administrative countervailing duty determinations have largely escaped examination by an interested public.[38]

Thus, by 1930, the substantive character of United States countervailing duty law had been fully shaped and its contours were preserved without modification for over four decades prior to enactment of the 1974 Trade Act. During the interim period, what did change was the conceptual framework within which the countervailing duty law was to function. The protectionist trade policies prevailing at the enactment of the first general countervailing duty statute gave way to the liberal, free-trade policies embodied in the General Agreement on

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[31] *See, e.g.*, V. Mueller & Co. v. United States, 115 F.2d 354, 360-61 (C.C.P.A. 1940).

[32] *Id. See also* Energetic Worsted Corp. v. United States, 53 C.C.P.A. 36 (1966).

[33] *But cf.* Energetic Worsted Corp. v. United States, 53 C.C.P.A. 36 (1966), in which the Court of Customs and Patent Appeals rejected the manner in which the Treasury Department had calculated the amount of the bounty because it was not supported by substantial evidence. *Id.* at 42.

[34] These provisions were first included in our countervailing duty statute in the Tariff Act of 1897, ch. 11, § 5, 30 Stat. 205. They have been retained without subsequent modification through the 1974 amendments.

[35] *See* Butler, *supra* note 2, at 97.

[36] *Compare* 19 U.S.C. § 1303 (1970), *with* the Tariff Act of 1897, ch. 11, § 5, 30 Stat. 205.

[37] V. Mueller & Co. v. United States, 115 F.2d 354, 360 (C.C.P.A. 1940).

[38] See text at notes 262-66 *infra*.

Tariffs and Trade (GATT),[39] embraced by this country through executive agreement in 1947.[40]

The fundamental substantive divergence between the GATT and section 303 of the Tariff Act of 1930 lay in an injury test requirement. Whereas United States countervailing duty law had never predicated its sanctions on a finding of injury, Article VI, paragraph 6 of the GATT prohibited the imposition of such duties unless a showing was made that subsidized imports "cause or threaten *material* injury to an established domestic industry, or is such as to prevent or to materially retard the establishment of a domestic industry."[41] The GATT, however, did not subject the Tariff Act of 1930 to any diminution. A "grandfather clause," contained in the Protocol of Provisional Application, provided that signatory countries would apply the GATT article dealing with countervailing duties "to the fullest extent not inconsistent with existing legislation."[42] While the United States was thus able to preserve section 303 intact, future domestic countervailing duty legislation obviously need acknowledge the international obligations assumed in the GATT, including the injury requirement.[43] Between 1951 and 1953, three attempts were in fact made to add an injury clause to the countervailing duty law;[44] none, however proved successful.[45] Indeed, it was not until the Trade Act of 1974 that a limited formulation of the injury test was finally incorporated into domestic countervailing duty legislation.[46] The provisions embodying this test will be discussed in Part II of this comment.[47]

B. *Enforcement History*

1. Administrative Practice and Procedure

The countervailing duty laws are enforced by the Treasury Department, primarily through the Customs Service.[48] Proceedings may be initiated either through information provided by the Customs Ser-

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[39] 61 Stat. A11 (1947). Countervailing duty provisions may be found in pt. II, art. VI (6) of the GATT. 61 Stat. A24 (1947).

[40] 12 Fed. Reg. 8863, Proclamation No. 2671 A (1947).

[41] 61 Stat. A24 (1947) (emphasis added).

[42] *Id.* at A2051.

[43] Congress did in fact acknowledge the GATT when extending the coverage of our countervailing duty statute in 1974 to nondutiable imports. *See* S. REP. NO. 1298, 93d Cong., 2d Sess., *reprinted in* 93 U.S. CODE CONG. & AD. NEWS 7186, 7320 (1974).

[44] *See Hearings on H.R. 5106 Before the House Ways & Means Comm.*, 83d Cong., 1st Sess. 42 (1953); *Hearings on H.R. 5505 Before the Senate Finance Comm.*, 82d Cong., 2d Sess. 2 (1952); *Hearings on H.R. 1535 Before the House Way & Means Comm.*, 82d Cong., 1st Sess. 2 (1951).

[45] For a discussion of these unsuccessful legislative attempts to harmonize U.S. countervailing duty law with the GATT, see Feller, *supra* note 3, at 26; Butler, *supra* note 2, at 126-27.

[46] 19 U.S.C.A. §§ 1303(a)(2), (b)(1) (Supp. 1976). See text at notes 206-11 *infra*.

[47] See text at notes 206-22 *infra*.

[48] See note 85 *infra*.

vice to the Commissioner of Customs,[49] or upon complaint by an interested party to any district director or to the Commissioner.[50] In practice, however, investigations were conducted almost solely in response to protests from domestic manufacturers.[51] While section 303 mandated no statutory hurdle in terms of meeting an "injury test" to invoke its sanctions,[52] such a test was effectively imposed by the Treasury Department's selective enforcement of the statute, since proceedings were not brought absent an injury-provoked complaint.[53] In this manner, the application of United States countervailing duty law mitigated the divergence between GATT principles and those embodied in domestic statutes.[54] The executive branch, then, seemingly sought to harmonize the international obligations it undertook with the constraints of domestic legislation.[55]

No form is explicitly prescribed for a countervailing duty complaint.[56] Customs regulations simply require a "full statement of the reasons for the belief" that a bounty or grant is being paid or bestowed; "a detailed description or sample of the merchandise;" and a statement of "all pertinent facts obtainable . . . ."[57] In practice, this last provision has been liberally applied by the Treasury Department and, thus, has posed no procedural obstacle to the filing of a "proper" complaint.[58] Despite these minimal regulatory requirements relative to complaints, complainants must present a sufficiently detailed and persuasive analysis to warrant an investigation.[59] Furthermore, even if a complaint met the limited requirements and successfully triggered a formal inquiry, it still had to demonstrate a very strong case to overcome Treasury's reluctant posture toward enforcement of the counter-

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[49] 19 C F.R. §159.47(a), (c) (1975).

[50] 19 C.F.R. §159.47(b)(1), (c) (1975).

[51] *See* STAFF OF HOUSE COMM. ON WAYS & MEANS, SELECTED PROVISIONS OF THE TARIFF AND TRADE LAWS OF THE UNITED STATES, 91st CONG., 2d SESS., 148 (Comm. Print 1970) (where this practice is acknowledged); Butler, *supra* note 2, at 127, 129.

[52] 19 U.S.C. § 1303 (1970). This provision has been amended, however, by the 1974 Trade Act, which incorporates a limited injury test for nondutiable items. 19 U.S.C.A. § 1303(a)(2), (b)(1) (Supp. 1976). See text at notes 206-22 *infra*.

[53] See note 51 *supra*.

[54] Differences nevertheless exist since the GATT requires a showing of *material* injury, 61 Stat. A24 (1947) whereas the "injury test" of administrative practice is likely to be satisfied by a showing of any injury. Butler, *supra* note 2, at 127.

[55] *See* Butler, *Countervailing Duties and Export Subsidization: A Re-emerging Issue in International Trade*, 9 VA. J. INT'L L. 82, 127 (1969).

[56] Customs regulations refer only to "communications." 19 C.F.R. § 159.47(b) (1975). *See* King, *Countervailing Duties–An Old Remedy With New Appeal*, 24 BUS. LAW 1179, 1190-91 (1969).

[57] 19 C.F.R. §159.47(b)(1) (1975) (emphasis added).

[58] *See* Marks & Malingren, *Negotiating Non-Tariff Distortions to Trade*, 7 LAW & POL. INT'L BUS. 327, 365 (1975).

[59] *See* 19 C.F.R. § 159.47(c) (1975).

vailing duty statute.[60]

The key to a section 303 complaint, and to the successful invocation of concomitant countervailing sanctions, is found in the concept of "bounty or grant." While this phrase is at the very heart of the countervailing duty statute, effective enforcement has historically been hindered by the lack of a statutory definition.[61] In addition, neither the legislative history of the various tariff acts, nor the administrative regulations[62] promulgated pursuant to them, have furnished any direction to those who seek to avail themselves of the section 303 remedy.

Successful invocation of countervailing duties has been further hindered by the fact that little or no guidance could be gleaned from administrative practice with respect to what exactly constituted illegal foreign bounties or grants.[63] Throughout the enforcement history of our countervailing duty statute, only the fact of the existence of a bounty or grant, and the amount thereof, are presented in published Treasury orders.[64] There has been no requirement that the Secretary of the Treasury elaborate upon the manner in which a particular bounty or grant was estimated.[65] Nevertheless, the public was forced to rely upon these published orders to glean evidence of administrative statutory interpretation, since no provision was ever made for the publication of negative determinations or the reasons for them.[66] This

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[60] Customs regulations provide that upon receipt of a complaint, "the Commissioner [of Customs] shall cause such investigation to be made as appears to be warranted by the circumstances of the case." 19 C.F.R. § 159.47(c) (1975). *See* King, *supra* note 56, at 1191.

[61] "The lack of any statutory definition of a bounty or grant in the statute vests great discretion in the Secretary of the Treasury . . . ." Butler, *supra* note 55, at 125. *See* United States v. Hammond Lead Prods., Inc., 440 F.2d 1024, 1031 (C.C.P.A. 1971). There can be no doubt that this discretion has been abused in the absence of a definition, particularly when viewed from the standpoint of the mandatory nature of the law. See discussion in text at notes 87-92 *infra*. *See also* S. REP. NO. 1298, 93d Cong., 2d Sess., *reprinted in* 93 U.S. CODE CONG. & AD. NEWS 7186, 7318, 7321 (1975).

[62] *See* 19 C.F.R. § 159.47 (1975) (formerly 19 C.F.R. § 16.24).

[63] SUBCOMMITTEE ON CUSTOMS, TARIFFS AND RECIPROCAL TRADE AGREEMENTS, REPORT TO THE HOUSE COMM. ON WAYS & MEANS ON UNITED STATES CUSTOMS, TARIFF, AND TRADE AGREEMENT LAWS AND THEIR ADMINISTRATION, 85TH CONG., 1ST SESS. 95 (1957). In the ". . . absence of any reports from the Treasury Department as to the basis on which its determinations of the existence of subsidization are made, it is difficult, if not impossible, to analyze the administration of § 303." *Id.*

[64] For a criticism of this practice, see text at notes 262-68 *infra*. *See also* Butler, *supra* note 55, at 131-33, 144.

[65] *See* V. Mueller & Co. v. United States, 115 F.2d 354, 360-61 (C.C.P.A. 1940).

[66] *See* 19 C.F.R. § 159.47(d) (1975) (issuance of countervailing duty order). Amendments under the 1974 Trade Act change this practice by statutorily requiring that "[a]ll determinations by the Secretary . . . (whether affirmative or negative) . . . shall be published in the Federal Register." 19 U.S.C.A. § 1303(a),(b) (Supp. 1976). It is possible that an interested party could compel disclosure of the Treasury Department's reasons in a negative bounty determination situation through suit under the Freedom of Information Act (FOIA). 5 U.S.C. § 552 (1970). *Cf.* NLRB v. Sears, 421 U.S. 132 (1975), where the Supreme Court held that FOIA Exemption 5 relating to "intra-

failure to publish findings that *no* bounty or grant existed, coupled with the paucity of detail and reasoning in Treasury orders issuing countervailing duties, combined to render attempts to analyze the administration of section 303 almost impossible, both by those who sought to invoke the section's remedy, and by Congressional Committees attempting to review the operation of the countervailing duty system.[67]

Attempts to successfully compel executive enforcement of the countervailing duty statute were further complicated by the fact that throughout nearly seven decades of administrative practice, no notice of Treasury countervailing duty investigations was ever given to the public.[68] Only recently, as a result of relatively newly promulgated regulations,[69] have the marshalling of enforcement arguments and compilation of data been facilitated by the publication of a notice of complaint in the Federal Register,[70] with an accompanying solicitation of comments within specified time limits from all interested parties.[71] Now, after consideration of such comments and "other relevant data,"[72] a countervailing duty order or determination—depending upon whether affirmative or negative findings are made—is published in the Federal Register.[73] Nevertheless, a significant shortcoming of previous administrative practice remains under the new regulations, for the underlying rationales of those decisions remain unpublished.[74]

Thus, interested domestic producers and manufacturers, as well as importers, have had almost no way of knowing which foreign practices were legal under our countervailing duty law, and only scant notice as to which were not.[75] Nor has the general public been able to easily learn why particular foreign practices may or may not have

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agency memoranda," 5 U.S.C. § 552b(5) (1970), can never apply to "final opinions," 421 U.S. at 153-54, and that decisions not to file an unfair labor practice complaint with the NLRB were disclosable "final opinions" made in the adjudication of one case, therefore falling outside the scope of FOIA Exemption 5. *Id.* at 155.

[67] See note 63 *supra.*

[68] *See* Feller, *Mutiny Against the Bounty: An Examination of Subsidies, Border Tax Adjustments, and the Resurgence of the Countervailing Duty Law,* LAW & POL. INT'L BUS. 17, 39 (1969).

[69] 32 Fed. Reg. 13276 (1967), *amending* 19 C.F.R. § 16.24 (1967) (§ 16.24 was the forerunner of the present § 159.47).

[70] Present regulations require publication of a notice upon receipt of a complaint, *if* it is determined that communication is not "patently in error," and contingent upon approval of the Secretary of the Treasury. 19 C.F.R. § 159.47(c) (1975) (investigation and notice by the Commissioner). There is no time limit, however, within which publication of the notice of such complaint must be accomplished. *See* 19 C.F.R. § 159.47(d) (1975).

[71] 19 C.F.R. § 159.47(c) (1975).

[72] 19 C.F.R. § 159.47(d) (1975). It is possible that "other relevant data" includes memoranda from the State Department in politically sensitive cases.

[73] 19 U.S.C.A. § 1303(a),(b) (Supp. 1976).

[74] See note 64 *supra.*

[75] See text at note 64 *supra.* The only genuine elucidation in this respect has been

been found to be legal.[76] There has been no guidance provided by Congress or executive administrators with respect to the meaning of the broadly phrased concepts set forth in the statute, and the legitimacy of trade schemes potentially encompassed by these concepts. In the absence of such guidance, the public simply has been left to its own devices in attempting to discern which foreign practices may be illegal bounties or grants. It is small wonder then that for decades, most domestic concerns have resorted to alternative means to protect themselves from unfair foreign trade practices,[77] leaving the countervailing duty statute as "the most under administered of all of the tariff and customs laws."[78]

Although interpretative difficulties and lack of public notice rendered section 303 a rather unwieldy protective device, the ineffectiveness of the statutory remedy prior to the 1974 reforms may be traced primarily to fundamental administrative abuses;[79] namely, *extreme* delays in making findings, an abuse attributable to a near complete lack of procedural safeguards in official proceedings.[80] Time is of the essence to a United States industry seeking relief from injury sustained as a result of unfair foreign trade practices.[81] However,

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provided through judicial opinions. *See, e.g.*, Nicholas v. United States, 7 Ct. Cust. Apps. 97 (1916), *aff'd*, 249 U.S. 34 (1919) (direct subsidy payments); Downs v. United States, 113 F. 144 (4th Cir. 1902), *aff'd*, 187 U.S. 496 (1903) (tax rebate on exportation); United States v. Passavant, 169 U.S. 16 (1897) (tax rebate on exportation); V. Mueller & Co. v. United States, 115 F.2d 354 (C.C.P.A. 1940) (currency manipulation); F.W. Woolworth Co. v. United States, 115 F.2d 348 (C.C.P.A.1940). The analysis of legal scholars has also provided considerable clarification in this area. *See, e.g.*, Feller, *supra* note 68, at 40-53. Feller lists and describes eight categories of practices incurring countervailing duties or which are generally regarded as subsidies. Practices included among these categories are: direct subsidy payments, excessive tax rebates, preferred income tax treatment, government price support systems, export loss indemnification, subsidies for specific production and distribution costs, currency manipulation, and unjustified tax remissions. *Id.* For further discussion of these categories *see* Silberger, *Trade Act of 1974: New Remedies Against Unfair Trade Practices in International Trade*, 5 DENVER J. INT'L L. & POL. 77, 104-10 (1975).

[76] See note 266 *infra*.

[77] *See Hearings on H.R. 6767 Before the House Comm. on Ways & Means*, 93d Cong., 1st Sess., pt. 10, at 3294 (1973) [hereinafter *House Hearings on the Trade Act of 1974*] (position paper by Magnavox Co.).

[78] *Id.*, pt. 7, at 2169 (remarks of the Trade Relations Council of the U.S., Inc.).

[79] In the hearings before the House Ways and Means Committee on the Trade Act of 1974, numerous industries protested the delay in enforcement which occurred under past administrative practice. *See id.*, pt. 3, at 806 (1973) (remarks of the National Machine Tool Builders Ass'n); *id.*, pt. 10, at 3268 (remarks of the Electronic Indus. Ass'n); *id.*, pt. 14, at 4752 (remarks of the United Rubber, Cork, Linoleum and Plastic Workers of America); *id.*, pt. 4, at 1225 (remarks of the AFI-CIO); *id.*, pt. 7, at 2165, 2168, 2170 (remarks of the Trade Relations Council of the U.S., Inc.).

[80] *See Id.;* S. REP. NO. 1298, 93d Cong., 2d Sess., *reprinted* in 93 U.S. CODE CONG. & AD. NEWS 7186, 7318 (1974).

[81] *House Hearings on the Trade Act of 1974, supra* note 77, pt. 10, at 3269 (remarks of the Electronic Indus. Ass'n).

while customs regulations and procedures seemingly imply a prompt resolution of countervailing duty issues,[82] such was not the enforcement experience.[83] Indeed, delay in enforcement was not only a major impediment to obtaining relief under section 303, but was also probably the greatest deterrent preventing aggrieved domestic industries from even seeking to invoke the countervailing duty statute.[84] Prior to the 1974 reforms, countervailing duty legislation lacked a statutory time limit within which the Treasury Department, through the Bureau of Customs,[85] was required to act in determining whether or not a bounty or grant existed.[86] This absence of a time limit enabled the Treasury Department to circumvent the mandatory terms of the statute. By stretching out and even shelving investigations,[87] the Department exercised what in fact amounted to administrative discretion in imposing countervailing duty sanctions[88] simply by allowing section 303 complaints "to gather dust."[89]

This executive preference for administrative inaction, especially in politically sensitive cases, eventually rendered countervailing duty sanctions too discretionary to be meaningful. While the Treasury Department's policy was motivated from the standpoint of a legitimate concern over triggering international economic retaliation,[90] it nevertheless was grossly abusive of the clear and mandatory nature of the countervailing duty law.[91] As such, the administrative practice of de facto discretion brought the section 303 remedy to a point of such diminished efficacy as to place it virtually "in opposition to the [statute's] original concept."[92]

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[82] *See* 19 U.S.C. § 1303 (1970), *as amended,* 19 U.S.C.A. § 1303 (Supp. 1976); 19 C.F.R. § 159.47(a)-(d) (1975).

[83] See notes 78-79 *supra.*

[84] *See id.*

[85] 19 C.F.R. § 1.1 (1975) generally provides for a delegaton of duties by the Secretary of the Treasury to the Customs Service. Countervailing duty determinations are, in fact, carried out by the Customs Service. *See id.* § 159.47(a)-(d).

[86] *Compare* 19 U.S.C. § 1303 (1970), *with* 19 U.S.C.A. § 1303(a)(4) (Supp. 1976). The customs regulations also made no provision limiting the time for acting on such determinations. *See* 19 C.F.R. § 159.47(a)-(d) (1975).

[87] The legislative history of the Trade Act of 1974 acknowledges the existence of these practices. S. REP. NO. 1298, 93d Cong., 2d Sess., *reprinted in* 93 U.S. CODE CONG. & AD. NEWS 7186, 7318 (1974).

[88] *See House Hearings on the Trade Act of 1974, supra* note 77, pt. 7, at 2165 (remarks of the Trade Relations Council of the U.S., Inc.).

[89] *Id.* at 2165, 2170.

[90] The Secretary of the Treasury has acknowledged retaliation as a factor to be considered in any countervailing duty imposition. *See Hearings on H.R. 10710 Before the Senate Comm. on Finance,* 93d Cong., 2d Sess., pt. 1, at 166, pt. 2 at 504 (1974).

[91] See discussion in text at notes 116-19 *infra.*

[92] *House Hearings on the Trade Act of 1974, supra* note 77, pt. 14, at 4752 (remarks of the United Rubber, Cork, Linoleum and Plastic Workers of America).

2. Judicial Review

a. The Right to Review

American importers have traditionally enjoyed the right to judicially contest countervailing duty assessments in the United States Customs Court and Court of Customs and Patent Appeals.[93] Such challenges are brought pursuant to procedures[94] outlined in section 514 of the Tariff Act of 1930, as amended.[95] This section specifies, *inter alia,* that "all charges[96] or *exactions* of whatever character within the jurisdiction of the Secretary of the Treasury. . ." are subject to protest by importers or consignees.[97] Written protests under this section "[must] be filed within ninety days after but not before [the] notice of liquidation or reliquidation . . . ."[98] Administrative denials of such protests may then be litigated in United States Customs Court.[99]

From practically the inception of the first general countervailing duty statute in 1897, importers have litigated denials of their protests that no bounty or grant existed.[100] It was not until 1967, however, than an American manufacturer sought, through appeal of a protest filed under section 516(b) of the Tariff Act of 1930,[101] to invoke a "right" to judicial review of *negative* subsidy determinations.[102] In *United States v. Hammond Lead Products, Inc.,*[103] the Court of Customs and Patent Appeals, reversing the decision below,[104] concluded that the Customs Court lacked jurisdiction to review an appeal of a negative countervailing duty determination.[105] Reasoning that section 303 of the Tariff Act of 1930 was penal in character, the court concluded that countervailing duties or customs penalties were "exactions."[106] In contrast to the sweeping language of section 514 which applies to im-

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[93] Every countervailing duty case prior to 1967 was brought by an importer. *See, e.g.,* the cases cited in note 75 *supra.*

[94] Judicial protests pursuant to § 303 must be brought in accordance with 28 U.S.C. §§ 2631-32 (1970). *See also* 28 U.S.C. § 1582 (1970) (jurisdiction of the Customs Court).

[95] 19 U.S.C. § 1514 (1970), *amending* Act of June 17, 1930, ch. 497, title IV, § 6514, 46 Stat. 734, 19 U.S.C. § 1514 (1964).

[96] Prior to the 1970 amendment, § 1514 had rendered "all decisions" by the Secretary of the Treasury subject to protest. Act of June 17, 1930, ch. 497, title IV, § 514, 46 Stat. 734, 19 U.S.C. § 1514 (1964).

[97] 19 U.S.C. § 1514(a)(3) (1970) (emphasis added).

[98] 19 U.S.C. § 1514(b)(2)(A) (1970).

[99] See note 94 *supra.*

[100] *See, e.g.,* Downs v. United States, 187 U.S. 496 (1903); United States v. Hills Bros. Co., 107 F. 107 (2d Cir. 1901).

[101] 19 U.S.C. § 1516 (1970), *as amended,* 19 U.S.C.A. § 1516 (Supp. 1976).

[102] Hammond Lead Prods., Inc. v. United States, 306 F. Supp. 460, 461 (Cust. Ct. 1969), *rev'd,* 440 F.2d 1024 (C.C.P.A. 1971).

[103] 440 F.2d 1024 (C.C.P.A. 1971) (*noted in* 4 LAW & POL. INT'L BUS. 146 (1972)).

[104] 306 F. Supp. 460 (Cust. Ct. 1969).

[105] 440 F.2d at 1027.

[106] *Id.* at 1028.

porters and includes "exactions, of whatever character . . . ,"[107] section 516(b) limited protests by domestic producers to challenges to "the classification of, or rate of duty assessed upon, the merchandise."[108] The court concluded from its comparison of the language utilized in each section that protests of penal duties were outside the scope of section 516(b), which was limited solely to challenges of *regular* customs duties determinations.[109] Thus, the court answered negatively the question of whether section 303 was intended to work in "harness" with section 516(b), so that a domestic manufacturer could "obtain the assessment of countervailing duties by reason of the action of a foreign government, *without* the acquiescence of the Treasury Department in the assessment."[110] Appeals of negative decisions on subsidy determinations would not be entertained, since as to the jurisdictional issue, "Congress *did not intend* the courts to impose [a penal exaction] should the Treasury be recalcitrant . . . ."[111]

While the court wrapped its jurisdictional conclusion in the cloak of congressional intent, the reasoning advanced to support it rested in large part upon an underlying policy consideration. In view of the court's recognition of the international repercussions which may attend impositions of countervailing duties, it was simply unwilling to allow manufacturers to "bypass" the executive branch and to enlist the judiciary to define the actions of foreign sovereigns as *illegal*.[112] In further recognition of the "penal" nature of section 303 sanctions, the court acknowledged that the Secretary of the Treasury "does and *must* exercise some discretion in defining what acts of foreign governments confer bounties or grants. . . ."[113] Indeed, it suggested that "[t]he practical standard [in determining whether section 303 is applicable to the actions of a foreign sovereign] may well be whether the indirect *bounty* seems reasonable or unreasonable in the circumstances."[114] Thus, although a foreign government bestowed a subsidy, the Treasury Department enjoyed moderate latitude in defining whether such actions constituted bounties or grants for the purposes of actually invoking the countervailing duty statute.[115] By perceiving the definitional process as a discretionary, political policy determination,[116] the

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[107] Act of June 17, 1930, ch. 497, tit. IV, § 514, 46 Stat. 734.

[108] Act of June 17, 1930, ch. 497, tit. IV, § 516(b), 46 stat. 735. The action was brought prior to the 1970 amendment to the section, which did not, in any event, affect the ultimate decision. 440 F.2d at 1031-32.

[109] *See* 440 F.2d at 1030. *But see id.* at 1033-35. (Almond, J., dissenting). See also the criticism of the majority conclusion advanced in Note, 4 LAW & POL. INT'L BUS. 146, 148-53 (1972). *Cf.* Feltex Corp. v. Dutchess Hat Works, 21 C.C.P.A. 463, 472 (1934).

[110] 440 F.2d at 1027 (emphasis added).

[111] *Id.* at 1030 (emphasis added).

[112] *Id.* at 1031.

[113] *Id.* (emphasis added).

[114] *Id.* at 1030 (emphasis added).

[115] *Id.* at 1030-31.

[116] *Id.* at 1031.

court, in effect, legitimized prevailing administrative practice. This practice, however, flew in the face of the clear and mandatory language of the statute that if a foreign government bestows a bounty or grant in fact, then countervailing duty sanctions "shall"[117] be an automatic concomitant.[118] Use of the word "shall" in the language of section 303 simply did not permit definitional discretion of the sort posited by the court in *Hammond Lead.*[119]

United States Customs Courts, were thus without jurisdiction to hear manufacturers' challenges to the Treasury Department's negative countervailing duty determinations.[120] In so concluding, the Court of Customs and Patent Appeals created[121] the anomalous situation in which a question as to the existence of a bounty or grant was justiciable when presented by an importer, but not so when presented by an American manufacturer or producer. In the absence of such a right to review, the mandatory nature of section 303 and its remedial impact were largely illusory, especially where Treasury continued to be so heavily influenced by foreign policy considerations in the exercise of its "definitional discretion."[122] Indeed, these considerations so influenced the Treasury Department that throughout section 303's enforcement history, the phrase "bounty or grant" was narrowly construed when politically expedient.[123] As a direct result, the reach of the "mandatory" countervailing duty statute was significantly limited.[124]

In light of the Department's relatively narrow definitional posture, and the negative subsidy determinations resulting therefrom, the unreviewability of these determinations took on vastly increased significance, for no judicial check on executive action existed under these circumstances.[125] In combination, these factors acted so as to virtually leave manufacturers without the very remedy the statute was designed

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[117] 19 U.S.C. § 1303 (1970).

[118] *Compare* the majority's position on Treasury discretion, 440 F.2d at 1030 *with* the mandatory language used in the countervailing duty statute, 19 U.S.C. § 1303 (1970).

[119] While the statute's language requires imposition of countervailing duties upon a finding that a bounty or grant has been paid or bestowed, 19 U.S.C. § 1303 (1970), the court suggested that "[t]he practical standard may well be whether the indirect *bounty* seems reasonable or unreasonable in the circumstances." 440 F.2d at 1030 (emphasis added).

[120] 440 F.2d at 1027.

[121] The majority in *Hammond Lead* would contend, quite obviously, that it was Congress who *created* the anomaly.

[122] During an eight year period beginning in 1959, for example, no countervailing duty orders were issued. Indeed, from May 1, 1934, through December 31, 1969 there were approximately 200 countervailing duty cases, only 34 of which resulted in the issuance of countervailing duty orders. STAFF OF HOUSE COMM. ON WAYS & MEANS, SELECTED PROVISIONS OF THE TARIFF AND TRADE LAWS OF THE UNITED STATES, 91st Cong., 2d Sess. 148, (Comm. Print 1970).

[123] *See Hearings on H.R. 10710 Before the Senate Comm. on Finance,* 93d Cong., 2d Sess., pt. 2, at 504 (1974).

[124] *See* S. REP. NO. 1298, 93d Cong., 2d Sess., *reprinted in* 93 U.S. CODE CONG. & AD. NEWS 7186, 7318, 7321 (1974).

[125] See text at notes 105-16 *supra* and 152 *infra.*

to provide.[126] It is not surprising, then, that American manufacturers felt that the Treasury Department's interpretative and administrative practices had rendered the countervailing duty statute inadequate as a protective device.[127]

b. Bounty or Grant?—Judicial Construction

The Treasury Department's administration of the countervailing duty law has been subject to considerable criticism as based upon an excessively restrictive interpretation of the phrase "bounty or grant."[128] American manufacturers, urging a more active use of the statute, have sought to bring Treasury practice into conformity with the more liberal reading of the phrase suggested by a number of judicial decisions.[129] There is a long line of cases, dating nearly to the inception of the United States countervailing duty law, wherein courts, upon review of the Treasury Department's determination that a bounty or grant was paid or bestowed, have held imposition of countervailing duties justified.[130] The courts in these cases—all based on appeals by importers from rejected protests—have expressed the gist of the terms "bounty or grant" in expansive language.

The broadest interpretations of this phrase may be found in two leading opinions by the Supreme Court dating from the first two decades of this century. In *Downs v. United States,*[131] the Court reviewed certain laws of Russia which, while imposing a tax on all sugar produced, remitted the tax upon all sugar exported. These laws also permitted Russian exporters to obtain, solely on the basis of the exportation of sugar, a certificate from the government which was of value and salable.[132] In upholding the lower court's rejection of the importer's protest, the Court elaborated at great length upon the word "bounty," stating:

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[126] See note 122 *supra.*

[127] See text at note 77 *supra.*

[128] Butler, *Countervailing Duties and Export Subsidization: A Re-emerging Issue in International Trade,* 9 VA. J. INT'L L. 82, 118 (1969). Domestic critics of the Treasury Department's administration of the statute sought unsuccessfully, to incorporate a broad definition of the phrase "bounty or grant" into the 1974 reforms. *See Hearings on H.R. 6767 Before the House Comm. on Ways & Means,* 93d Cong., 1st Sess., pt. 9, at 3097-98 (1973) (suggestion of the Pulp and Paper Mach. Manufacturer's Ass'n); *id.,* pt. 10, at 3296 (suggestion of the Electronic Indus. Ass'n), *id.,* pt. 9, at 3075, 3079-80 (suggestion of the Am. Retail Fed'n).

[129] *Id.* See text at notes 133-34, 142 *infra.*

[130] *See* cases cited in note 75 *supra.*

[131] 187 U.S. 496 (1903).

[132] For a thorough analysis of the *Downs* decision, see Note, *The Michelin Decision: A Possible New Direction for U.S. Countervailing Duty Law,* 6 LAW & POL. INT'L BUS. 237, 243-46 (1974).

> A bounty is defined by Webster as "a premium offered or given to induce men to enlist into the public service; or to encourage any branch of industry, as husbandry or manufacturers." And by Bouvier, as "an additional benefit conferred upon or a compensation paid to a class of persons."[133]

The Court also took judicial notice of a definition advanced in an 1898 conference of European powers in Brussels on sugar bounties. Under this definition, bounties encompassed ". . . all the advantages conceded to manufacturers and refiners by the fiscal legislation of the states, and that, directly or indirectly, are borne by the public treasury. . . . [including] [t]he total or partial exemptions from taxation granted to a portion of the manufactured products."[134] In language which parallels in breadth the Brussels definition, the court suggested that:

> [w]hen a tax is imposed upon all sugar produced, but is remitted upon all sugar exported, then, by whatever process, or in whatever manner, or under whatever name it is disguised, it is a bounty upon exportation.[135]

Some sixteen years later, the Supreme Court in *Nicholas & Co. v. United States*[136] addressed the distinction between the terms "bounty" and "grant."[137] In *Nicholas*, the Court examined the question of whether a British law, which provided for a payment to distillers on the export of spirits, constituted a bounty or grant.[138] In affirming the decision of the Court of Customs Appeals,[139] the Court concluded that the government payments were "grants" upon exportation.[140] These payments were, therefore, subject to countervailing duties, since they sought to provide an inducement to distillers to seek foreign markets.[141] In so concluding, the Court made clear the liberal coverage intended by Congress in the countervailing duty law, indicating that:

> [T]he statute was addressed to a condition and its words

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[133] 187 U.S. at 501.

[134] *Id.* at 501-02.

[135] *Id.* at 515. Considerable debate exists as to whether this language is holding or dicta. *See* Note, *supra* note 132, at 244-48 which concludes that the language is dicta. *Id.* at 248. *Accord, Hammond Lead,* 440 F.2d at 1030. *But see* American Express Co. v. United States, 332 F. Supp. 191, 198 (Cust. Ct. 1971), *aff'd on other grounds,* 472 F.2d 1050 (C.C.P.A. 1973) for authority that the statement is holding. Upon review in *Hammond Lead* the Court of Customs and Patent Appeals specifically left this question open. 472 F.2d at 1057.

[136] 249 U.S. 34 (1919).

[137] *See also* Allen v. Smith, 173 U.S. 389, 402 (1899) (definition of the term "bounty").

[138] 249 U.S. at 36-37, 39.

[139] 7 Ct. Cust. App. 97 (1916).

[140] 249 U.S. at 39-40.

[141] *Id.* at 40.

> must be considered as intending to define it, and all of them—"grant" as well as "bounty"—must be given effect. If the word "bounty" has a limited sense the word "grant" has not. A word of broader significance than "grant" could not have been used. Like its synonyms "give" and "bestow," it expresses a concession, the conferring of something by one person upon another. And if the "something" be conferred by a country "upon the exportation of any article or merchandise" a countervailing duty is required . . .[142]

The language of these two Supreme Court decisions illustrates the broad and comprehensive meaning to be given to the phrase "bounty or grant." Such an all-inclusive interpretative approach to the concept of foreign subsidization would seemingly be most efficacious in giving substance to congressional purpose, for "[i]t was a *result* Congress was seeking to equalize [by countervailing] regardless of whatever name or in whatever manner or form or for whatever purpose [such aid or advantage was provided]."[143] Thus, as suggested in the lower court decision in *Nicholas,* "[t]he sole inquiry is, do the results of such acts stimulate exportation or give a special advantage by affording aid from the public treasury whereby such goods may when exported be sold in competition with ours for less."[144] The courts, then, have looked to the *facts* and trade *effects* of foreign actions in determining whether a bounty or a grant exists.[145] The concern of the courts has been with trade *results,* however incidental or indirect, and not with intentions or international repercussions.[146] In stark contrast, the Treasury Department has not been so mechanical in its administrative decisions. Unlike the courts, which have not felt at liberty to adopt "constrained" definitions of the words "bounty or grant,"[147] the Treasury Department, in the exercise of its "definitional discretion," has looked beyond the trade results of foreign actions to their motivation and to possible repercussions attendant upon any finding of illegal subsidy.[148]

While such administrative practice certainly was rationally based—indeed, it seems well calculated to save the United States from

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[142] *Id.* at 39.

[143] Nicholas & Co. v. United States, 7 Ct. Cust. App. 97, 106 (1916) (emphasis added), *aff'd,* 249 U.S. 34 (1919).

[144] 7 Ct. Cust. App. at 107.

[145] *Id.*; *accord,* F.W. Woolworth Co. v. United States, 115 F.2d 348, 354 (C.C.P.A. 1940).

[146] One commentator suggests that the courts have looked primarily to whether foreign actions confer a *trade advantage* when examining the results of such actions. *See* King, *Countervailing Duties–An Old Remedy With New Appeal,* 24 BUS. LAW. 1179, 1190 (1969).

[147] Nicholas & Co. v. United States, 7 Ct. Cust. App. 97, 106 (1916), *aff'd,* 249 U.S. 34 (1919).

[148] *See Hearings on H.R. 10710 Before the Senate Comm. on Finance,* 93d Cong., 2d Sess., pt. 2, at 504 (1974); *Hammond Lead,* 440 F.2d at 1030, 1031.

potential international embarrassment and disadvantageous economic repercussions[149]—it did not serve to effectuate and, in all likelihood, actually impeded the fulfillment of congressional purpose[150]—as clearly expressed in the broad statutory mandate.[151] It would seem, then, that the expansive interpretation given the phrase "bounty or grant" in judicial dicta, more accurately reflects congressional intent and the true spirit of the countervailing duty law. Treasury's failure to embrace this expansive construction has likely resulted in negative bounty determinations, many of which have no doubt been based largely on political policy considerations having little or nothing to do with the language of the statute.

c. Justiciability: A New Remedy for an Old Problem

While the court in *Hammond Lead* concluded only that the *Customs Court* lacked jurisdiction to review negative bounty determinations, the plain import of the decision was to foreclose protests by American manufacturers to the judiciary regarding countervailing duties.[152] Yet, faced with the prospect of a continuing surge of bounty-fed imports into their home markets, domestic manufacturers were not content to let customs decisions—or the lack of decisions—go unchallenged, especially where executive action or inaction favored foreign manufacturing interests and importers. The first judicial challenge attempted after *Hammond Lead* came three years later in *National Milk Producers Federation v. Shultz*.[153]

The plaintiff in *National Milk* sought a writ of mandamus in federal district court to compel the Secretary of the Treasury to act on a complaint which had "gathered dust" for five years.[154] In rejecting a motion to dismiss for want of jurisdiction,[155] the district court took cognizance of the decision in *Hammond Lead* which had left American manufacturers without a remedy in Customs Court.[156] As there was no right of protest pursuant to section 516, the *exclusive* statutory grant of jurisdiction to the Customs Court[157] was rendered inoperative, since it is expressly conditioned upon the availability of review

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[149] *Hammond Lead*, 440 F.2d at 1031.

[150] *See* S. REP. NO. 1298, 93d Cong., 2d Sess., *reprinted in* 93 U.S. CODE CONG. & AD. NEWS 7186, 7318, 7321, (1974).

[151] See text at notes 116-19 *supra*.

[152] *See* National Milk Producers Fed'n v. Shultz, 372 F. Supp. 745, 746 (D.D.C. 1974).

[153] 372 F. Supp. 745 (D.D.C. 1974).

[154] *Id.* at 746.

[155] *Id.* at 747. The motion to dismiss was also advanced on the ground of lack of standing. *Id.* at 747-48. The court rejected the motion, indicating that plaintiff had alleged an injury in fact, and claimed an interest within the zone of interests protected under the countervailing duty statute, thus satisfying applicable standing requirements. *Id.* at 748.

[156] See text at notes 105-11 *supra*.

[157] 28 U.S.C. § 1582 (1970).

from denials of "protests [filed] pursuant to the Tariff Act of 1930 . . . ."[158] The court, therefore, reasoned that the very unavailability of an action based upon section 516 served to confer jurisdiction upon district courts to hear manufacturer protests with regard to countervailing duty issues.[159] Additionally, the court concluded that since section 303 imposed no time limits, the mandamus statute[160] was a proper alternative ground for its jurisdiction in a suit against the Treasury Department to force compliance with Tariff Act requirements.[161]

The *National Milk* decision reopened the doors of judicial review which had been slammed shut to domestic manufacturers in *Hammond Lead.* The decision held out the promise that there might finally be judicial redress through mandamus from the abusive use of executive inaction which had so crippled attempts to invoke section 303 sanctions.[162] Even prior to the reforms of the 1974 Trade Act, then, it appeared that limits were to be drawn upon the Treasury's freedom of action in countervailing duty determinations. With such a potent weapon as mandamus seemingly available to compel action, the Treasury Department was likely to feel constrained from continuing to utilize unreasonably long delays in the investigation process in order to avoid the political and economic impact of positive bounty determinations.[163] Investigative activity was, accordingly, likely to increase.[164] As a result, the issue as to the nature of the determinations process was bound to take on renewed significance, since the Department's "definitional discretion" would be its sole remaining policy tool with which to avoid strained international economic relations arising from imposition of countervailing duties.

d. Nature of the Bounty Determination Process

The court in *Hammond Lead* had characterized administrative bounty determinations as involving judgments that are essentially political and of a policy-making nature.[165] As such, the court felt that section 303 contemplated the exercise of executive discretion in defining what sort of actions by foreign governments constitute indirect

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[158] 372 F. Supp. at 746, *quoting* 28 U.S.C. § 1582 (1970).

[159] 372 F. Supp. at 746 ("Since § 1582 is the only statutory grant of jurisdiction to the Customs Court respecting review of import charges, its unavilability acts to confer original jurisdiction upon this court under 28 U.S.C. § 1340.").

[160] 28 U.S.C. § 1361 (1970). This section provides: "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." *Id.*

[161] 372 F. Supp. at 747.

[162] See note 79 *supra.*

[163] *See* Marks & Malingren, *Negotiating Non-Tariff Distortions to Trade,* 7 LAW & POL. INT'L BUS. 327, 361 (1975).

[164] *Id.*

[165] 440 F.2d at 1030-31.

bounties or grants.[166] Given this characterization, questions arose as to whether countervailing duty determinations might be more appropriately characterized as rule-making rather than adjudicative activity for purposes of the Administrative Procedure Act (APA).[167] Prior to the *Hammond Lead* decision, one legal commentator had concluded that although "the determination of the existence of a bounty has characteristics of both an order and a rule. . . ,"[168] Treasury decisions were adjudications within the meaning of the Administrative Procedure Act.[169] This conclusion presupposed, however, that the determination that a bounty exists is not a matter of agency discretion; that is, a decision which is essentially policy-making in nature.[170] In light of the decision in *Hammond Lead*, this presupposition was obviously open to attack. Resolution of this issue portended significant consequences for the reviewability of Treasury's negative bounty determinations, since the APA excludes judicial review of "agency action . . . committed to agency discretion by laws."[171]

In *American Express Co. v. United States*,[172] the contention was advanced that a Treasury countervailing duty determination was invalid "because its promulgation constituted a rule-making activity within the purview of the APA that was carried out 'without compliance with the procedural requirements of . . . [that Act] and of the Customs Regulations.' "[173] The Court of Customs and Patent Appeals disagreed, however, concluding that determinations under section 303 were not rule-making under the APA.[174] Treasury's countervailing duty decisions were viewed as more clearly resembling orders,[175] since "once it has been determined that a bounty exists, the Secretary has no discretion but to levy the appropriate countervailing duty."[176] While this conclusion went to the nature of Treasury's decision, it did not address the issue of the decisional *process*, and what discretion, if any, there was available to the Secretary. The court did, however, make a finding on this point, stating that "an investigation for the

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[166] *Id.*

[167] 5 U.S.C. § 551 *et seq.* (1970).

[168] Butler, *Countervailing Duties and Export Subsidization: A Re-emerging Issue in International Trade*, 9 VA. J. INT'L L. 82, 131 n.240 (1969).

[169] *Id.* at 130.

[170] *Id.* at 140-41.

[171] *See* 5 U.S.C. § 701(a)(2) (1970). Positive bounty determinations would nevertheless be subject to judicial review, since such review of importer protests was provided for by statute. *See* 19 U.S.C. § 1514 (1970), 28 U.S.C. § 1582 (1970).

[172] 472 F.2d 1050 (C.C.P.A. 1973).

[173] *Id.* at 1055 (bracketed material contained in original) (citation omitted from original).

[174] *Id.* at 1055-56.

[175] *See id.* at 1055, 1056. The APA defines an "order" as "the whole or a part of a final disposition, whether affirmative [or] negative, . . . of an agency in a matter other than rule-making . . . ." 5 U.S.C. § 551(6) (1970). Definitions of "rule" and "rule-making" are set out at 5 U.S.C. § 551(4), (5) (1970). An adjudication, under the Act, is the "agency process for the formulation of an order." 5 U.S.C. § 551(7) (1970).

[176] 472 F.2d at 1056.

purpose of determining the existence of a bounty is in the nature of a *fact-finding* activity rather than rule-making."[177]

The *American Express* court's finding with respect to the decisional process suggests that the Secretary of the Treasury must look solely to evidentiary facts in determining whether or not a bounty or grant exists, and not to policy-making conclusions to be drawn from those facts as in rule-making.[178] This finding that the definitional process is adjudicative in nature, that is, "concerned with issues of fact under stated law,"[179] harkens the return to a *result-oriented* determination process of the sort envisioned in the early judicial pronouncements on the countervailing duty statute.[180] As such, it also effectively represents a repudiation of the administrative practice of giving considerable weight to political policy considerations in the definitional process[181]—a practice which had met with favorable judicial comment only two years before in *Hammond Lead.*[182]

The decisions in *National Milk* and *American Express* evidenced a growing attempt by the judiciary to remedy the erosion of countervailing duty law brought about by administrative abuses. American manufacturers, however, were unwilling to entrust their quest for effective protection solely to the uncertain vehicle of litigation. Arguments in favor of significant reforms in the countervailing duty law were also pressed before both houses of Congress.[183] A political solution was thus sought for what many had viewed as essentially a political question. Legislative resolution of the most pressing issues arising under the countervailing duty statute was provided by the Trade Act of 1974.[184] In this Act, revisions in customs practice were integrally linked to a comprehensive congressional reformation of the framework for the conduct of United States foreign trade policy.

II. COUNTERVAILING DUTY REFORMS UNDER THE TRADE ACT OF 1974

The Trade Act of 1974 made several significant changes in American countervailing duty law. Section 331 restructures the opera-

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[177] *Id.* (emphasis added).

[178] *See id.*

[179] *Id.* at 1055.

[180] See text at notes 143-46 *supra.*

[181] There were apparently no such policy considerations involved in the Treasury's decision in this case, *see* 1 Cust. Bull. 212 (1967) (T.D. 67-102), 472 F.2d at 1056-57, or perhaps more accurately, no overriding policy considerations. *See* 472 F.2d at 1052.

[182] 440 F.2d at 1030-31. *But see id.* at 1033-35 (Almond, J., dissenting). It is interesting to note that Judge Almond, who vigorously dissented from the majority position in *Hammond Lead,* authored the decision in *American Express.*

[183] *See Hearings on H.R. 6767 Before the House Comm. on Ways & Means,* 93d Cong., 1st Sess., pt. 15, at 5246-53 (1973). *See generally Hearings on H.R. 10710 Before the Senate Comm. on Finance,* 93d Cong., 2d Sess. (1974).

[184] 19 U.S.C.A. §§ 1303, 1516 (Supp. 1976).

tion of the law in an attempt to balance the executive branch's desire for flexibility in application of the statute, with the need for effective protection of domestic interests.[185] In framing the substantive and procedural amendments to sections 303 and 516 of the Tariff Act of 1930, Congress sought to meet the wide-spread criticisms regarding the past administration of the Act.[186] The resulting reforms reflect a two-fold concern on the part of Congress: (1) to assure an effective domestic remedy against trade-distorting foreign export subsidies through new procedural guidelines fashioned "to tighten the administration of the countervailing duty law;"[187] and (2) to promote at once the establishment of "*internationally* acceptable rules and procedures governing the use of subsidies and imposition of countervailing duties," while providing sufficient flexibility in the statute so as not to jeopardize international negotiations contemplated under the Act.[188]

A. *The Amendments*

1. Time Limits on Procedures

The new countervailing duty section provides for publication of a notice in the Federal Register by the Secretary of the Treasury upon commencement of a formal investigation to determine the existence of a bounty or grant.[189] As in the past, such investigations may be triggered by information provided through customs or upon the filing of a complaint.[190] While the legislative history does not address the historical lack of Treasury-initiated investigations, all new time limits are framed in reference to situations in which an investigation is brought absent a private complaint.[191] Thus, it may be concluded that Congress acted in the belief that the duty imposed upon the Secretary to bring its own investigations would in fact be complied with. It remains to be seen whether administrative practice will be in accordance with this obligation.

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[185] S. REP. NO. 1298, 93d Cong., 2d Sess., *reprinted in* 93 U.S. CODE CONG. & AD. NEWS 7186, 7318-19, 7321 (1975).

[186] *Id.* at 7318.

[187] *Id.* at 7320.

[188] *Id.* at 7321 (emphasis added).

[189] 19 U.S.C.A. § 1303(a)(3) (Supp. 1976).

[190] 19 U.S.C.A. § 1303(a) (3) (A)-(B) (Supp. 1976). This section of the statute, as finally enacted, represents a change from the House version of the bill, which would have imposed the outer time limits from the date of publication of the notice initiating the formal investigation. *See* S. REP. NO. 1298, 93d Cong., 2d Sess., *reprinted in* 93 U.S. CODE CONG. & AD. NEWS 7186, 7319 (1974). The House version, however, would have opened up the possibility of administrative abuse, since there was no time limit imposed by statute or regulation within which it was necessary to publish the notice after reviewing the complaint. The Cast Iron Soil Pipe Institute raised this very point at hearings on the bill. *See Hearings on H.R. 6767 Before the House Ways & Means Comm.*, 93d Cong., 1st Sess., pt. 12, at 4089 (1973). The amendment as finally enacted, then, is illustrative of the lengths to which Congress went in attempting to prevent circumvention of the new procedures by the Treasury Department.

[191] *See, e.g.*, 19 U.S.C.A. § 1303(a) (3) (A)-(B), (a)(4) (Supp. 1976).

Regardless of increased administrative activity, however, private complaints will remain the obvious tool for triggering formal investigations. These complaints must meet *reasonable* standards imposed by the Secretary.[192] Customs regulations currently retain the standard of presenting "all pertinent facts obtainable . . . ."[193] Whereas past practice placed a liberal constuction on this phrase, it is obvious that it is equally susceptible to a stricter interpretation. Such an interpretation would create the possibility that the regulations would be applied so as to avoid both time limits and initiation of an investigation. However, when Congress authorized the Secretary to issue regulations, it seemingly took this possibility into account. The legislative history explicitly states that standards are to be "utilized for the purpose of assuring that the Secretary has sufficient information in order to determine whether or not to proceed, and not for the purpose of evading the time limits established . . . ."[194] Toward the legitimate end of obtaining adequate information, the Secretary may return a private complaint with a request for additional information, but this must be done "promptly" and with "*detailed* written advice as to the respects in which [the complaint] does not conform [with the regulations]."[195] Hopefully, the Treasury Department will comply with these standards of administrative behavior. In the event that it does not, a mandamus suit in federal district court might be an appropriate tool by which to compel Treasury to honor them.[196]

The prime motivation for an enforcement-reluctant Treasury Department to refuse complaints arises from the new outer time limits placed on its bounty or grant determination process.[197] From the date that a formal notice of investigation is published regarding a Treasury-initiated study, or in the more likely alternative, from the date of *filing* of an *acceptable* private complaint, the Secretary has six months within which to make a preliminary determination as to the existence of a bounty or a grant, and twelve months within which to make a final determination.[198] These time limits are not activated, however, until a "proper" petition is filed.[199] Thus, the easiest way to avoid triggering these limits is to increase the qualitative standard by which the acceptability of complaints is governed. While the customs regulations do provide for an explanation of the complaint's defi-

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[192] *See* S. REP. NO. 1298, 93d Cong., 2d Sess., *reprinted in* 93 U.S. CODE CONG. & AD. NEWS 7186, 7319 (1974) (emphasis added). *See, e.g.*, 19 C.F.R. § 159.47 (b)-(d) (1975).

[193] 19 C.F.R. § 159.47(b) (1) (iii) (1975).

[194] S. REP. NO. 1298, 93d Cong., 2d Sess., *reprinted in* 93 U.S. CODE CONG. & AD. NEWS 7186, 7319 (1974).

[195] 19 C.F.R. § 159.47(b) (2) (1975) (emphasis added).

[196] See text at notes 160-61 *supra* and notes 237-42 *infra*.

[197] 19 U.S.C.A. § 1303(a)(4) (Supp. 1976).

[198] *Id.*

[199] *Id.* § 1303(a) (3) (A) (Supp. 1976). *See* S. REP. NO. 1298, 93d Cong., 2d Sess., *reprinted in* 93 U.S. CODE CONG. & NEWS 7186, 7319 (1974); 19 C.F.R. § 159.47(b) (1975).

ciencies,[200] this process cannot avoid but have a delaying and perhaps discouraging impact upon those seeking to invoke the statutory remedy.

Although the statute sets out "*maximum*" time limits, the legislative history reveals that Congress fully expects that the Secretary could and "should" make his final determination as to the existence of a bounty or grant whenever sufficient evidence exists to make such a determination.[201] Thus, Congress adopted the six and twelve month periods as outer time limits, and fully expected expeditious determinations whenever possible.[202] Regardless of when the preliminary and final determinations are made, publication of *all* decisions in the Federal Register is mandatory although no reasons need be given.[203] Upon such publication, the new amendments to section 303 provide for *immediate* application of countervailing duties.[204] This stepped-up application of the duties advances by nearly two months the effective date of countervailing duty orders, since Treasury practice prior to the 1974 Act perfected such orders some thirty days after publication in the Customs Bulletin.[205]

2. Duty-Free Merchandise

In the first significant substantive amendment to United States countervailing duty law since 1922, Congress extended the reach of the statute to encompass *duty-free* articles.[206] Countervailing duties may not be imposed on such merchandise, however, absent an affirmative finding by the United States International Trade Com-

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[200] 19 C.F.R. § 159.47(b)(2) (1975).

[201] S. REP. NO. 1298, 93d Cong., 2d Sess., *reprinted in* 93 U.S. CODE CONG. & AD. NEWS 7186, 7319 (1974) (emphasis in original).

[202] *Id.* Through early 1976, the Treasury Department has largely taken advantage of the full six month period for preliminary determinations. *See, e.g.*, the following notices of preliminary countervailing duty determinations issued in June, 1975, approximately six months after the publication of the initial notice of receipt of countervailing duty petitions: 40 Fed. Reg. 27498 (1975) (canned hams and shoulders from the member states of the European Economic Community); *id.* at 27498 (ferrochrome from S. Africa), 27499 (float glass from France); *id.* at 27498 (float glass from the United Kingdom); *id.* at 27498 (float glass from W. Ger.); *id.* at 27499 (leather handbags from Brazil); *id.* at 27500 (oxygen sensing probes from Canada). In contrast, Treasury practice with regard to final determinations seems to be in keeping with Congress' expectation that decisions be expedited whenever possible. *See, e.g.*, 40 Fed. Reg. 23899 (1975) (shoes and steel products from the member states of the European Economic Community); *id.* at 23899 (woven tie fabrics from Japan, W. Ger., and S. Korea); *id.* at 54447 (cast iron soil pipe and fittings from India); *id.* at 56697 (float glass from France).

[203] The Trade Act of 1974 provides that "[a]ll determinations by the Secretary under this section . . . (whether affirmative or negative) shall be published in the Federal Register." 19 U.S.C.A. § 1303(a)(6) (Supp. 1976).

[204] *See* 19 U.S.C.A. § 1303(c) (Supp. 1976) (application of affirmative determination); S. REP. NO. 1298, 93d Cong., 2d Sess., *reprinted in* 93 U.S. CODE CONG. & AD. NEWS 7186, 7320 (1974).

[205] S. REP. NO. 1298, 93d Cong., 2d Sess., *reprinted in* 93 U.S. CODE CONG. & AD. NEWS 7186, 7320 (1974).

[206] 19 U.S.C.A. § 1303(a)(2) (Supp. 1976).

mission[207] that a domestic industry is "being or is likely to be injured, or is prevented from being established . . . ."[208] Congress perceived the inclusion of this injury standard as appropriate in light of the Article VI requirement of the GATT, which conditions the levying of countervailing duties on subsidized imports upon a finding of material injury.[209] While section 303's coverage of dutiable items predated GATT and as such fell within its "grandfather clause" exemption from the injury test, an extension of such coverage to nondutiable goods was not covered by the exemption.[210] Congress, therefore, felt compelled to subject nondutiable items to an injury test.[211]

Several related problems may arise, however, in the delineation and application of the injury test. While framed in terms of injury to an "industry," the statute fails to define the concept of industry. The legislative history suggests that a broad reading of the term is warranted, since the discussion of injury is framed in reference to "a domestic producer . . . ."[212] This would seem to indicate that Congress contemplated that the Trade Commission need not consider the *entire* industry, but only a *portion* thereof, in determining whether an injury has, in fact, been suffered.[213] Such a standard represents a departure from the international rule under the GATT, where an injury to the *whole* industry is required.[214]

A second problematic aspect of the new injury test is the fact that neither the statute nor its legislative history delineates the criteria for establishing injury.[215] The standard under the GATT is material-

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[207] The Trade Act of 1974 changed the name of the United States Tariff Commission to the United States International Trade Commission. 19 U.S.C.A. § 2231(a) (Supp. 1976). All references in any law, order, regulation, etc. to the United States Tariff Commission are now considered to refer to the International Trade Commission. *Id.* at § 2231(b).

[208] 19 U.S.C.A. § 1303(b)(A) (Supp. 1976). Under the statute, the finding as to injury must be completed by the Commission within three months of Treasury's final bounty determination. *Id.* The injury requirement on non-dutiable goods is only required so long as necessitated by our international obligations under GATT. *Id.* at § 1303(a)(2).

[209] S. REP. NO. 1298, 93d Cong., 2d Sess., *reprinted in* 93 U.S. CODE CONG. & AD. NEWS 7186, 7320 (1974).

[210] See text at notes 41-43 *supra.*

[211] S. REP. NO. 1298, 93d Cong., 2d Sess., *reprinted in* 93 U.S. CODE CONG. & AD. NEWS 7186, 7320 (1974).

[212] *See id.*

[213] The American Importers Association had specifically advocated adoption of a broader rule, suggesting that "[i]n determining whether an industry is suffering serious injury, the [Treasury Department] should be required to consider the entire industry and not just a portion thereof." *See Hearings on H.R. 6767 Before the House Ways & Means Comm.*, 93d Cong., 2d Sess., pt. 3, at 768 (1973).

[214] *See* Group of Experts on Anti-Dumping & Countervailing Duties, GATT Document L/963 at 10, 2 April 1959. *See generally* J. JACKSON, WORLD TRADE AND THE LAW OF GATT, 424-26 (1969).

[215] Some domestic concerns had pressed for the establishment by Congress of criteria for demonstrating injury. *See, e.g., Hearings on H.R. 6767 Before the House Ways & Means Comm.*, 93d Cong., 2d Sess., pt. 12, at 3967 (1973) (remarks by the American Iron and Steel Institute).

ity; only upon proof of a "material" injury to the domestic industry does the GATT authorize countervailing duties.[216] Federal regulations suggest that a potentially different standard may be applied under the Trade Act of 1974. The Trade Commission will proceed beyond a preliminary inquiry only where there is a "good and sufficient reason for a full investigation . . . [and accompanying public hearing]."[217] Customs regulations set forth requirements which a complaint must meet in order to be deemed "properly filed," and among them is the requirement that there be an allegation of "*substantial* injury."[218] However, since no standard is provided by which the "substantiality" of an injury is to be judged, it is difficult to ascertain which allegations will prove "good and sufficient." It will in all likelihood be left to the courts, then, particularly in the case of negative determinations, to carve out such a standard on a case by case basis.

In practice, the International Trade Commission seems to have adopted a very strict injury standard, for it is framed in reference to an industry, rather than to the complaining individual producer and others similarly situated.[219] This appears to be at variance with the congressional intent that injury to a portion of an industry be sufficient for the purpose of invoking the statute's protection.[220] The Commission's standard on its face, then, apparently imposes a far more substantial hurdle to the domestic manufacturer than was ever legislatively contemplated. There are but two probable explanations for the Commission's actions in framing such a stringent standard. First, if there is no practical difference between the Commission's "substantial" and the GATT's "material" injury to an entire industry tests, then the Commission has merely sought to harmonize the injury standard with that which is internationally accepted. Although such action would seem to be at variance with congressional intent, it would at least reflect an interpretation to which the actual statutory language is susceptible. If in fact the Commission did intend to embrace the international standard, then a regulation based upon "material" rather than "substantial" injury would have more clearly reflected that intent. Use of the word "substantial" in its stead, however, suggests a second approach to injury determinations which is considerably stricter than that existing under the international standard with respect to an industry. Given such an approach, imposition of this exacting standard would likely spring from yet another attempt by the executive branch to administratively frustrate the use of countervailing duties as a rem-

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[216] 61 Stat. A 24 (1947). See text at note 41 *supra.*

[217] 19 C.F.R. § 203.3 (1975) (U.S. International Trade Commission Preliminary Inquiry). Provision for a public hearing is made in 19 C.F.R. § 203.5 (1975).

[218] 19 C.F.R. § 203.2(b) (1975) (emphasis added).

[219] *See* 19 C.F.R. § 203.2(7)(i) (1975).

[220] *Compare* 19 C.F.R. § 203.2(b)(7)(i) (1975), *with* S. REP. NO. 1298, 93d Cong., 2d Sess., *reprinted in* 93 U.S. CODE CONG. & AD. NEWS 7186, 7320 (1974). See text at notes 212-19 *supra.*

edy for unfair trade practices.

Regardless of which approach motivated the International Trade Commission, neither would seem to be consistent with congressional intent that there need only be injury to a portion of an industry. It thus remains to be seen whether a "substantial" injury to an industry test can withstand judicial challenge. Much will depend upon the manner in which the test is actually applied. If it is liberally administered, no cause for challenge will likely arise. If the test is applied strictly, however, resulting in an inordinate number of negative injury determinations, the matter will no doubt be litigated.

The key to the regulation, as with the statute, apparently lies with the construction given to "industry." If the Commission, in practice, hinges its injury finding on substantial injury to the *entire* industry, the standard should arguably fall if challenged. If, on the other hand, the Commission adopts a construction of "industry" consistent with the legislative history—that is, substantial injury to a portion of an industry—then the test would not only withstand challenge, but would make sense in practice as well. Under such a construction, the "substantial" injury test would serve to mitigate the current divergence between United States countervailing duty law and the GATT standard of *material* injury to an *entire* industry. It would also more nearly approximate international practice under the material injury standard. Contemporary practice has not only related findings of material injury to an industry's total output, but has also permitted such a finding where complaining individual firms or producers represent a substantial portion of an industry.[221] Movement toward harmonization of our domestic practices with the international standard as well as practice would seem particularly appropriate in light of Congress' admitted deference to the GATT in establishing an injury test for nondutiable goods.[222] Such a construction of the International Trade Commission's regulation would also sufficiently limit the availability of the countervailing duty remedy to a single firm within a large industry, so as to prevent the standard from becoming essentially "protectionist" in character[223]—an approach wholly alien to the liberal trade policies of the GATT.

Dutiable items remain exempt from an injury test under the 1974 amendments.[224] Past criticism levied at the absence of an injury requirement has suggested that the imposition of a countervailing duty absent injury makes no practical sense, since it penalizes domestic consumers through higher prices, while confering no correspond-

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[221] *See* Group of Experts on Anti-Dumping & Countervailing Duties, GATT Document L/963 at 10, April 2, 1959.

[222] *See* S. REP. NO. 1298, 93d Cong., 2d Sess., *reprinted in* 93 U.S. CODE CONG. & AD. NEWS 7186, 7320 (1974).

[223] See text at notes 295-97 *infra*.

[224] *Compare* 19 U.S.C.A. § 1303(a)(1) (Supp. 1976), *with* Ch. 356, § 303, 42 Stat. 935-36, 19 U.S.C. § 1303 (1970).

ing protective benefit to a domestic industry.[225] In principle, it would seem that if all goods—dutiable or nondutiable—are to be subject to countervailing duties, then the imposition of an injury test should not be contingent upon the status of the goods. If it makes sense to assess countervailing duties where there is injury to domestic interests then the standards under which such duties are assessed should be uniform. In practice, it can be argued that no anomaly exists with respect to countervailing duty assessments since section 303 proceedings with respect to dutiable goods are only brought upon complaints, which normally arise where injury is, in fact, experienced.[226] As a matter of principle, it may also be argued that dutiable status itself represents a judgment that such imported goods would cause injury absent customs assessments.[227] Thus, it may be concluded that a de facto injury test does exist with respect to dutiable goods. Accepting such arguments, however, it is still likely that an anomalous situation between dutiable and nondutiable merchandise would arise, since the standards applied to the "injury" determination may well vary in accordance with the status of the goods involved.[228] To eliminate this anomaly, uniformity, in practice as well as in principle, would seem desirable.

During the course of hearings on the Trade Act of 1974, a number of domestic advocates argued in favor of uniformity in the countervailing duty law through the extension of an injury test to dutiable items.[229] Congress, while failing to extend an injury test to such goods, did acknowledge that the United States will likely move toward such uniformity in negotiations during the current round of international fair trade talks.[230] In anticipation of the full harmonization of United States countervailing duty law with existing international standards for imposing such duties, Congress expressed its expectation that any concession by the United States with regard to the injury test on dutiable items would be met with equivalent concessions by other nations.[231] Thus, while recognizing the rationality of the un-

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[225] *See, e.g.*, Feller, *Mutiny Against the Bounty: An Examination of Subsidies, Border Tax Adjustments, and the Resurgence of the Countervailing Duty Law*, 1 LAW & POL. INT'L BUS. 17, 25 (1969); Butler, *Countervailing Duties and Export Subsidization: A Re-emerging Issue in International Trade*, 9 VA. J. INT'L L. 82, 127 (1969). *See also Hearings on H. 6767 Before the House Comm. on Ways & Means*, 93d Cong., 1st Sess., pt. 3, at 995 (remarks of Caterpillar, Inc.); *Id.*, pt. 9, at 3080 (1973) (remarks of the Am. Retail Fed'n); *Id.*, pt. 13, at 4319-20 (remarks of Northwest Hotricultural Council). *But see* Marks & Malingren, *Negotiating Non-Tariff Distortions to Trade*, 7 LAW & POL. INT'L BUS. 327, 347-48 (1975).

[226] See text at notes 51-53 *supra*.

[227] See text at note 21 *supra*.

[228] For example, a marginal injury or threat of injury test might be applied to dutiable goods, whereas a substantial or material injury test might be applied to nondutiable merchandise.

[229] See industry remarks in note 225 *supra*.

[230] *See* S. REP. NO. 1298, 93d Cong., 2d Sess., *reprinted in* 93 U.S. CODE CONG. & AD. NEWS 7186, 7320 (1974).

[231] *Id.*

iformity arguments, Congress was, nonetheless, unwilling to make a unilateral concession to principle where it was under no international legal obligation to do so. In so refusing, Congress no doubt acted in a manner calculated to strengthen the American negotiating position at international trade talks.[232]

3. Judicial Review

Under the provisions of the new countervailing duty law, Congress had granted American manufacturers the right to judicial review of negative bounty determinations.[233] This right to review was explicitly granted "so as to assure effective protection under the countervailing duty laws to American producers . . . ."[234] The provision reverses, then, the 1971 decision by the Court of Customs and Patent Appeals in *Hammond Lead*, which had denied such a right to review.[235] As such, the amendment marks a "return" by Congress to its 1922 posture that American manufacturers should enjoy the same right to judicial review as has always been available to importers.[236]

With the legislative creation of a right to judicial review in the Customs Court of protests pursuant to section 516, the rationales supporting the decision in *National Milk* would seem to be virtually extinguished.[237] The district court's jurisdiction in that case was initially premised on the unavailability of review in the Customs Court, a condition which obviously no longer obtains.[238] With respect to its mandamus jurisdiction, the decision in *National Milk* was seemingly predicated on the absence of time restrictions on the bounty determination process.[239] The institution of such time limits by Congress would seem, therefore, to have dispelled the condition supporting the

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[232] Other countries may be expected to act in a similar manner. See text at notes 256-59 *infra*.

[233] 19 U.S.C.A. § 1516(c) (Supp. 1976). This subsection provides that American manufacturers and producers may contest the "failure to assess countervailing duties . . . ." Under 28 U.S.C. § 1582 (1970), the Customs Court has exclusive jurisdiction to hear appeals from denied protests. These petitions must be filed in accordance with the procedures outlined in 28 U.S.C. §§ 2631-32 (1970).

[234] S. REP. NO. 1298, 93d Cong., 2d Sess., *reprinted in* 93 U.S. CODE CONG. & AD. NEWS 7186, 7320 (1974).

[235] See discussion in text at notes 105-11 *supra*.

[236] Section 516 of the Tariff Act of 1922 had explicitly provided that the protest of a domestic manufacturer might be filed "with the same effect as a protest of a consignee filed under the provisions of sections 514 and 515 of this Act." Ch. 356, § 516(b), 42 Stat. 971. For a discussion of the legislative intent underlying the subsequent deletion of the phrase see Feltex Corp. v. Dutchess Hat Works, 21 C.C.P.A. 463, 472 (1934) and Note, 4 LAW & POL. INT'L BUS. 146, 150-52 (1972).

[237] Marks & Malingren, *Negotiating Non-Tariff Distortions to Trade*, 7 LAW & POL. INT'L BUS. 327, 359-60 n.127, 364 (1975).

[238] See text at notes 156-59 *supra*. Protests may now be made to the Customs Court pursuant to the Tariff Act of 1930, as amended. *See* 28 U.S.C. §§ 1582, 1631-32 (1970).

[239] 372 F. Supp. at 747.

court's alternative ground for decision.

There may, however, be future cases of Treasury abuse in administration of the statute which would be appropriate instances in which to confer mandamus jurisdiction upon a federal district court. One such possibility arises from the lack of time limits within which the Treasury must act on manufacturers' petitions protesting negative bounty determinations.[240] In cases where such protests are allowed to "collect dust," the judicial review in Customs Court which the 1974 Trade Act purports to guarantee would be precluded since no review could be granted "pursuant" to section 516 until the administrative remedy had been exhausted.[241] In such cases of undue administrative delay, it does not seem unlikely that a federal district court would feel compelled to conclude that it has jurisdiction.[242] Thus, it would appear a bit premature to completely write off the ability of federal district courts to fashion mandamus relief in countervailing duty cases.

4. Administrative Discretion

The 1974 Amendments contain temporary provisions for executive discretion in administering section 303 while international trade negotiations proceed.[243] Under these provisions, the Secretary of the Treasury is empowered to suspend application of countervailing duty orders at any time in the four year period following enactment of the 1974 Trade Act.[244] Such suspension is, however, expressly qualified by three conditions. The Amendments require that:

> (A) adequate steps have been taken to reduce substantially or eliminate during such period the adverse effect of a bounty or grant . . .
>
> (B) there is a reasonable prospect that, under section 2112 of [the Trade Act of 1974], successful trade agreements will be entered into with foreign countries or instrumentalities providing for the reduction or elimination of barriers to or other distortions of international trade; and
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> (C) the imposition of the additional duty under this section with respect to such article or merchandise would

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[240] Both the 1974 amendments and customs regulations are silent on this point. Note however that 19 C.F.R. § 174.21(a) (1975) sets a two year period from the date a protest is filed by an *importer* within which a determination must be reached. It may be anticipated that the Treasury Department will move to harmonize its regulations such that importers and domestic manufacturers will be treated similarly.

[241] Customs Court review is explicitly conditioned upon a "protest pursuant to the Tariff Act of 1930." 28 U.S.C. § 1582 (1970). If one cannot even invoke the provisions of the 1930 Act, then a protest could hardly be filed pursuant to it.

[242] National Milk Prods Fed'n. v. Shultz, 372 F. Supp. 745, 747 (D.D.C. 1974) (mandamus jurisdiction). See also text at note 196 *supra*.

[243] 19 U.S.C.A. § 1303(d)(1)-(3), (e)(1)-(2) (Supp. 1976).

[244] *Id.* § 1303(d)(2).

> be likely to seriously jeopardize the satisfactory completion of such negotiations . . . .[245]

All three of these conditions must be met if the Secretary is to exercise executive discretion and suspend application of countervailing duty orders.[246] In addition, every such suspension, as well as the reasons therefore, must be "promptly" transmitted to Congress,[247] where *either* the House or the Senate, by a majority vote of those present, may override the Secretary's resolution and render the merchandise in question subject to countervailing duties.[248]

The 1974 Trade Act's provision for executive discretion was adopted over widespread opposition voiced by domestic interests.[249] Much of this opposition, however, was addressed to the House version of the trade reform bill, which had conditioned the exercise of discretion solely on the prospect that negotiations would be jeopardized, and which had made no provision for congressional review.[250] Such broad discretion, it was believed, would render the other reforms in the countervailing duty law virtually meaningless, since the illegitimate result of prior administrative practice—unavailability of the remedy—would now be legitimated.[251] Congressional resolution of the discretion issue attempts to solve the conflict between the need for protection from unfair subsidies and the desire for flexibility in international negotiations.[252] The exercise of executive discretion is, therefore, contingent upon a positive response by the foreign nation to ameliorate the effects of a trade practice which has been adjudged

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[245] *Id.* § 1303(d)(2)(A)-(C).

[246] *Id.* The House bill had not contained all of these limitations, and as such, had been subject to considerable criticism. *See Hearings on H.R. 6767 Before the House Comm. on Ways & Means*, 93d Cong., 1st Sess., pt. 8, at 2817 (1973) (remarks of the National Livestock Feeders Ass'n) [hereinafter *House Hearings on the Trade Act of 1974*]; *Id.*, pt. 10, at 3269 (remarks of the Electronic Indus. Ass'n); *Id.*, pt. 7, at 2164-65 (remarks of the General Electric Co.). *But see id.*, pt. 3, at 1014-15 (remarks of the U.S.-Japan Trade Council). Congress viewed the statute as a check on potential abuse of the discretion provision. *See* S REP. NO. 1298, 93d Cong., 2d Sess., *reprinted in* 93 U.S. CODE CONG. & AD. NEWS 7186, 7322 (1974).

[247] 19 U.S.C.A. § 1303(e)(2) (Supp. 1976) (reports to Congress).

[248] *Id.* The House bill did not contain similar measures. H. CONF. REP. NO. 1644, 93d Cong., 2d Sess., *reprinted in* 93 U.S. CODE CONG. & AD. NEWS 7186, 7390 (1974).

[249] See note 246 *supra*.

[250] *See* S. REP NO. 1298, 93d Cong., 2d Sess., *reprinted in* 93 U.S. CODE CONG. & AD. NEWS 7186, 7321 (1974). In commenting on the House bill during hearings on the Trade Act of 1974 before the House Committee on Ways & Means, the Trade Relations Council of the U.S., Inc. suggested: "If this provision of the bill were to be enacted, it can be predicted that in few cases, *if any*, would the Secretary impose countervailing duties, notwithstanding proof of the bounty or grant being paid by the foreign government or other foreign interests . . . ." *House Hearings on the Trade Act of 1974, supra* note 235, pt. 7, at 2164-65 (emphasis added).

[251] *See, e.g., id.* (remarks of the Trade Relations Council of the U.S., Inc.).

[252] *See* S. REP. NO. 1298, 93d Cong., 2d Sess., *reprinted in* 93 U.S. CODE CONG. & AD. NEWS 7186, 7321 (1974).

unfair.[253] In this manner, protection from foreign subsidization practices can be attained through voluntary elimination of the bounty or grant at its source, rather than through neutralization of its impact by means of a protective countervailing duty.

The legislative history of the executive discretion proviso reveals that Congress contemplated sparing use of this device.[254] It was believed that foreign countries should and would be encouraged to eliminate bounties or grants during the interval between the Treasury Department's preliminary and final determinations. Congress, therefore, felt that the discretionary power granted to the Secretary would prove unnecessary in many cases.[255] It would seem unlikely, however, that foreign sovereigns will share American perceptions of their trade practices as unethical, and unilaterally move to curb them.[256] Support for this view may be garnered from both the nature of subsidization practices, as well as from the dynamics of the international negotiation process. First, many subsidization decisions by other nations represent a political decision to aid a particular sector of their economy.[257] Often, such assistance is only provided to *enable* products to compete in world markets, rather than to confer any competitive advantage.[258] It would seem unrealistic to expect a nation to condemn practices thus motivated as "unethical" in the absence of an international consensus that they are indeed unfair. Secondly, with international negotiations concerning fair trade practices in progress, it is unlikely that a country would in any way prejudice or compromise its own negotiating position by conceding that its subsidization practices are unfair in advance of formal multilateral condemnation. Given the likelihood of other nations assuming such a reluctant posture in the face of a Treasury Department finding that a bounty exists and that countervailing duties are warranted, resort to the exercise of discretion will, in all likelihood, occur more frequently than anticipated by Congress. The results of current administrative practice appear to confirm precisely this conclusion.[259]

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[253] 19 U.S.C.A. § 1303(d) (2) (A) (Supp. 1976).

[254] *See* S. REP. NO. 1298, 93d Cong., 2d Sess., *reprinted in* 93 U.S. CODE CONG. & AD. NEWS 7186, 7322 (1974).

[255] *Id.*

[256] It is more likely that the affected nations will view American countervailing duty impositions as indicative of a move by the U.S. toward a "protectionist" foreign trade posture. Brazil, for example, has responded in this manner to countervailing duties imposed on its goods. *See* N.Y. Times, Feb. 27, 1976, at 2, col. 5 (city ed.).

[257] Feller suggests that "government assistance to entrepreneurs for the purpose of promoting regional development, reducing unemployment, encouraging plant and equipment modernization, or fostering national self-sufficiency in particular industries—all recognized as legitimate government functions—could technically come within the ambit of 303 without regard to their effect on exports." Feller, *supra* note 225, at 27.

[258] *Id.* at 22.

[259] *See, e.g.*, 40 Fed. Reg. 21719, 21720 (1975) (waiver of countervailing duties on dairy products from member states of the European Economic Community); *Id.* at 55638, 55639 (waiver of countervailing duties on canned ham and shoulders from the

B. *Effects of the Amendments*

The amendments under the 1974 Trade Act do not address the existing confusion regarding what constitutes a "bounty or grant." While numerous domestic groups advocated the adoption of amendments defining these terms,[260] Congress left it to the President to "seek through negotiations the establishment of internationally agreed rules and procedures governing the use of subsidies . . . and the application of countervailing duties."[261] During the interim period pending the achievement of such an international consensus, domestic concerns will necessarily look to old and new Treasury and judicial decisions in attempts to glean support for their contentions that particular subsidization practices are, in fact, bounties or grants. Treasury decisions will continue to provide little assistance, however, for even under the new publication requirements, the Treasury Department is still not required to specify the reasons underlying either its negative or positive responses to the issue of whether a bounty or a grant exists.[262] The continuation of this practice will hinder, as previously,[263] both those seeking a clear understanding of administrative construction of the phrase, as well as those who seek to support or protest particular Treasury determinations in an intelligent manner.[264] Thus, while the Treasury is obliged under the new amendments to explain its reasoning to Congress if it exercises its discretionary powers to suspend duties,[265] it need not publicly explain its bounty determinations.[266] Absent judicial challenge and the resultant elucidation provided through opinions,[267] there will remain little guidance offered to the public as to which foreign trade practices may legitimately be protested under the countervailing duty law.[268]

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member states of the European Economic Community); 41 Fed. Reg. 1274, 1275 (1976) (waiver of countervailing duties on cheese from Australia); *Id.* at 1467, 1468 (waiver of countervailing duties on cheese from Switzerland); *Id.* at 1587, 1588 (waiver of countervailing duties on rubber footwear from S. Korea).

[260] Many definitions were proposed by domestic concerns at the hearings before the House Ways and Means Committee. *See, e.g., Hearings on the Trade Act of 1974, supra* note 246, pt. 9, at 3097-98 (suggestions by the Pulp and Paper Mach. Mfrs. Ass'n); *id.*, pt. 10, at 3296 (Electronic Indus. Ass'n); *id.*, pt. 9, at 3075, 3079-80 (Am. Retail Fed'n).

[261] 19 U.S.C.A. § 1303(d)(1) (Supp. 1976).

[262] *Id.* § 1303(a)(5). This subsection provides: "[t]he Secretary shall from time to time ascertain and determine, or estimate, the net amount of each such bounty or grant, and shall declare the net amount so determined or estimated." *Id.*

[263] See text at notes 63-67 *supra.*

[264] *Cf.* Butler, *supra* note 225, at 131-32.

[265] 19 U.S.C.A. § 1303(e)(1) (Supp. 1976).

[266] Customs regulation provide for a limited disclosure to interested parties. *See* 19 C.F.R. §§ 103.8(a), (b)(viii), 103.10 and 175.21(b) (1975). Requests under the Freedom of Information Act may also be fruitful in securing nonprivileged documents. *See* 5 U.S.C. § 552(a), (b) (1970). Neither method, however, offers the broad public disclosure that would be afforded by publication in the Federal Register.

[267] See note 75 *supra* and authorities cited therein.

[268] For a description of the categories of practices usually incurring countervailing duties or generally regarded as subsidies by legal scholars, see note 75 *supra.*

While there are significant negative aspects to the dearth of congressional guidance as to what constitutes a "bounty or grant," this very absence of a government provided definition may, in fact, provide a broad remedial opportunity to domestic concerns. Through the very inexactitude of the concept, it is left to the dictates of private interest to seek to give it content. Toward this end, the language of the Supreme Court in *Downs*[269] and *Nicholas*[270] provide unchallenged authority for an expansive construction of the phrase "bounty or grant." A wide-open door then, is available to domestic manufacturers and producers through which to seek to have foreign subsidization practices declared illegal. Furthermore, just as Congress has left it to the executive branch to negotiate international agreements with respect to subsidization practices,[271] it has also left it to the private sector to seek to influence the positions taken by American negotiators at the current trade talks with regard to proscribed "bounties or grants."[272] This is possible because in persuading the Treasury Department that a trade practice is unfair and illegal, a domestic manufacturer equally addresses the representatives of nations who are now creating the very guidelines by which future international trade practice will be governed.

The opportunity, however, is one of limited duration. Since Congress has sought to create incentives to expedite executive attempts to reach international accords,[273] it has consequently limited the time in which domestic concerns may seek to influence the executive branch in its negotiations. As the trade talks are currently in progress, arguments as to the fairness or unfairness of foreign subsidization practices had best be made now, for the future may well prove too late.

The 1974 Amendments have also had a significant impact upon the decision-making process with respect to countervailing duty impositions. The nature of determinations with respect to such impositions has traditionally evidenced a tension between its adjudicative and political aspects.[274] Since the law was explicitly mandatory in its terms,[275] past administration of the countervailing duty statute integrated both aspects into the determination of the existence of a bounty or grant.[276] The 1974 Amendments relieve this tension by

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[269] See text at notes 133-35 *supra.*

[270] See text at note 142 *supra.*

[271] See note 54 *supra. See also* S. REP. NO. 1298, 93d Cong., 2d Sess., *reprinted in* 93 U.S. CODE CONG. & AD. NEWS 7186, 7318, 7321 (1974).

[272] Through the complaint and countervailing duty imposition process, domestic manufacturers send an explicit message to the Treasury Department as to the nature of foreign trade practices which they regard as unfair.

[273] For example, the discretionary power to suspend a countervailing duty imposition is limited to the four year period beginning on the date of enactment or the Trade Act of 1974. 19 U.S.C.A. § 1303(d)(2) (Supp. 1976).

[274] *See Hammond Lead,* 440 F.2d 1024, 1030-31 (C.C.P.A. 1971).

[275] Ch. 356, § 303, 42 Stat. 935-36, 19 U.S.C. § 1303 (1970).

[276] *See Hammond Lead,* 440 F.2d 1024, 1030-31 (C.C.P.A. 1971).

creating a new two-phase imposition process which completely separates these aspects. The first, or bounty determination phase, is fundamentally adjudicative in nature. As suggested by the court in *American Express,* it is the Treasury Department's function in determining the existence of a "bounty or grant" to simply examine the challenged practice to determine if a bounty or grant exists as a matter of fact.[277] The element of discretion is completely removed from this stage of the decisional process. As such, administrative application of the law to the facts presents a justiciable issue[278] and review of negative determinations in the United States Customs Court is, therefore, provided.[279]

The second phase of the new process for imposing countervailing duties relates to the decision of whether or not to assess a countervailing duty once it has been established that a bounty or grant exists. At this stage, the Secretary of the Treasury's discretion in the application of sanctions enters the picture. The nature of the question of whether or not to impose additional duties is essentially political in nature, for it addresses the continuing conflict between protective interests based on a unilateral perception of the "unfairness" of particular subsidization practices, and the desire to internationalize perceptions of what constitute unethical trade practices.[280] While this second stage recognizes the political considerations, it establishes three conditions, set out above,[281] which must be met in order for the Secretary to suspend application of additional duties.[282] There are, however, no objective standards by which the Secretary's determination is to be judged. Consequently, considerable latitude in such determinations will probably be afforded by the statutory language utilized.[283] A decision to invoke the discretion provision is, nevertheless, subject to review by Congress,[284] where the Secretary's reasons must prove persuasive to avoid imposition of the otherwise mandatory countervailing duties.[285] Thus, under the 1974 reforms, such political decisions have been removed from exclusive executive jurisdiction, which had been unilaterally assumed by the Secretary under past administrative practice.[286]

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[277] 472 F.2d 1050, 1055-56 (C.C.P.A. 1973).

[278] *See id.* at 1056. *See also* 5 U.S.C. §§ 701, 702, 704, 706 (1970).

[279] 28 U.S.C. § 1582 (1970). Such review may be taken from negative bounty determinations pursuant to the 1930 Tariff Act, as amended by the 1974 Trade Act. 19 U.S.C.A. § 1516(c) (Supp. 1976).

[280] *See* S. REP. NO. 1298, 93d Cong., 2d Sess., *reprinted in* 93 U.S. CODE CONG. & AD. NEWS 7186, 7320-21 (1974).

[281] See text at note 245 *supra.*

[282] 19 U.S.C.A. § 1303(d) (2) (A)-(C) (Supp. 1976).

[283] *See id.*

[284] *Id.* § 1303(e).

[285] *Id.* § 1303(e)(2).

[286] *See Hammond Lead,* 440 F.2d 1024, 1030, 1031 (C.C.P.A. 1971). *See also* S. REP. NO. 1298, 93d Cong., 2d Sess., *reprinted in* 93 U.S. CODE CONG. & AD. NEWS 7186, 7318, 7321 (1974).

As an adjunct to the new two-step process for imposing countervailing duties, section 301 of the Trade Act of 1974[287] provides for limited Presidential discretion. In instances where duties imposed under section 303 of the Tariff Act of 1930 are inadequate to deter foreign subsidization practices, the President "may impose duties or other import restrictions on the products of such foreign countries . . . for such time as he deems appropriate."[288] Section 301 mandates, however, that the President "take all appropriate and feasible steps within his power to obtain the elimination of such . . . [foreign] subsidies . . . ."[289] Presidential action taken pursuant to section 301 is subject to Congressional scrutiny;[290] an affirmative vote of a majority of those present in *each* House of Congress on a concurrent resolution of disapproval will render section 301 action inoperative.[291]

The 1974 Trade Act, then, subjects the exercise of executive discretion, whether by the President[292] or by the Secretary of the Treasury,[293] to a check by Congress. Final decisions on the imposition of countervailing duties and similar retaliatory checks have thus been "returned" to the halls of Congress in keeping with the Constitution's mandate.[294] While the continued influence of the Department of State will no doubt be felt in Congress' decisional process, participation by the public, through its elected representatives, is finally possible in determining an appropriate political response to harmful unfair foreign trade practices.

Finally, the 1974 amendments have had a major effect upon the very function of United States countervailing duty law. At the inception of this law, these duties acted as a "repair mechanism" designed

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[287] 19 U.S.C.A. § 2411 (Supp. 1976). For a discussion of section 301, see Hudec, *Retaliation Against "Unreasonable" Foreign Trade Practices: The New Section 301 and GATT Nullification and Impairment*, 59 MINN. L. REV. 461, 510-39 (1975).

[288] 19 U.S.C.A. § 2411(c)(3) (Supp. 1976). Presidential actions pursuant to section 301 are further conditioned on a finding by the Secretary of the Treasury that subsidies or incentives having the effect of subsidies, are provided by a country or instrumentality on its exports, as well as a finding by the International Trade Commission that such exports "have the effect of substantially reducing sales of the competitive United States product . . . ." *Id.* § 2411(c)(1), (2). An example of such restrictive action may be found in President Ford's recent decision to impose import quotas on stainless and other specialty steels. Imposition of these quotas was suspended, however, for ninety days pending "an effort to negotiate an 'orderly marketing agreement' with the main foreign supplying countries." N.Y. Times, March 17, 1976, at 1, col. 8 (city ed.).

[289] 19 U.S.C.A. § 241(a)(B) (Supp. 1976). President Ford's recent decision to seek a special world trade agreement covering all international trade in steel at the current international trade negotiations in Geneva is illustrative of such action. N.Y. Times, March 17, 1976, at 1, col. 8 (city ed.).

[290] 19 U.S.C.A. § 2412 (Supp. 1976).

[291] *Id.* § 2412(b).

[292] *Id.*

[293] 19 U.S.C.A. § 1303(e)(2) (Supp. 1976).

[294] U.S. CONST. art. I, § 8, which provides: "The Congress shall have Power . . . to regulate Commerce with foreign Nations . . . ."

to preserve the protection of domestic tariff walls.[295] As such, they had a basically anticompetitive thrust.[296] However, under the GATT, there has been a worldwide movement toward freer trade, with consequent attempts to reduce and eliminate tariff and nontariff trade barriers. Today, countervailing duties neither seek to preserve such barriers, nor do they themselves represent barriers.[297] While remaining protective in nature, these duties are no longer "protectionist," for they seek only to compensate for subsidization practices which would otherwise confer unfair economic advantage and distort trade patterns. The new countervailing duty law, then, seeks to protect free competition from unfair distortion, rather than to preserve competitive restriction through "protectionist" barriers.

The transformation in theoretical function of countervailing duty law is completed by the extension of such duties to otherwise nondutiable items.[298] Whereas formerly the duty-free or dutiable status of goods impacted upon countervailing duties as a restrictive trade device,[299] such distinctions can no longer affect a device whose new function is to insure that *all* products compete according to relative merit. Thus, even within the framework of current liberal trade policies, there would seem to remain a place, if not an expanding role, for countervailing duties.

CONCLUSION

Section 331 of the Trade Act of 1974 has substantially strengthened the existing substantive and procedural provisions of the United States' countervailing duty law. In establishing time limits for action on complaints by the Treasury Department, extending the statute's reach to nondutiable goods, and ensuring judicial review of negative determinations to domestic manufacturers, Congress has provided American business with a renewed and expanded remedy for unfair foreign trade practices which tend to undermine the competitive underpinnings of domestic markets. As such, countervailing duties have been returned to the realm of domestic economic policy, and rendered less of an adjunct to diplomacy. Whether this transfer can be effectuated without counterproductive international repercussions remains to be seen, for the establishment of equitable international trade relations will ultimately depend upon whether or not nations can harmonize divergent perceptions of the fairness of subsidiza-

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[295] See text at notes 19-20 *supra*.

[296] Feller, *supra* note 225, at 22.

[297] *See* Butler, *supra* note 225, at 83; Note, *The Michelin Decision: A Possible New Direction for U.S. Countervailing Duty Law*, 6 LAW & POL. INT'L BUS. 237, 242 (1974).

[298] *See* Feller, *supra* note 225, at 24.

[299] See text at notes 21-22 *supra*.

tion practices. Only through such consonance will strengthened economic relations develop between foreign nations and the United States in the form of open and nondiscriminatory world trade.

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