

Remedies for Unfair Import Competition in the United States

Leslie W. Jacobs

Randall A. Hove

Follow this and additional works at: <http://scholarship.law.cornell.edu/cilj>

 Part of the [Law Commons](#)

Recommended Citation

Jacobs, Leslie W. and Hove, Randall A. (1980) "Remedies for Unfair Import Competition in the United States," *Cornell International Law Journal*: Vol. 13: Iss. 1, Article 1.

Available at: <http://scholarship.law.cornell.edu/cilj/vol13/iss1/1>

This Article is brought to you for free and open access by Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell International Law Journal by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

CORNELL INTERNATIONAL LAW JOURNAL

Volume 13

Winter 1980

Number 1

ARTICLES

REMEDIES FOR UNFAIR IMPORT COMPETITION IN THE UNITED STATES*

Leslie W. Jacobs† and Randall A. Hove††

Foreign trade has increased more than ten-fold in the last thirty years¹ to almost \$1.3 trillion annually.² Over one-sixth of everything grown or manufactured in the world is traded internationally.³ In the United States in the last few years, exports and imports have represented a greater share of the Gross National Product than ever before.⁴ In fact, this growth of

* This Article is adapted from lectures given by Mr. Jacobs at the Federal Bar Association's Antitrust Seminar in Cleveland, Ohio, on April 18, 1979, and the Ohio State Bar Association's Corporate Counsel Institute on October 21, 1978. The authors wish to express their gratitude to Mary Brigid McManamon, Cornell Law School class of 1980, for her invaluable assistance in connection with this Article.

† Partner, Thompson, Hine and Flory, Cleveland, Ohio. B.S.B.A. 1965, Northwestern University; J.D. 1968, Harvard Law School.

†† Associate, Thompson, Hine and Flory, Cleveland, Ohio. B.Sc. 1967, University of Toronto; M.B.A. 1969, Harvard Business School; J.D. 1977, University of Utah Law School.

1. OFFICE OF THE SPECIAL REPRESENTATIVE FOR TRADE NEGOTIATIONS, PUB. NO. G-8, THE MTN PACKAGE 1 (1979) [hereinafter cited as STR PUB. No. G-8].

2. [1978] PRESIDENT'S TWENTY-THIRD ANN. REP. ON THE TRADE AGREEMENTS PROGRAM 1 [hereinafter cited as TWENTY-THIRD ANN. REP.].

3. STR PUB. NO. G-8, *supra* note 1.

4. TWENTY-THIRD ANN. REP., *supra* note 2, at 123.

foreign trade is even more sudden in the United States than elsewhere. The absolute value of U.S. imports and exports far surpasses that of any other nation.⁵ Of even greater importance, the United States suffered its first overall trade deficit of this century in 1971, and the situation has worsened. In 1979, there was a \$29.13 billion excess of imports over exports and an overall balance of payments deficit of \$24.69 billion.⁶ Because of these and other factors, a new spirit of protectionism has arisen⁷ and as a result many businesses are seeking relief from foreign competition.

This Article considers the use of existing laws to challenge the abuse of U.S. markets by foreign sellers. Because domestic businesses perceive an increasing need for redress of injury from import competition and the relevant legislation is scattered and complex, a comparison of the available alternatives is vital to a practitioner. This Article, therefore, does not only address the question of what actions a U.S. company can legally take to combat the threat of unfairly priced foreign products. It also discusses the principal factors to consider in determining the pertinence and relative attractiveness of each alternative.

I

THE STATUTORY SCHEME

There are several statutory avenues to attack unfair import competition. Possible relief includes the following measures: imposition of antidumping⁸ or countervailing duties,⁹ other administrative relief, such as

5. The value of U.S. imports in 1977 was \$187 billion. Exports were valued at \$176 billion. The comparable figures for West Germany were \$130 billion and \$142 billion; for Japan, \$84 billion and \$96 billion. CONGRESSIONAL BUDGET OFFICE, U.S. TRADE POLICY AND THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS 3 (1979) [hereinafter cited as CBO BACKGROUND PAPER].

6. Wall St. J., Feb. 7, 1980, at 11, col. 1. The balance of payments deficit in 1971 was \$1.5 billion; in 1972, \$5.8 billion; in 1974, \$1.8 billion; in 1976, \$5.7 billion; in 1977, \$26.6 billion; and in 1978, \$28.4 billion. The balance of payments figures exclude government arms sales and contain certain other adjustments. COMPTROLLER GENERAL, REPORT TO THE CONGRESS ON U.S. ADMINISTRATION OF THE ANTIDUMPING ACT OF 1921, at 5 (1979) [hereinafter cited as COMPTROLLER GENERAL'S REPORT].

7. For a brief discussion of the recent rise in protectionist sentiment, see CBO BACKGROUND PAPER, *supra* note 5, at 5-7.

8. The law in force until this year was the Antidumping Act of 1921, 19 U.S.C. §§ 160-171 (1976); regulations are set forth in 19 C.F.R. pt. 153 (1979). This law was repealed effective January 1, 1980, and replaced by a new Title VII(B) to the Tariff Act of 1930, 19 U.S.C. §§ 731-740 (1976), as set forth in § 101 of the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (to be codified at 19 U.S.C. §§ 1673-1673i). New regulations have been proposed for both antidumping and countervailing duties. Proposed regulations 19 C.F.R. §§ 155.1-.64 (promulgated by the Treasury Department), 44 Fed. Reg. 57,044 (Oct. 3, 1979); final regulations 19 C.F.R. pt. 207 (promulgated by the International Trade Commission), 44 Fed. Reg. 76,458 (Dec. 26, 1979). See also note 44 *infra*.

9. Tariff Act of 1930, § 303, 19 U.S.C. § 1303 (1976), as amended by Trade Agreements

financial assistance to domestic persons,¹⁰ limitations on imports,¹¹ exclusion of the imported articles,¹² or a cease and desist order;¹³ investigations of import practices;¹⁴ and antitrust proceedings.¹⁵ In general, these laws are not punitive, nor do they directly benefit the injured domestic parties by providing damages.¹⁶ Instead, the laws are intended to relieve such parties from the need to compete with artificially low prices for foreign goods. The newly rediscovered provisions of the antitrust laws, however, do provide for private treble damage actions,¹⁷ criminal penalties,¹⁸ forfeitures,¹⁹ and injunctive relief²⁰ for unfair competition and restraints of trade in the sale of imported goods.

Prior to the 1970's, while the volume and proportion of U.S. imports were relatively low, the number of import relief proceedings was steady.²¹ As the trade balance deteriorated, however, enforcement efforts increased,²² and cases became more complex.²³ Finally, Congress passed the Trade Act

Act of 1979, Pub. L. No. 96-39, §§ 101, 103, 93 Stat. 144 (1979) (to be codified at 19 U.S.C. §§ 1303, 1701-1707, 1751-1778).

10. Trade Act of 1974, §§ 201-284, 19 U.S.C. §§ 2251-2394 (1976) (so-called "escape clause" proceeding).

11. *Id.*

12. Tariff Act of 1930, § 337, 19 U.S.C. § 1337 (1976), as amended by Trade Agreements Act of 1979, Pub. L. No. 96-39, § 1105, 93 Stat. 144 (1979) (to be codified at 19 U.S.C. §§ 1337 (b), (c), (f)).

13. *Id.*

14. Agricultural Adjustment Act of 1933, § 22, 7 U.S.C. § 624 (1976); Tariff Act of 1930, § 332, 19 U.S.C. § 1332 (1976).

15. Wilson Tariff Act §§ 73-76, 15 U.S.C. §§ 8-11 (1976); Clayton Act §§ 4, 15-16, 15 U.S.C. §§ 15, 25-26 (1976). The Antidumping Act of 1916, §§ 801-802, 15 U.S.C. §§ 72-73 (1976), also belongs conceptually in this category.

16. A civil penalty of up to \$10,000 or the domestic value of the articles may be recovered by the U.S. Government in the event of a violation of a cease and desist order. Trade Agreements Act of 1979, Pub. L. No. 96-39, § 1105, 93 Stat. 144 (1979) (amending Tariff Act of 1930, § 337, 19 U.S.C. § 1337 (1976)). Under certain conditions firms may be eligible for financial assistance under escape clause proceedings. Trade Act of 1974, §§ 251-264, 19 U.S.C. §§ 2341-2354 (1976). Finally, treble damages and other relief may be available in antitrust proceedings. See notes 17-20 *infra* and accompanying text.

17. Clayton Act § 4, 15 U.S.C. § 15 (1976); Antidumping Act of 1916, § 801, 15 U.S.C. § 72 (1976).

18. Wilson Tariff Act § 73, 15 U.S.C. § 8 (1976); Antidumping Act of 1916, § 801, 15 U.S.C. § 72 (1976).

19. Wilson Tariff Act § 76, 15 U.S.C. § 11 (1976).

20. Clayton Act §§ 15-16, 15 U.S.C. §§ 25-26 (1976).

21. COMPTROLLER GENERAL'S REPORT, *supra* note 6, at 7.

22. Mundheim, *Developments in Antidumping Law*, 34 BUS. LAW. 1831 (1979); Rein, *Legal Remedies Against Unfair Import Competition*, 9 LAW NOTES 45, 45 (1973).

23. COMPTROLLER GENERAL'S REPORT, *supra* note 6, at 7.

of 1974²⁴ which was a watershed in this area. That Act amended the old forms of relief²⁵ and added several new ones.²⁶

In addition to the change in then-existing laws, the Trade Act of 1974 enabled the President to participate in the Tokyo Round negotiations of the General Agreement on Tariffs and Trade (GATT).²⁷ As a result of the Tokyo Round, the United States signed ten international trade agreements ("codes") in Geneva on April 12, 1979.²⁸ These codes required implementing legislation in the United States.²⁹ That legislation, the Trade Agreements Act of 1979 (the "Act"), was introduced on June 19, 1979,³⁰ and was passed by the House on July 11, and by the Senate on July 23, 1979.³¹ The President approved it on July 26, 1979.³²

The Act attempts to align U.S. nontariff trade restrictions with the new codes produced by the Multilateral Trade Negotiations. Title I of the Act adds to the Tariff Act of 1930³³ a new Title VII dealing with antidumping and countervailing duties.³⁴ Title IX of the Act amends and strengthens

24. 19 U.S.C. §§ 2101-2487 (1976).

25. Trade Act of 1974, Pub. L. No. 93-618, § 321, 88 Stat. 1978 (1975) (amending Antidumping Act of 1921, §§ 201, 203-205, 212(3), 19 U.S.C. §§ 160, 162-164, 170a (1976)); Trade Act of 1974, Pub. L. No. 93-618, §§ 331(a), 173, 341(a)-(b), 88 Stat. 1978 (1975) (amending Tariff Act of 1930, §§ 303, 332(g), 337, 19 U.S.C. §§ 1303, 1332, 1337 (1976)).

26. Trade Act of 1974, §§ 201-284, 301-302, 406, 19 U.S.C. §§ 2251-2394, 2411-2412, 2436 (1976).

27. Trade Act of 1974, Pub. L. No. 93-618, §§ 101-175, 88 Stat. 1978 (1975) (codified in scattered sections of 19 U.S.C.).

28. The ten codes signed are Subsidies/Countervailing Measures, Antidumping, Customs Valuation, Government Procurement, Technical Barriers to Trade, Import Licensing Procedures, Trade in Civil Aircraft, International Dairy Arrangement, Bovine Meat Arrangement, and Group "Framework." For the texts of these codes, see AGREEMENTS REACHED IN THE TOKYO ROUND OF THE MULTILATERAL TRADE NEGOTIATIONS, H.R. DOC. NO. 96-153, 96th Cong., 1st Sess. (1979).

29. Under special rules adopted in the Trade Act of 1974, each House of Congress had to accept or reject the President's legislative proposals as a whole, without amendments, within 60 legislative days after introduction. Trade Act of 1974, § 151, 19 U.S.C. § 2191 (1976).

30. H.R. 4537, 96th Cong., 1st Sess. (1979). This bill reflected extensive pre-introduction political compromise among the Administration (through the Special Trade Representative), the Congress (through the Trade Subcommittees of the Senate Finance Committee and the House Committee on Ways and Means), and U.S. industry. See, e.g., *Implementation of the Multilateral Trade Negotiations: Hearings Before the Subcomm. on Int'l Trade of the Senate Comm. on Finance*, 96th Cong., 1st Sess. (Feb. 21-22, 1979); *Multinational Trade Negotiations: Hearings Before the Subcomm. on General Oversight and Minority Enterprise of the House Comm. on Small Bus.*, 96th Cong., 1st Sess. (Mar. 20, Apr. 4, 1979); SUBCOMM. ON TRADE OF THE HOUSE COMM. ON WAYS AND MEANS, SUMMARY OF RECOMMENDATIONS FOR LEGISLATION IMPLEMENTING THE MULTILATERAL TRADE NEGOTIATIONS, 96th Cong., 1st Sess. (Comm. Print 1979). This unique series of hearings and "gentlemen's agreements" preceding the filing of the bill was occasioned by the special legislative procedures. See note 29 *supra*.

31. 125 CONG. REC. H5,690-91, S10,389-91 (1979).

32. Pub. L. No. 96-39, 93 Stat. 144 (1979).

33. 19 U.S.C. §§ 1202-1654 (1976).

34. Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 144 (1979).

section 301 of the Trade Act of 1974,³⁵ which deals with foreign trade practices that restrict or discriminate against U.S. commerce. Title X considerably expands the availability of judicial review of administrative determinations.³⁶ Title XI, among other things, adds a civil penalty for the violation of a cease and desist order under section 337 of the Tariff Act of 1930³⁷ and makes other technical amendments to the Trade Act of 1974.³⁸ Titles II-VIII deal with tariff and tax measures.

In addition to the substantive and procedural changes wrought by GATT and reflected in the Trade Agreements Act of 1979, the Administration promulgated a reorganization plan to improve the enforcement and change the duties of the responsible agencies involved with trade.³⁹ The plan, among other things, transferred responsibility for countervailing and antidumping duty proceedings from Treasury to the Department of Commerce. It also strengthened and centralized the trade policy coordination and negotiation functions of the Office of the Special Trade Representative for Trade Negotiations, to be renamed the Office of the United States Trade Representative. Whether this plan will do more than juggle the players around remains to be seen.

II

SPECIAL DUTIES

A. ANTIDUMPING DUTIES

An American manufacturer's most immediate concerns are normally the effect of foreign price competition on the domestic company's market share and price. Dumping tends to erode both share and price. Dumping usually occurs when a foreign competitor's export price to the United States

35. 19 U.S.C. § 2411 (1976), *as amended by* Trade Agreements Act of 1979, Pub. L. No. 96-39, §§ 901-903, 93 Stat. 144 (1979).

36. Title X amends § 516 of the Tariff Act of 1930, 19 U.S.C. § 1516 (1976), and adds a new § 516A (to be codified at 19 U.S.C. § 1516a) governing judicial appeals from antidumping or countervailing duty proceedings.

37. Trade Agreements Act of 1979, Pub. L. No. 96-39, § 1105, 93 Stat. 144 (1979) (amending Tariff Act of 1930, § 337, 19 U.S.C. § 1337 (1976)).

38. *Id.* § 1106.

39. For a summary of the Administration's proposal, see Reorg. Plan No. 3 of 1979, 44 Fed. Reg. 69,273 (1979). This proposal included a number of congressional recommendations. See REORGANIZATION PLAN NO. 3 OF 1979, H.R. REP. NO. 96-585, 96th Cong., 1st Sess. 3 (Nov. 2, 1979); REORGANIZATION PLAN NO. 3 OF 1979, S. REP. NO. 96-402, 96th Cong., 1st Sess. 44 (Nov. 7, 1979). Hearings were held on the proposal in both the House and the Senate, and in each case the formal resolution to reject it was overwhelmingly disapproved by the responsible committee. H.R. Res. 428, 96th Cong., 1st Sess. (1979); S. Res. 245, 96th Cong., 1st Sess. (1979). On January 2, 1980, the President implemented this reorganization by executive order. Exec. Order No. 12,188, 45 Fed. Reg. 989 (1980).

is less than its price in the home country or other countries. The competitor may even be selling to the United States at a price below total cost. Price discrimination of this variety can be beneficial to the seller, particularly when it operates from an insulated home market with little fear of competitive retaliation and either faces the low portion of a business cycle with large fixed costs or is temporarily restricted in its ability to reduce employment. In these circumstances, it will be economically worthwhile to make foreign sales as long as the price is sufficient to cover variable costs. In these situations, the foreign competitor may be dumping its product in the United States at the expense of American manufacturers' sales.⁴⁰

The statute now governing dumping is new. Section 101 of the Trade Agreements Act of 1979⁴¹ supersedes the Antidumping Act of 1921.⁴² The new provisions, however, are basically a recodification of the old law, with certain changes in procedure.⁴³ In order for a special dumping duty to be assessed on foreign merchandise, the administering authority⁴⁴ must first find that "a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value" (LTFV).⁴⁵ Then, under

40. For a general discussion of the dumping phenomenon, see Myerson, *A Review of Current Antidumping Procedures: United States Law and the Case of Japan*, 15 COLUM. J. TRANS-NAT'L L. 167 (1976).

41. Pub. L. No. 96-39, 93 Stat. 144 (1979) (to be codified at 19 U.S.C. §§ 1671-1677g).

42. 19 U.S.C. §§ 160-171 (1976) (repealed by Trade Agreements Act of 1979, Pub. L. No. 96-39, § 106(a), 93 Stat. 144 (1979)).

43. "The implementation of the anti-dumping code should have little immediate effect on the United States. Current U.S. practice is generally in conformance with the provisions of the code, and no major changes in U.S. laws are anticipated." CONGRESSIONAL BUDGET OFFICE, *THE EFFECTS OF THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS ON THE U.S. ECONOMY: AN UPDATED VIEW* 32 (1979). In fact, much of the criticism of the antidumping remedies attacked the administration of the law rather than its substance. See, e.g., *Administration of the Antidumping Act of 1921: Hearing Before the Subcomm. on Trade of the House Comm. on Ways and Means on Assessment and Collection of Duties Under the Antidumping Act of 1921*, 95th Cong., 2d Sess. (1978); *Oversight of the Antidumping Act of 1921: Hearing Before the Subcomm. on Trade of the House Comm. on Ways and Means on the Adequacy and the Administration of the Antidumping Act of 1921*, 95th Cong., 1st Sess. (1977).

44. Section 771(1) of the Tariff Act of 1930, added by Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 144 (1979) (to be codified at 19 U.S.C. § 1677(1)), defined the administering authority as "the Secretary of the Treasury, or any other officer of the United States to whom the responsibility for carrying out the duties of the administering authority under this title are transferred by law." The Administration's reorganization plan shifted administration to the Department of Commerce. See note 39 *supra* and accompanying text. Some might view this shift as a protectionist one, since Treasury is perceived to have a "free trade" bias, while Commerce is the opposite. The Administration claimed not to view the change as one toward protectionism, however, expecting only more efficient enforcement. Statement of James T. McIntyre, Jr., Director of Office of Management and Budget, before the Senate Governmental Affairs Committee at 11 (July 23, 1979).

45. Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 144 (1979) (adding new § 731(1) to Tariff Act of 1930, to be codified at 19 U.S.C. § 1673(1)).

the new Act, the International Trade Commission (the "Commission")⁴⁶ must determine that a domestic industry "is materially injured" or "is threatened with material injury," or that "the establishment of an industry in the United States is materially retarded" by reason of the sale of the imports.⁴⁷ Thus the decision whether to proceed with an antidumping action involves a two-tiered analysis. First, is there a sale, or a likelihood of sale, at LTFV? If so, is there material injury or a threat thereof?

"Fair value" has no relation to the costs or prices of U.S. producers; thus it can be either lower or higher than those prices.⁴⁸ It is usually considered to be the foreign manufacturer's f.o.b. plant price to purchasers in the country of export.⁴⁹ The first question to ask, therefore, is whether the foreign competitor's f.o.b. plant price to U.S. customers is less than its price at home. If the prices are the same, a finding of dumping is unlikely. Thus the domestic product may be faced with valid price competition from abroad.

The rule differs if the foreign manufacturer does not sell, or sells only relatively small quantities, in its home market, or has sold below cost there for an extended period. Then the reference point may be either f.o.b. plant sales at prices above cost to customers in third countries, or a "constructed value," which is the average cost of production over a business cycle plus 10% for general expenses and 8% for profit.⁵⁰ Thus, if the foreign producer

46. The new Act defines the Commission as "the United States International Trade Commission." *Id.* (adding new § 771(2) to Tariff Act of 1930, to be codified at 19 U.S.C. § 1677(2)). The Administration's plan was not clear as to whether this provision will be changed.

47. *Id.* (adding new § 731(2) to Tariff Act of 1930, to be codified at 19 U.S.C. § 1673(2)). Under § 201 of the Antidumping Act of 1921, 19 U.S.C. § 160 (1976) (repealed by Trade Agreements Act of 1979, Pub. L. No. 96-39, § 106(a), 93 Stat. 144 (1979)), the Commission had to determine if an industry "is being or is likely to be injured, or is prevented from being established." Congress apparently did not want to change the standard and indicated that a Commission determination of threat "must be based upon information showing that the threat is real and injury is imminent, not a mere supposition or conjecture." S. REP. NO. 96-249, 96th Cong., 1st Sess. 88-89 (1979).

48. "Fair value" is not defined in the Act. Congress apparently intended the concept to be applied essentially as an estimate of "foreign market value." See HOUSE WAYS AND MEANS COMM., TRADE AGREEMENTS ACT OF 1979, H.R. REP. NO. 96-317, 96th Cong., 1st Sess. 59 (1979).

49. See Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 144 (1979) (adding new § 773(a)(1) to Tariff Act of 1930, to be codified at 19 U.S.C. § 1677b(a)(1)).

50. *Id.* (adding new §§ 773(a)(2), (e) to Tariff Act of 1930, to be codified at 19 U.S.C. §§ 1677b(a)(2), (e)). Formerly, § 206 of the Antidumping Act of 1921, 19 U.S.C. § 165 (1976) (repealed by Trade Agreements Act of 1979, Pub. L. No. 96-39, § 106(a), 93 Stat. 144 (1979)), arguably required third country prices to be sought first before constructed value could be used. New § 773(a)(2) of the Tariff Act of 1930 authorizes either standard to be used and eliminates any preference. Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 144 (1979) (adding new § 773(a)(2) to Tariff Act of 1930, to be codified at 19 U.S.C. § 1677b(a)(2)). An exporter may cite cost justification for large volume U.S. sales as an expla-

sells very little at home, the inquiry becomes whether the competitor's prices in other countries are above its U.S. prices, or whether there is reason to believe costs at home would preclude making a profit on U.S. sales.

A domestic manufacturer should consider filing a petition for relief from dumping if the manufacturer suspects that a competitor is attempting to maintain its volume and employment during a period of excess capacity, or gain a market share in the United States by taking a loss or significantly narrowing its routine overseas margins on U.S. sales. The complainant must remember the second prong of the dumping test, however—material injury.

"Material injury" is now defined as "harm which is not inconsequential, immaterial, or unimportant."⁵¹ The Commission must consider several factors in making a determination of material injury. First, is "the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, . . . significant"?⁵² Second, has there "been significant price undercutting by the imported merchandise as compared with the price of like products of the United States"?⁵³ Third, does "the effect of imports of such merchandise otherwise [depress] prices to a significant degree or [prevent] price increases, which otherwise would have occurred to a significant degree"?⁵⁴ Fourth, what is the "actual and potential decline in output, sales, market share, profits, productivity, return on investments, and utilization of capacity"?⁵⁵ Finally, the Commission must consider the "factors affecting domestic prices"⁵⁶ and the "actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment."⁵⁷ The presence or absence of any single factor is not

nation for a cost differential, but only if: (a) similar discounts are given on domestic sales in the exporter's home country on at least 20% of the total sales in that country for a period of at least six months before any particular U.S. sale; (b) such discounts are freely available; and (c) cost savings are provable in relation to the quantities sold. 19 C.F.R. § 153.9 (1979).

51. Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 144 (1979) (adding new § 771(7)(A) to Tariff Act of 1930, to be codified at 19 U.S.C. § 1677(7)(A)). "Material injury" is supposedly a strengthening of the old law's injury test. *But see* note 62 *infra*.

52. Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 144 (1979) (adding new § 771(7)(C)(i) to Tariff Act of 1930, to be codified at 19 U.S.C. § 1677(7)(C)(i)).

53. *Id.* (adding new § 771(7)(C)(ii)(I) to Tariff Act of 1930, to be codified at 19 U.S.C. § 1677(7)(C)(ii)(I)).

54. *Id.* (adding new § 771(7)(C)(ii)(II) to Tariff Act of 1930, to be codified at 19 U.S.C. § 1677(7)(C)(ii)(II)).

55. *Id.* (adding new § 771(7)(C)(iii)(I) to Tariff Act of 1930, to be codified at 19 U.S.C. § 1677(7)(C)(iii)(I)).

56. *Id.* (adding new § 771(7)(C)(iii)(II) to Tariff Act of 1930, to be codified at 19 U.S.C. § 1677(7)(C)(iii)(II)).

57. *Id.* (adding new § 771(7)(C)(iii)(III) to Tariff Act of 1930, to be codified at 19 U.S.C. § 1677(7)(C)(iii)(III)).

decisive, and Congress has made clear that the Commission must consider the facts of each particular case.⁵⁸

Since the enactment of the 1974 Trade Act, the success rate in dumping proceedings has been about 50%.⁵⁹ The new Act will probably not have much impact on these results. Should a domestic manufacturer initiate a dumping proceeding?⁶⁰ Perhaps, but there is more to consider than the merits of the case. First, the manufacturer must evaluate the cost of the proceeding. There is usually a large burden on the complainant to produce detailed economic data supporting the dumping charge.⁶¹ This burden might be even greater now that the new law requires the injury to be "material."⁶² Unfortunately, a domestic company will probably have to undertake an investigation and hire an economist to determine the merits of the case.

Second, even if the domestic company can afford to pay the costs of the suit, it should evaluate the relief that a successful suit provides. If injury is found, the only relief available is a special dumping duty.⁶³ Treasury is

58. S. REP. NO. 96-249, *supra* note 47, at 88.

59. See COMPTROLLER GENERAL'S REPORT, *supra* note 6, at 72-74.

60. If the domestic manufacturer decides to institute an antidumping action, the procedure is detailed in the Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 144 (1979) (adding new §§ 731-735 to Tariff Act of 1930, to be codified at 19 U.S.C. §§ 1673-1673d). The maximum period for an antidumping proceeding is 420 days, with the ordinary proceeding expected to take 235 days. See S. REP. NO. 96-249, *supra* note 47, at 72-73. Under the Antidumping Act of 1921, investigations usually consumed 13 months and could last up to 16 months.

61. 19 C.F.R. § 153.27 (1979); Myerson, *supra* note 40, at 192. Of course, this regulation refers to the Antidumping Act of 1921. Since, however, a major change in the law is not anticipated, see note 43 *supra*, the requirement will probably remain in effect.

62. The current standard is generally considered to be "more than de minimus," a standard that was set forth in Titanium Sponge from the USSR, 33 Fed. Reg. 10,769, 10,772 (Tariff (Comm'n 1968)). That standard had been criticized as not in line with the international standard of material injury. Myerson, *supra* note 40, at 188-90. Recent Commission decisions, however, as well as the legislative history of the new Act, indicate that the introduction of a "material injury" standard may not result in a drastic change in Commission results. For example, in Perchloroethylene from Belgium, France, and Italy, U.S. ITC Pub. No. 969 (Apr. 1979), the Commission indicated that its standard is injury that is "more than frivolous, inconsequential, insignificant, or immaterial." *Id.* at 4. The new statutory definition in § 771(7) is injury that is "not inconsequential, immaterial, or unimportant." Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 144 (1979) (adding new § 771(7)(A) to Tariff Act of 1930, to be codified at 19 U.S.C. § 1677(7)(A)). It is difficult to see the difference between "material" and "more than de minimus."

63. This duty equals the "foreign market value," Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 144 (1979) (adding new § 773 to Tariff Act of 1930, to be codified at 19 U.S.C. § 1677b), minus the "United States Price," which is either the f.o.b. factory "purchase price" to buyers in the United States, *id.* (adding new § 772(b) to Tariff Act of 1930, to be codified at 19 U.S.C. § 1677a(b)), or the "exporter's sales price" which is "the price at which merchandise is sold . . . in the United States . . . for the account of the exporter," *id.* (adding new § 772(c) to Tariff Act of 1930, to be codified at 19 U.S.C. § 1677a(C)).

approximately three years behind in assessing dumping duties, although it hopes to clear up these difficulties by assigning more staff.⁶⁴ In practice, however, few duties are ever collected because foreign manufacturers simply adjust prices upward, thereby closing the gap between the prices of foreign and domestic products.⁶⁵ In those cases where duties are payable, there has been an unconscionable delay in actual collection. For example, Alexander's, Inc., the New York department store, pled guilty on March 29, 1979, to criminal customs fraud involving secret rebates on Japanese television sets imported in 1974.⁶⁶ The dumping duties still have not been collected.⁶⁷

Even if the duties were collected immediately upon assessment, the relief might be too late. There is usually a significant period of pre-filing preparation, followed by a lapse of from ten to seventeen months between the filing of an acceptable petition and an affirmative determination of dumping.⁶⁸ Thus a foreign manufacturer may survive a temporary downturn in demand or establish a U.S. market share before the administering authority completes an investigation.

The new code attempts to improve the overall procedure. Although it is too early to determine the effectiveness of these measures, a few tentative conclusions may be advanced. First, the overall proceeding may be shortened, but probably not dramatically.⁶⁹ The relief provided, however, may prove more effective. The new provisions for immediate suspension of liquidation upon a preliminary determination of sales at LTFV⁷⁰ should provide more relief when an American manufacturer faces dumping for the purpose of establishing market share. Moreover, in the case of persistent past dumping, the petitioner can allege "critical circumstances"⁷¹ at the time of filing to enable a retroactive ninety-day suspension of liquidation to be made.

Second, the long-run effect of the new law may be more litigation in the courts. The procedures are still complex, but the availability of judicial

64. COMPTROLLER GENERAL'S REPORT, *supra* note 6, at 82.

65. *See id.* at 10. This adjustment is not necessarily a problem, however, since a price increase and a duty produce the same competitive effect.

66. N.Y. Times, Mar. 30, 1979, § 4, at 1, col. 6.

67. *See Administration of the Antidumping Act of 1921, supra* note 43, at 63.

68. *See* COMPTROLLER GENERAL'S REPORT, *supra* note 6, at 72-74.

69. The new code provides for a time focus of between 235 and 420 calendar days. S. REP. NO. 96-249, *supra* note 47, at 72-73. For a detailed comparison of elapsed time for investigations during the years 1972-77, see COMPTROLLER GENERAL'S REPORT, *supra* note 6, at 70-75.

70. Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 144 (1979) (adding new § 733(d)(1) to Tariff Act of 1930, to be codified at 19 U.S.C. § 1673b(d)(1)).

71. *Id.* (adding new § 733(e) to Tariff Act of 1930, to be codified at 19 U.S.C. § 1673b(e)).

review is vastly expanded with increased Customs Court jurisdiction⁷² and the possibility of immediate judicial review for five varieties of interlocutory determinations⁷³ and four final determinations.⁷⁴ Further, since the category of interested parties now specifically includes representative unions and trade associations, the opportunities to spread the costs of litigating antidumping determinations are more readily available. Therefore, small domestic manufacturers, otherwise barred by the high cost of litigation, may be encouraged to seek relief.

Another source of litigation may be the new provision for suspension of an investigation upon the acceptance of an agreement between the United States and foreign exporters to cease exports or eliminate dumping by adjusting prices. That provision was designed "to permit rapid and pragmatic resolutions of antidumping duty cases."⁷⁵ Congress did not intend it to become the normal means to dispose of cases; it may be undertaken only to serve the interests of the public and the domestic industry.⁷⁶ Suspension of an investigation can occur only after an affirmative preliminary determination has been made. In addition, 85% of the exporters must be parties to the agreement. Since the decision to suspend the investigation and accept an agreement is subject to judicial review,⁷⁷ the petitioner may appeal if he is not satisfied with the agreement. Thus the provision for an agreement to eliminate dumping may become a frequent source of collateral dispute.

Third, the elements required to be proved may not in fact have changed. Although the standard is now "material injury," the statutory definition of that term is "not inconsequential, immaterial, or unimpor-

72. *Id.* § 1001, (to be codified at 19 U.S.C. §§ 1514, 1515(a), 1516, 1516a, 28 U.S.C. §§ 1514(a), 1582, 2632(f), 2633). In addition, a pending bill, S. 1654, 96th Cong., 1st Sess. (1979), would change the name of the United States Customs Court to the United States Court of International Trade and expand its jurisdiction to entertain any civil action arising out of import transactions or under U.S. trade legislation. "S. 1654 would add the last missing pieces of the puzzle begun so many years ago by filling the few remaining spaces left open by the Trade Agreements Act of 1979." Testimony of David M. Cohen, Branch Director, Commercial Litigation Branch, Civil Division, Department of Justice, before Subcommittee on Improvements in Judicial Machinery, Senate Committee on the Judiciary, 96th Cong., 1st Sess. (Sept. 10, 1979). The Senate passed the bill on December 18, 1979. 125 CONG. REC. S18,968-75 (1979). It was referred to the House Committee on the Judiciary on December 20, 1979. *Id.* at H12,448.

73. Trade Agreements Act of 1979, Pub. L. No. 96-39, § 1001, 93 Stat. 144 (1979) (adding new § 516A(a)(1) to Tariff Act of 1930, to be codified at 19 U.S.C. § 1516(a)(1)).

74. *Id.* (adding new § 516A(a)(2) to Tariff Act of 1930, to be codified at 19 U.S.C. § 1516(a)(2)).

75. S. REP. NO. 96-249, *supra* note 47, at 71.

76. *Id.*

77. Trade Agreements Act of 1979, Pub. L. No. 96-39, § 1001, 93 Stat. 144 (1979) (adding new § 516A(a)(2)(B)(iv) to Tariff Act of 1930, 19 U.S.C. § 1516(a)(2)(B)(iv)).

tant.”⁷⁸ Congress apparently felt that recent Commission decisions have been consistent with that standard.⁷⁹ Although a “more than de minimus” standard supposedly has been used since 1968,⁸⁰ recent Commission decisions have described it as injury that is “more than frivolous, inconsequential, insignificant, or immaterial.”⁸¹ It is hard to see a difference between the old and new tests.

Fourth, the Act, which specifically defines the term “industry” for the first time, answers the question of whether an affected “industry” must be national or can also be regional. The definition provides that an industry may consist of all domestic producers, producers of a major portion of the total domestic production, or a regional industry.⁸² A regional industry may exist if there is a high concentration of imports in an isolated regional market.⁸³ These requirements are consistent with recent Commission decisions.⁸⁴ The new definition is broader, however, since it does not require that the region constitute a major or even a significant part of the domestic industry as is currently the practice. It is conceivable, then, that the new statutory definition would allow isolated, small regional industries to petition for relief without having to undertake a broader economic study or prove a more pervasive impact of an unfair import practice.

Finally, imports from state-controlled economies remain a problem. These countries are not signatories to the GATT, and it is not clear on what basis the “fair value” of their imports may be determined. Treasury regulations have provided that constructed value may be based on prices in a country at a similar stage of economic development in which the economy is not state-controlled.⁸⁵ However, Congress, even though reenacting current statutory law,⁸⁶ specifically did not approve or disapprove this regula-

78. *Id.* § 101 (adding new § 771(7)(A) to Tariff Act of 1930, to be codified at 19 U.S.C. § 1677(7)(A)).

79. S. REP. NO. 96-249, *supra* note 47, at 87.

80. *See* note 62 *supra*.

81. Perchloroethylene from Belgium, France, and Italy, U.S. ITC Pub. No. 969 (Apr. 1979).

82. Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 144 (1979) (adding new § 771(4) to Tariff Act of 1930, to be codified at 19 U.S.C. § 1677(4)).

83. *Id.* (adding new § 771(4)(C) to Tariff Act of 1930, to be codified at 19 U.S.C. § 1677(4)(C)).

84. For example, in Carbon Steel Plate from Taiwan, U.S. ITC Pub. No. 970 (May 1979), the Commission proposed a set of three factors for determining whether an industry can be subdivided regionally: (1) whether the region under consideration is separate and identifiable; (2) whether LTFV imports are concentrated in that region; (3) whether that region constitutes a significant part of the domestic industry. *Id.* at 20. *See also* Sugar from Belgium, France, and West Germany, U.S. ITC Pub. No. 972 (May 1979).

85. 43 Fed. Reg. 35,262 (Aug. 9, 1978).

86. S. REP. NO. 96-249, *supra* note 47, at 95.

tion.⁸⁷ It therefore remains to be seen how fair value will be calculated in such cases.

Use of the antidumping statute is a cumbersome way to deal with international price discrimination. Even with the recent amendments, the administrative superstructure remains awkward. This problem was probably exacerbated rather than cured by shortening time periods and adding judicial review. Nonetheless, a dumping petition is often the most attractive alternative when a significant price discrepancy exists, particularly when the discrepancy is persistent.⁸⁸ Furthermore, even though a company may not have an iron-clad injury case, it may still wish to file a petition since, if the administering authority makes an affirmative preliminary determination of sales at LTFV, the authority must order immediate suspension of liquidation. A suspension order should have a strong positive impact on import prices during the later stages of the proceeding because a bond for an indeterminate contingent duty must be posted.⁸⁹ Many businesses, including importers, do not like to make sales when they do not know their costs. As a consequence, the dumping petition may have the effect, hopefully now more immediate, of causing a foreign competitor to revise its prices upward.

B. COUNTERVAILING DUTIES

A domestic manufacturer may believe that a foreign competitor is able to charge unreasonably low prices in the American market because its home government is considerably more helpful to business enterprises than is the United States. If the domestic manufacturer is correct, the critical question is exactly what does the foreign government contribute to the competitor? The answer to that question is important because the countervailing duty statute allows the administering authority⁹⁰ to impose additional duties on imports aided by a "bounty or grant" from any foreign country that is not under the GATT Agreement on Subsidies and Countervailing Measures or a similar agreement.⁹¹ If the foreign country is "under the Agreement,"⁹² the Commission must also determine that the aid causes

87. *Id.* at 96.

88. Rein, *supra* note 22, at 47.

89. Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 144 (1979) (adding new § 733(d)(2) to Tariff Act of 1930, to be codified at 19 U.S.C. § 1673b(d)(2)).

90. Formerly the Secretary of the Treasury. *See* note 39 *supra* and accompanying text. The Reorganization Plan changed the authority to Commerce. *See* Reorg. Plan No. 3, *supra* note 39.

91. Tariff Act of 1930, § 303, 19 U.S.C. § 1303 (1976), *as amended by* Trade Agreements Act of 1979, Pub. L. No. 96-39, § 103, 93 Stat. 144 (1979).

92. A country under the Agreement is defined as a country:

(1) between the United States and which the Agreement on Subsidies and Counter-

“material injury” to a domestic industry.⁹³ Thus an American company must first determine whether it should bring an action under section 303 of the Tariff Act of 1930⁹⁴ (country not under the Agreement) or section 701 of that Act⁹⁵ (country under the Agreement).

If the foreign country is not under the Agreement, the only issue is whether that country has provided a “bounty or grant.” What constitutes a “bounty or grant,” however, is not specifically set forth in the statute. Early Supreme Court decisions adopted a broad definition of “bounty or grant”

vailing Measures applies, as determined under section 2(b) of the Trade Agreements Act of 1979;

- (2) which has assumed obligations with respect to the United States which are substantially equivalent to obligations under the Agreement, as determined by the President; or
- (3) with respect to which the President determines that—
 - (a) there is an agreement in effect between the United States and that country which—
 - (i) was in force on June 19, 1979, and
 - (ii) requires unconditional most-favored-nation treatment with respect to articles imported into the United States;
 - (b) the General Agreement on Tariffs and Trade does not apply between the United States and that country; and
 - (c) the agreement described in subparagraph (a) does not expressly permit—
 - (i) actions required or permitted by the General Agreement on Tariffs and Trade, or required by the Congress; or
 - (ii) non-discriminatory prohibitions or restrictions on importation which are designed to prevent deceptive or unfair practices.

Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 144 (1979) (adding new § 701(b) to Tariff Act of 1930, to be codified at 19 U.S.C. § 1671(b)). Section (1) refers to the GATT signatories; section (2) currently refers only to Taiwan; and section (3) currently refers only to Venezuela, Honduras, Nepal, North Yemen, El Salvador, Paraguay, and Liberia. *See* S. REP. NO. 96-249, *supra* note 47, at 45.

93. Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 144 (1979) (adding new § 701(a)(2) to Tariff Act of 1930, to be codified at 19 U.S.C. § 1671(a)(2)). The lack of this additional requirement of material injury in the old law has been the cause of much criticism of U.S. countervailing duty law. For a discussion of the tensions regarding this issue at the Tokyo Round negotiations, see Graham, *Reforming the International Trading System: The Tokyo Round Trade Negotiations in the Final Stage*, 12 CORNELL INT'L L.J. 1, 19-24 (1979).

The definition of material injury in a countervailing duty action is the same as for dumping. In fact, the entire procedure for a countervailing duty determination is virtually identical to that for a dumping action. *Compare* Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 144 (1979) (adding new §§ 701-705 to Tariff Act of 1930, to be codified at 19 U.S.C. §§ 1671-1671d) *with id.* (adding new §§ 731-735 to Tariff Act of 1930, to be codified at 19 U.S.C. §§ 1673-1673d). The principal difference is that instead of having 160 days to make a preliminary determination, the administering authority has only 85 days to make a preliminary determination on whether there is a subsidy. *Id.* (adding new § 703 to Tariff Act of 1930, to be codified at 19 U.S.C. § 1671b(b)).

94. Tariff Act of 1930, § 303, 19 U.S.C. § 1303 (1976), *as amended by* Trade Agreements Act of 1979, Pub. L. No. 96-39, § 103, 93 Stat. 144 (1979).

95. Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 144 (1979) (adding new § 701 to Tariff Act of 1930, to be codified at 19 U.S.C. § 1671).

in upholding the imposition of countervailing duties.⁹⁶ Despite the Court's liberal attitude, Secretaries of the Treasury generally remained hostile to the imposition of countervailing duties. Since there was no time limit for a countervailing duty action, the Treasury Department regularly delayed its investigations for political reasons.⁹⁷

In addition, the countervailing duty statute proved of limited use to domestic industry because of the small amount of published guidance. The Secretary of the Treasury had to state only that a bounty or grant had been found, and its amount. The Secretary did not have to state how the amount was determined. If Treasury found no bounty or grant, it was not required to publish its findings at all. Furthermore, while importers had a right to obtain judicial review of findings of a bounty or grant, domestic industry had no such right with respect to negative findings.⁹⁸

Chapter 3 of the Trade Act of 1974⁹⁹ substantially revitalized the section 303 proceeding. The Act made a number of important procedural changes, including imposition of time limits on the Treasury Department, mandatory publication of all determinations, and provision for judicial review of both affirmative and negative findings.¹⁰⁰ However, Chapter 3 failed to define the contours of a "bounty or grant."

That uncertainty is lessened in a section 701 proceeding. The Trade Agreements Act of 1979, adding section 701 to the Tariff Act of 1930, defines "subsidy" as follows:

The term 'subsidy' has the same meaning as the term 'bounty or grant' as

96. In *Nicholas & Co. v. United States*, 249 U.S. 34 (1919), the Supreme Court held: "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." *Id.* at 39. See also *Downs v. United States*, 187 U.S. 496 (1903).

97. Rein, *supra* note 22, at 47-48. For a discussion of the history of judicial review of Treasury determinations, see Comment, *United States Countervailing Duty Law: Renewed, Revamped and Revisited—Trade Act of 1974*, 17 B.C. INDUS. & COM. L. REV. 832, 843-52 (1976); Note, *Effective Judicial Review of Antidumping Determinations*, 12 CORNELL INT'L L.J. 269 (1979).

98. Comment, *supra* note 97, at 843.

99. Pub. L. No. 93-618, § 331, 88 Stat. 1978 (1975) (amending Tariff Act of 1930, § 303, 19 U.S.C. § 1303 (1976)).

100. When Congress added judicial review of negative findings by the Treasury Department, domestic manufacturers thought that this amendment would open the doors for judicial imposition of duties. Comment, *supra* note 97, at 849-52. *United States v. Zenith Radio Corp.*, 430 F. Supp. 242 (Cust. Ct.), *rev'd*, 562 F.2d 1209 (C.C.P.A. 1977), *aff'd*, 437 U.S. 443 (1978), however, was a great disappointment because it evidenced a judicial reluctance to impose duties. The *Zenith* case involved Japanese Government rebates to exporters of consumer goods of the entire domestic commodity tax previously paid by the exporters to that Government. *Zenith* contended that this rebate should be classified as a "bounty," and the Customs Court agreed. The Court of Customs and Patent Appeals reversed and held that, when a product is exported, the nonexcessive rebate by a government of an indirect tax on that product is not a bounty. The Supreme Court affirmed.

that term is used in section 303 of this Act, and includes, but is not limited to, the following:

(A) Any export subsidy described in Annex A to the Agreement (relating to illustrative list of export subsidies).

(B) The following domestic subsidies, if provided or required by government action to a specific enterprise or industry, or group of enterprises or industries, whether publicly or privately owned, and whether paid or bestowed directly or indirectly on the manufacture, production, or export of any class or kind of merchandise:

(i) The provision of capital, loans, or loan guarantees on terms inconsistent with commercial considerations.

(ii) The provision of goods or services at preferential rates.

(iii) The grant of funds or forgiveness of debt to cover operating losses sustained by a specific industry.

(iv) The assumption of any costs or expenses of manufacture, production, or distribution.¹⁰¹

In one respect this definition is helpful; it incorporates the illustrative list of the Agreement.¹⁰² The basic definition is circular, however, because it refers to a non-definition. In other words, the test will be one of facts and circumstances. A domestic producer must look to the specific examples of subsidies set forth in the definition and to practices previously pronounced to be bounties for similarities with the situation at hand.¹⁰³ Since, however,

101. Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 144 (1979) (adding new § 771(5) to Tariff Act of 1930, to be codified at 19 U.S.C. § 1677(5)). The four types of domestic subsidies listed have generally been held to be bounties or grants in past Treasury determinations. S. REP. NO. 96-249, *supra* note 47, at 84. Current practice of offsetting the effects of subsidies by increased costs (for example, costs for relocating a factory, Diuron from Israel, 43 Fed. Reg. 33,860 (1978)), however, will no longer be acceptable. "Net subsidies" will be used only to calculate the amount of the duties; the types of offsets to gross subsidies to determine net subsidies are severely restricted. Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 144 (1979) (adding new § 771(6) to Tariff Act of 1930, to be codified at 19 U.S.C. § 1677(6)); S. REP. NO. 96-249, *supra* note 47, at 85. Future litigation, then, will likely revolve around the meaning of the new definition of domestic subsidy. One unanswered question is whether a government practice of providing disincentives for specific industries to remain located in a high population area, rather than grants or incentives to locate in low population areas, constitutes a domestic subsidy. It does not come within the four specific types of domestic subsidies, but may very well have the same effect. *Cf.* Textiles from Korea, 43 Fed. Reg. 23,791 (1978) (such a practice was a bounty).

102. Annex A is an illustrative list of recognized export subsidies. H.R. DOC. NO. 96-153, pt. I, at 295, 96th Cong., 1st Sess. (June 19, 1979).

103. A provision of the Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 144 (1979) (adding new § 777(a) to Tariff Act of 1930, to be codified at 19 U.S.C. § 1677f(a)), creates a "library of . . . subsidy practices" to which petitioners can turn to determine what practices may be considered subsidies. For a comprehensive list of government practices that have been held to be bounties or grants, see Comment, *supra* note 97, at 841 n.75, and S. REP. NO. 96-249, *supra* note 47, at 84. *See, e.g.,* Nicholas v. United States, 249 U.S. 34 (1919) (direct subsidy payments); Bicycle Tires and Tubes from Korea, 43 Fed. Reg. 32,910 (1978) (short-term preferential financing at low interest rates and preferential income tax treatment for export items); Fish from Canada, 43 Fed. Reg. 29,637 (1978) (regional aids, cash assistance, and grants for constructing facilities used solely or almost exclusively for exported products).

the list of subsidies provides for the first time a statutory basis for definition, albeit vague, of this elusive concept, an American producer should focus attack on whether there is a subsidy.¹⁰⁴ The availability of immediate judicial review of a finding of no subsidy may influence the administering authority to find a subsidy where the practices clearly fall within the statutory examples.

The new material injury requirement, however, may prevent import relief even if the administering authority finds a subsidy. The Trade Act of 1974 created an injury requirement for the imposition of countervailing duties on the narrow group of duty-free goods. Of the ten injury investigations completed by the Commission since 1975, injury was found in only one case.¹⁰⁵ In virtually all these cases, no injury was found because total imports were negligible both in amount and in percent of U.S. consumption.¹⁰⁶ Given these results, a domestic manufacturer may well conclude that even if a subsidy can be proven, it may be difficult to show injury. Moreover, requiring proof of injury can effectively neutralize timing improvements incorporated into the new Act; the shortened period of administrative processing must be balanced against the more extensive pre-complaint investigation facing a petitioning party.

Whether a countervailing duty action will help a domestic manufacturer depends on the type and level of aid provided by the foreign government. In addition to the merits of the case, a manufacturer considering a section 701 proceeding must balance the same factors involved in the decision to initiate an antidumping action.¹⁰⁷ In fact, the manufacturer may want to consider a double-pronged attack if both foreign government assistance and dumping are occurring.

But see United States v. Zenith Radio Corp., 437 U.S. 443 (1978) (nonexcessive rebate of indirect commodity tax not a bounty); Bicycle Tires and Tubes from Korea, 43 Fed. Reg. 32,910 (1978) (wastage allowance for imported raw materials used in the production of exported products not a bounty); Silicon Electrical Steel from Italy, 42 Fed. Reg. 54,899 (1977) (purchase of stock in unprofitable manufacturer by state-controlled finance corporation not a bounty).

104. Of course, in a § 303 proceeding for countries not "under the Agreement" that is the only question.

105. Leather from Uruguay, U.S. ITC Pub. 883, 43 Fed. Reg. 18,343 (1978). Rapidly increasing imports and market share together with decline in domestic profits, price, and employment were key factors in the Commission's determination.

106. *See, e.g.*, Yarns of Wool from Brazil, U.S. ITC Pub. 940 (1979).

107. *See* notes 48-89 *supra* and accompanying text.

III

OTHER ADMINISTRATIVE RELIEF

A. SECTION 337 PROCEEDING

If neither a dumping nor a countervailing duty proceeding appears promising to a domestic producer facing unfair foreign competition, there are other alternatives to consider.¹⁰⁸ Section 337 of the Tariff Act of 1930¹⁰⁹ prohibits unfair acts or methods of competition in the importation or sale of articles that have at least one of the following tendencies: to destroy or substantially injure an efficient and economic U.S. industry; to prevent the establishment of such an industry; or to restrain or monopolize trade and commerce in the United States.¹¹⁰ The remedies available under section 337, subject to certain public interest qualifications, are a temporary exclusion of the imported articles during the course of the investigation,¹¹¹ a permanent exclusion of the articles,¹¹² and a cease and desist order.¹¹³ These remedies remain in effect only until the Commission finds that the proscribed practices have ceased.

108. In addition to the remedies detailed in this Article, the domestic farmer has another alternative in § 22 of the Agricultural Adjustment Act, 7 U.S.C. § 624 (1976). This section provides that the Secretary of Agriculture must advise the President whenever there is reason to believe that articles are being imported under such conditions and in such quantities as to render ineffective, or materially interfere with, any program or operation undertaken by the Agriculture Department with respect to any agricultural commodity, or to reduce substantially the amount of any product processed in the United States from an agricultural product. The President may cause an investigation to be initiated by the Commission. If the Commission makes an affirmative finding, the President may impose either an import quota or an appropriate import fee (not in excess of 50% ad valorem).

One other alternative of interest mainly for information-gathering purposes is a Commission investigation under § 332 of the Tariff Act of 1930, 19 U.S.C. § 1332 (1976). Under § 332, the Commission, either upon its own motion or upon filing of a request, must investigate and report on a number of aspects of international trade, including the duty "in general, to investigate the operation of customs laws, including their relation to the Federal revenues, [and] their effect upon the industries and labor of the country." *Id.* This function is purely investigative, and the only result is a report to the President and Congress. However, an investigation may cool any questionable import practices with the ice of publicity. It may also generate useful data. In one case, a subsequent escape clause proceeding was brought with the help of data developed during the course of the § 332 investigation. Shrimp, TA-201-12, U.S. ITC Pub. 773 (May 1976).

109. 19 U.S.C. § 1337 (1976); 19 C.F.R. pt. 210 (1979).

110. 19 U.S.C. § 1337(a) (1976).

111. *Id.* § 1337(e).

112. *Id.* § 1337(d).

113. *Id.* § 1337(f). The Trade Agreements Act of 1979 added a new § 1337(f)(2) providing for a civil penalty in the event of a violation of a cease and desist order. Pub. L. No. 96-39, § 1105(b), 93 Stat. 144 (1979) (adding new § 337(f)(2) to Tariff Act of 1930, to be codified at 19 U.S.C. § 1337(f)(2)).

The proceeding is initiated only by a properly filed complaint.¹¹⁴ It is adjudicatory in nature rather than investigatory, as are antidumping and countervailing duty proceedings. The Commission is responsible for decision-making and enforcement in a section 337 proceeding. However, the President maintains final veto power over actions taken by the Commission.¹¹⁵

All but a few complaints brought under section 337 have involved patent infringement.¹¹⁶ If a domestic product facing unfair foreign competition has patented parts, the manufacturer should have the foreign product technically evaluated. If there is an arguable infringement, it may be possible to have the imports excluded from the country even before the Commission makes a final decision.

Section 337 does not require a patent claim, however. The Commission has reaffirmed its jurisdiction in the antitrust area in several nonpatent cases.¹¹⁷ At the present time, however, it is difficult to predict future actions by the Commission in nonpatent cases for several reasons. First, the current procedure is substantially different from pre-1974 practices. Second, there is a dearth of nonpatent case law authority on which the Commission can base its decision. Third, the Commission has been challenged in its antitrust jurisdiction by the Antitrust Division and Federal Trade Commission.¹¹⁸ Finally, the Commission's composition has shifted since its earlier

114. The procedure is set out in 19 U.S.C. § 1337 (1976), with detailed regulations in 19 C.F.R. pt. 210 (1979). Note that this proceeding is the only statutory method of import relief to which the Administrative Procedure Act, 5 U.S.C. §§ 554-557 (1976), applies.

115. 19 U.S.C. §§ 1337(b), (g) (1976). For a general discussion of the effect of the Trade Act of 1974 on § 337 proceedings, see Brown, *Unfair Methods of Competition in Importation*, 31 BUS. LAW. 1627 (1976).

116. As of September 1979, there had been a total of 71 complaints either filed since the enactment of the 1974 Trade Act or decided under the provisions of that Act. All but ten of these cases involved imports of articles allegedly infringing U.S. patents. Of the total 71 complaints, 21 were still in progress, 20 were terminated by reason of a license agreement or a settlement agreement, 18 were determined by the Commission not to be a violation, and 12 were determined by the Commission to be a violation. Of these 12, an exclusion order was issued in 11 cases, and a cease and desist order in one case. In that, the Stainless Steel case, 43 Fed. Reg. 8,304 (Mar. 1, 1978), the President disapproved the cease and desist order for policy reasons. 43 Fed. Reg. 17,789 (Apr. 22, 1978).

Of the 10 nonpatent cases, three were settled, five were found not to be a violation, and two, the Stainless Steel case and the Novelty Glasses case, 44 Fed. Reg. 41,971 (July 18, 1979), were found to be violations. The Novelty Glasses case involved infringement of common law trademarks, unlawful copying of trade dress, and false designation of origin. For a general discussion of recent § 337 cases, see Kaye & Plaia, *Developments in Unfair Trade Practices in International Trade*, 61 J. PAT. OFF. SOC'Y 115 (Mar. 1979).

117. See, e.g., *Certain Electronic Audio and Related Equipment*, ITC Pub. No. 768, at 47 (Apr. 1976); *Chicory Root*, ITC Inv. 337-TA-27, Comm'n Memo Opinion at 1-2 (Oct. 1, 1976).

118. See Kaye & Plaia, *supra* note 116, at 161-63.

antitrust-based decisions.¹¹⁹

The use of section 337 for nonpatent cases has been criticized because it overlaps the antidumping and countervailing duties provisions to some extent.¹²⁰ For example, in the *Stainless Steel* case,¹²¹ President Carter announced that he would disapprove an affirmative determination under section 337 whenever the practice under attack could also be dealt with by an antidumping petition. The Commission had found that Japanese steel tubing producers were selling their products below the average variable cost of production. It had further found that this practice tended to restrain trade by reducing the domestic market share of other *foreign* competitors. No injury to the domestic industry was found. The Commission issued a cease and desist order, but the President disapproved on policy grounds, noting that there were ongoing antidumping cases dealing with the same products.¹²² His disapproval was grounded primarily on a desire to avoid duplication of remedies. He perceived the Commission's action to be an unexpected departure from internationally agreed upon procedures for dealing with below-cost sales.

As a result of these problems, section 337 has been amended by the Trade Agreements Act of 1979 to provide that the Commission must terminate any actions that are based solely on charges of dumping or subsidies.¹²³ Actions that only partly overlap may continue, but a determination

119. Since the six-member Commission must not contain more than three commissioners of the same political party and the term of each commissioner is five years, 19 U.S.C. § 1330(a) (1976), the Commission's decisions are subject to frequent change in viewpoint. Only three of the present commissioners were on the Commission in 1975, when the Trade Act of 1974 was passed, and in 1976, when the decisions in note 117 *supra* were rendered.

120. See COMPTROLLER GENERAL'S REPORT, *supra* note 6, at 65-67, 69.

121. 43 Fed. Reg. 8,304 (Mar. 1, 1978), *order disapproved*, 43 Fed. Reg. 17,789 (Apr. 22, 1978); see note 116 *supra*.

122. The Commission later found no injury in these dumping cases. 43 Fed. Reg. 32,568 (July 20, 1978).

123. The amendment provides that:

If the Commission has reason to believe the matter before it is based solely on alleged acts and effects which are within the purview of section 303, 701, or 731 of this Act, it shall terminate, or not institute, any investigation into the matter. If the Commission has reason to believe the matter before it is based in part on alleged acts and effects which are within the purview of section 303, 701, or 731 of this Act, and in part on alleged acts and effects which may, independently from or in conjunction with those within the purview of such section, establish a basis for relief under this section, then it may institute or continue an investigation into the matter. If the Commission notifies the Secretary or the administering authority (as defined in section 771(1) of this Act) with respect to a matter under this paragraph, the Commission may suspend its investigation during the time the matter is before the Secretary or administering authority for final decision. For purposes of computing the 1-year or 18-month periods prescribed by this subsection, there shall be excluded such period of suspension. Any final decision of the Secretary under section 303 of this Act or by the administering authority under section 701 or 731 of this Act with respect to the matter within such

by the administering authority that sales have been made at LTFV, or that subsidies exist, are binding on the Commission in a section 337 action.¹²⁴

The Trade Agreements Act of 1979 also added a new section 337(f)(2), providing for a civil penalty for violation of a cease and desist order.¹²⁵ This change creates an alternative penalty to avoid the Draconian nature of an exclusion order.¹²⁶ But the future use of cease and desist orders is uncertain, for in deciding on the appropriate remedy, the Commission has generally favored an exclusion order.¹²⁷ The Commission has reasoned that a foreign company could avoid a cease and desist order, which is an in personam remedy, by switching to importers other than those who are parties to the order.¹²⁸ It is, therefore, difficult to predict any effect of the new law on the choice of remedies.

In summary, a section 337 proceeding is adversary in nature, and may be expensive to pursue and uncertain in result, especially when a nonpatent violation is alleged. Thus, for the present at any rate, a domestic manufacturer should probably pass up this alternative unless there is a strong case of patent infringement.

B. ESCAPE CLAUSE PROCEEDING

The impact of foreign imports may prove more severe than first suspected. If, for example, there have been layoffs in the industry, and a company or its hometown has been particularly hard hit, it may be appropriate to look for more fundamental forms of relief. The escape clause sections of the 1974 Trade Act¹²⁹ provide for a limit on imports¹³⁰ or adjustment

section 303, 701, or 731 of which the Commission has notified the Secretary or administering authority shall be conclusive upon the Commission with respect to the issue of less-than-fair-value sales or subsidization and the matters necessary for such decision.

Trade Agreements Act of 1979, Pub. L. No. 96-39, § 1105(a)(2), 93 Stat. 144 (1979) (amending 19 U.S.C. § 1337(b)(3) (1976)).

124. *Id.*

125. *Id.* § 1105(b) (adding new § 337(f)(2) to Tariff Act of 1930, to be codified at 19 U.S.C. § 1337(f)(2)).

126. S. REP. NO. 96-249, *supra* note 47, at 262.

127. *See, e.g.*, Reclosable Plastic Bags, U.S. ITC Pub. No. 801 (Jan. 1977).

128. *See, e.g.*, Certain Exercising Devices, U.S. ITC Pub. No. 813 (Apr. 1977).

129. Trade Act of 1974, §§ 201-284, 19 U.S.C. §§ 2251-2394 (1976).

130. Aside from financial or technical adjustment assistance, *see* note 131 *infra* and accompanying text, there are five forms of relief the President may provide, some of which have restrictions. He may: (1) increase duties to a maximum of 50% ad valorem above any previous rate; (2) impose a tariff-rate quota; (3) impose a quantitative restriction that is not less than the most current quantity that was allowed to be imported in a period chosen by the President; (4) negotiate orderly marketing agreements with foreign countries limiting the export of the articles to the United States; or (5) any combination of the above. Trade Act of 1974, § 203, 19 U.S.C. § 2253 (1976).

assistance¹³¹ (technical or financial) to American workers, firms, and communities injured by increased imports. However, any import relief chosen is limited to five-years duration, plus one three-year extension. No reinvestigation under this statute can be initiated within two years after the lapse of the previous import relief.¹³²

The Act provides for submission of a petition to the Commission, which will then investigate. For an affirmative finding, the Commission must determine that (1) increased imports are (2) a substantial cause of (3) serious injury (or threat thereof) to (4) a domestic industry producing (5) articles similar to, or directly competitive with, the imported articles.¹³³ In making these determinations, the Commission must consider several economic factors.¹³⁴ First, substantiality can be shown by an increase in imports, either actual or relative to domestic production, or a decline in the proportion of the domestic market supplied by domestic producers. Second, "serious injury" may be shown by the significant idling of productive facilities in the industry, the inability of a significant number of firms to operate at a reasonable level of profit, or significant unemployment or underemployment within the industry. Third, "threat of serious injury" is shown by a decline in sales, a growing inventory, or a downward trend in production, profits, wages, or employment. Fourth, "the domestic industry" may be considered as only those subdivisions of the various manufacturers that produce the article in question, or the major geographic area in which the producers are located and in which the imports are concentrated. The Commission may consider other factors at its discretion.

If the Commission finds substantial injury, its report is submitted to the President with a recommendation as to the form of relief. The President then determines whether relief will be granted and, if so, its form.¹³⁵ Congress may override the President's action to force him to implement the

131. Responsibility for administration of the adjustment assistance provisions is placed with the Commerce and Labor Departments. *Id.* §§ 201, 223, 19 U.S.C. §§ 2251, 2273. No change in this responsibility is envisioned by the Administration's reorganization plan. *See* Reorg. Plan No. 3, *supra* note 39. However, adjustment assistance will be phased out by 1982. Trade Act of 1974, § 255, 19 U.S.C. § 2345 (1976).

132. *Id.* § 203, 19 U.S.C. § 2253.

133. *Id.* § 201(b)(1), 19 U.S.C. § 2251.

134. *Id.*

135. In arriving at his decision, the President, who may consult with cabinet officers, must consider the following: (1) the probable effectiveness of import relief; (2) the efforts being made to adjust to import competition; (3) the effect of import relief on consumers; (4) the effect of import relief on U.S. international economic interests; (5) the geographic concentration of imported products; (6) the extent to which the United States is a focal point for exports of such articles; and (7) any economic and social costs to taxpayers, communities, and workers. *Id.* § 202, 19 U.S.C. § 2252.

Commission's recommendation; to date Congress has not done so.¹³⁶ An important factor to consider when determining whether to institute an escape clause proceeding is that the relief available is restricted both in time and in quantity.¹³⁷ Moreover, the success rate for this type of import relief is not great.¹³⁸ But this alternative *is* useful where imports have greatly increased and are a substantial cause of serious injury to the industry or community, for which financial adjustment assistance may be valuable. Usually a greater degree of injury is required in an escape clause proceeding than in an antidumping action. This limitation is understandable, though, because a demonstration of unfair conduct is not required. Thus an American manufacturer may wish to consider this alternative if dumping or subsidies cannot be shown, but there has been a surge of imports, a significant decline in production in the industry, and widespread unemployment.

C. SECTION 301 PROCEEDING

A domestic manufacturer may not think the situation is bad enough for an escape clause proceeding. In fact, the producer may prefer some form of self-help remedy for unfair import competition. But there may be little hope of competing with a foreign producer by dumping in its home country if that government discourages imports through high tariffs and arbitrary domestic standards. If this situation is the case, a section 301 proceeding may be appropriate.

Section 301 of the 1974 Trade Act¹³⁹ has been substantially changed

136. The procedure is spelled out in *id.* §§ 201-284, 19 U.S.C. §§ 2251-2394. The Trade Agreements Act of 1979, Pub. L. No. 96-39, § 1106, 93 Stat. 144 (1979), made a number of changes to the escape clause, chief among them being the authorization for the President to conclude and carry out, as well as negotiate, orderly marketing agreements. For an in-depth discussion of escape clause proceedings, see Note, *Title II of the Trade Act of 1974: What Changes Hath Congress Wrought to Relief from Injury Caused by Import Competition*, 10 J. INT'L L. & ECON. 197 (1976).

137. See notes 130-32 *supra* and accompanying text.

138. As of September 1979, 38 petitions had been received and completed by the Commission under § 201. Of these, the Commission made a negative determination in 15, an affirmative determination in 20, and was equally divided in three. In the case of an equal vote, the President may accept or reject the findings of the Commission; in these last three cases, the President took no action. Of the 20 affirmative determinations through August 1978, the President directed the negotiation of orderly marketing agreements in two, granted only adjustment assistance in four, decided to provide no import relief or rejected the Commission's findings in nine, and imposed tariff increases or quotas in five. Therefore, of the 38 completed investigations, import relief other than only adjustment assistance was provided in just seven cases. See the Commission's annual reports for the years 1975 through 1978.

139. Trade Act of 1974, §§ 301-302, 19 U.S.C. §§ 2411-2412 (1976); 15 C.F.R. pt. 2006 (1979).

by the Trade Agreements Act of 1979.¹⁴⁰ Basically, the section provides for presidential action to enforce U.S. rights under any trade agreement or to combat restrictive tariff practices or discriminatory import procedures on the part of foreign nations that unreasonably restrict U.S. commerce. It allows the President to suspend, withdraw, or prevent U.S. trade concessions to offending foreign countries. The President may also impose duties or other import restrictions on the products,¹⁴¹ and fees or restrictions on the services,¹⁴² of the foreign country. Such action may be applied to all countries on a nondiscriminatory basis, or may be applied solely against the products or services of the foreign country involved.¹⁴³

This proceeding is nonadjudicatory and investigative in nature. The Special Trade Representative (STR) is now responsible for gathering information and recommending action to the President.¹⁴⁴ The proceeding is initiated by the filing of a formal complaint by any interested person (including a trade association) with the Office of the Special Trade Representative. The STR must immediately request consultation with the foreign country involved.¹⁴⁵ If that country is a party to a trade agreement with the United States and the issues raised are covered by that agreement, then dispute settlement procedures must be invoked.¹⁴⁶ For the first time, strict time limits are imposed on all parties, so that a resolution is now theoretically possible within seven to twelve months.¹⁴⁷

140. Pub. L. No. 96-39, §§ 901-903, 93 Stat. 144 (1979) (repealing §§ 301-302 of Trade Act of 1974, 19 U.S.C. §§ 2411-2412 (1976)); *id.* adding new §§ 301-306 to Trade Act of 1974, to be codified at 19 U.S.C. §§ 2191-2194, 2411-2416.

141. *Id.* § 901 (adding new § 301(b) to Trade Act of 1974, to be codified at 19 U.S.C. 2411).

142. Section 301 is unique in that it can be used to combat discriminatory practices in services as well as products. *Id.* (adding new § 301(d)(1) to Trade Act of 1974, to be codified at 19 U.S.C. § 2411). Congress has made clear that the term includes "international trade in services, as, for example, the provision of broadcasting, banking, and insurance services across national boundaries." S. REP. NO. 96-249, *supra* note 47, at 237.

143. Trade Agreements Act of 1979, Pub. L. No. 96-39, § 901, 93 Stat. 144 (1979) (adding new § 301(a) to Trade Act of 1974, to be codified at 19 U.S.C. § 2411).

144. *Id.* (adding new § 302 to Trade Act of 1974, to be codified at 19 U.S.C. § 2412).

145. *Id.* (adding new § 303 to Trade Act of 1974, to be codified at 19 U.S.C. § 2413).

146. *Id.*

147. The STR has 45 days from the date of filing to determine whether to initiate an investigation and to publish the petition or the reasons for a negative decision in the Federal Register. The STR then has seven months in the case of an alleged export subsidy covered by GATT, eight months in a case involving other than export subsidies, 30 days after conclusion of the dispute settlement procedure in the case of trade agreements described in § 2(c) of the Act, and 12 months in all other cases to recommend what action the President should take. *Id.* (adding new § 304(a) (1) to Trade Act of 1974, to be codified at 19 U.S.C. § 2414). The President has 21 days to determine what action, if any, he will take. However, now there is no provision for congressional override of the President's decision, since the old § 302 has been repealed. *Compare id.* (adding new § 302 to Trade Act of 1974, to be codified at 19 U.S.C. § 2412) with Trade Act of 1974, Pub. L. No. 93-618, § 302, 88 Stat. 1978 (1975) (repealed 1980).

Under the old law, the proceeding was surprisingly effective.¹⁴⁸ Types of foreign trade restrictions that have been successfully attacked are import restrictions,¹⁴⁹ excessive or confiscatory tariffs,¹⁵⁰ minimum import prices,¹⁵¹ discriminatory incentives,¹⁵² and discriminatory restrictions.¹⁵³ As a result of the revisions in the Trade Agreements Act of 1979, and the strengthened role of the Office of the Special Trade Representative, there may be an increased number of petitions filed in the future.

Section 301 may also become more significant because it deals with the subject of the "Code of Conduct for Preventing Technical Barriers to Trade" (the "Standards Code"),¹⁵⁴ established in Geneva and implemented by the Trade Agreements Act of 1979.¹⁵⁵ The Code allows U.S. exporters to complain about, and secure reviews of, foreign standards practices that reduce export opportunities. The converse, of course, is also true. Foreign competitors now have a vehicle to attack both voluntary and compulsory U.S. standards, whether promulgated by the Federal Government, state or local governments, or private organizations. Furthermore, the Code obligates national and regional certification systems to grant access to foreigners.¹⁵⁶

The section 301 alternative is not useful to an American manufacturer in dealing directly with increased imports into the United States. It may be useful, however, in opening the market in the foreign country. At least it would focus attention on the problem. Furthermore, there is no prohibition

148. As of September 1979, 18 petitions had been filed under § 301 challenging unfair trade practices of foreign nations. Of these, two have been favorably settled; six are being resolved through the GATT dispute settlement procedure; four have resulted in subsidy elimination, tariff rollbacks, or import restriction adjustments; four are in process; and one resulted in an affirmative finding leading to an agreement between the United States and the USSR for a more equitable sharing of marine insurance. Only one petition, Japanese Steel Practices, 43 Fed. Reg. 3,962 (Jan. 30, 1978), resulted in a determination that no relief should be afforded. That case involved alleged diversion of Japanese steel to the United States as a result of a bilateral agreement between the European Economic Community and Japan. The STR and the President determined that there was not sufficient evidence or justification to claim that the pact created any unfair burden on U.S. commerce.

149. *See, e.g.*, Egg Exports to Canada, 40 Fed. Reg. 33,749 (Aug. 11, 1975).

150. *See, e.g.*, Home Appliances to Taiwan, 41 Fed. Reg. 15,452 (Apr. 13, 1976).

151. *See, e.g.*, Tomato Concentrate to EC, 40 Fed. Reg. 44,635 (Sept. 29, 1975).

152. *See, e.g.*, Soybeans to EC, 41 Fed. Reg. 15,384 (Apr. 12, 1976).

153. *See, e.g.*, U.S. Thrown Silk Exports to Japan, 43 Fed. Reg. 8,876 (Mar. 3, 1978).

154. For a text of this code, see H.R. Doc. No. 96-153, *supra* note 28, at 211-56.

155. Pub. L. No. 96-39, §§ 401-454, 93 Stat. 144 (1979) (to be codified at 19 U.S.C. §§ 2531-2573).

156. Similarly, the Government Procurement Code will open government purchases of goods (but not services) to foreign competition. For the text of this code, see H.R. Doc. No. 96-153, *supra* note 28, at 67-189. This code will be implemented by the Trade Agreements Act of 1979, Pub. L. No. 96-39, §§ 301-309, 93 Stat. 144 (1979) (to be codified at 19 U.S.C. §§ 2511-2518).

on seeking section 301 relief concurrently with other remedies.¹⁵⁷ Thus a domestic manufacturer may wish to use this alternative in conjunction with others.

D. MARKET DISRUPTION INVESTIGATIONS

Finally, if the foreign country involved has a Communist government, an American manufacturer faced with unfair foreign competition can seek relief under section 406 of the Trade Act of 1974.¹⁵⁸ This import relief alternative is specially designed to meet sudden flooding¹⁵⁹ of a U.S. market with imports from Communist countries that cause "market disruption."¹⁶⁰ The procedure for initiating an investigation with the Commission is essentially the same as an escape clause proceeding.¹⁶¹ If the Commission finds that market disruption exists, it recommends to the President relief similar to the escape clause remedies. However, presidential action may be taken only with respect to the particular countries involved.¹⁶²

The major difference between this and an escape clause proceeding is that the standards are different. For market disruption to exist, the imports must be: (1) the product of a Communist country; (2) competitive with a domestic product; (3) increasing rapidly, either absolutely or relatively; and (4) a significant cause of (5) material injury to the domestic industry.¹⁶³

157. Section 301(c) of the Trade Act of 1974 contained a requirement that before the President could take action against foreign export subsidies he was required to find that the Antidumping Act of 1921 and the countervailing duty statute were both inadequate to deter such practices. In addition, Treasury had to have determined the existence of such subsidies, and the Commission determined that the exports substantially reduced sales of competitive U.S. products. Trade Act of 1974, Pub. L. No. 93-618, § 302, 88 Stat. 1978 (1975) (repealed 1980). These requirements are not included in the section as amended by the Trade Agreements Act of 1979, Pub. L. No. 96-39, § 901, 93 Stat. 144 (1979) (adding new § 302 to Trade Act of 1974, to be codified at 19 U.S.C. § 2412).

158. Trade Act of 1974, § 406, 19 U.S.C. § 2436 (1976). The Treasury Department has recently given attention to the economics of state-controlled economies in connection with its duties in investigating dumping and countervailing duty petitions. Treasury proposed regulations to deal with the issue in January 1978, and issued final regulations on August 9, 1978. 43 Fed. Reg. 35,262-63 (1978). Basically, these regulations allow Treasury to calculate the fair value of the products of a state-controlled economy or state-owned enterprise on the basis of normal costs and profits for such merchandise in a nonstate-controlled economy country at a comparable stage of economic development. This alternative was used recently when Polish steel was evaluated on the basis of Spanish costs. U.S. ITC Pub. 984 (June 1979). Ironically, this issue was not discussed in Geneva because the major centrally planned economies are not parties to the GATT.

159. S. REP. NO. 93-1298, 93d Cong., 2d Sess. 210 (1974).

160. Trade Act of 1974, § 406(e)(2), 19 U.S.C. § 2436(e)(2)(1976).

161. *Id.* § 406(a)(2), 19 U.S.C. § 2436(a)(2).

162. *Id.* § 406(b), 19 U.S.C. 2436(b).

163. *Id.* § 406(e)(2), 19 U.S.C. § 2436(e)(2).

Congress intended the causal and injury standards to be less demanding than in an escape clause proceeding.¹⁶⁴ The terms "significant cause" and "material injury" are less rigorous than the "serious injury" required in an escape clause proceeding.¹⁶⁵

Unique to the section 406 proceeding, however, is the requirement that imports be "rapidly increasing."¹⁶⁶ This requirement prevented an affirmative determination in two of the five investigations initiated under this section.¹⁶⁷ The *Clothespins* cases¹⁶⁸ are instructive. The petitioner alleged that imports from China, Poland, and Rumania were causing injury to the domestic industry. The Commission found that imports from Poland were not increasing rapidly.¹⁶⁹ The imports from Rumania were fluctuating, and thus were not "increasing rapidly" either.¹⁷⁰ The Chinese imports, however, were increasing rapidly.¹⁷¹ Ironically, the Commission later initiated an escape clause proceeding on its own motion¹⁷² which considered imports from all sources (including non-Communist countries) that were increasing in the aggregate, though not necessarily rapidly. The Commission made an affirmative finding and recommended import quotas on clothespins which were later imposed by the President.¹⁷³ Since the section 406 remedy could be applied only against the country involved, the import quota would have been restricted to China, but under the escape clause proceeding the remedy was applied to all such imports from any country.

It is clear, therefore, that the section 406 proceeding is useful whenever there have been sudden surges of imports from a particular Communist

164. S. REP. NO. 93-1298, *supra* note 159, at 212.

165. *Id.*

166. Escape clause proceedings require only "increased" imports. Trade Act of 1974, § 201(b)(2)(c), 19 U.S.C. § 2251(b)(2)(c) (1976).

167. The five investigations to date under § 406 have produced negative findings in three cases: Gloves from China, TA-406-1, U.S. ITC Pub. 867 (Mar. 1978); Clothespins from Poland and Rumania, TA-406-3 and TA-406-4, U.S. ITC Pub. 902 (Aug. 1978). An affirmative determination was made in Clothespins from China, TA-406-2, U.S. ITC Pub. 902 (Aug. 1978), but no relief was granted by the President, 43 Fed. Reg. 45,547 (1978). The latest investigation, Anhydrous Ammonia from the USSR, TA-406-5, U.S. ITC Pub. No. 1,006 (Oct. 1979), also resulted in an affirmative finding. On December 11, 1979, however, the President decided that implementation of recommended import quotas would not be in the national interest. 44 Fed. Reg. 71,809 (1979).

168. U.S. ITC Pub. 902 (Aug. 1978).

169. *Id.* at 13.

170. *Id.*

171. *Id.* at 7.

172. Clothespins from China, Poland, and Rumania, TA-201-36, 43 Fed. Reg. 59,445 (Dec. 20, 1978). Commissioner Alberger noted that it was unfortunate that the § 406 petition was filed, causing undue expense and delay. He concluded that "where rapidly increasing imports are evenly split between non-market economy countries, it is clearly more appropriate to seek relief under section 201 [escape clause]." *Id.* at 59,445 n.4.

173. 44 Fed. Reg. 10,973 (Feb. 26, 1979).

country, and where the injury is perhaps less serious, the imports being only one cause of problems in the domestic industry rather than a substantial cause. Because of the "increasing rapidly" requirement, and the limited relief provision, however, a domestic producer should initiate an escape clause action, if at all sustainable, rather than a market disruption proceeding.

IV

ANTITRUST PROCEEDINGS

The alternatives considered thus far are essentially administrative and prospective. None of these alternatives reimburse an injured U.S. competitor for damages resulting from unfair import competition. There are two provisions, however, that do compensate an injured U.S. manufacturer.

The Antidumping Act of 1916¹⁷⁴ was enacted specifically to provide compensation to domestic companies and to penalize importers. Its provisions and remedies are similar to the antitrust laws. In addition to criminal penalties, section 801 of the Antidumping Act¹⁷⁵ provides standing to an injured private party to sue for treble damages plus costs and attorney fees. Almost from the beginning this statute was ignored, although its dumping prohibition parallels the administratively enforced antidumping law previously discussed.¹⁷⁶ The apparent explanation for this neglect lies in the 1916 Act's requirement, which was eliminated in the 1921 Act, that the complainant prove *intent* on the part of the alleged offender to injure a domestic industry. Finally, in 1974, Zenith brought a dumping action under the 1916 Act against several Japanese television manufacturers as well as importers and selected sellers of the Japanese products.¹⁷⁷ The United States District Court for the Eastern District of Pennsylvania denied a motion to dismiss the suit, recognizing it to be a case of first impression.¹⁷⁸ The district court's decision may open the way to private relief if administrative dumping procedures do not become less burdensome, more

174. 15 U.S.C. §§ 71-74 (1976). These provisions are actually the antidumping portions of the Revenue Act of 1916, ch. 463, §§ 800-806, 39 Stat. 798 (1916).

175. 15 U.S.C. § 72 (1976).

176. See notes 40-88 *supra* and accompanying text.

177. *Zenith Radio Corp. v. Matsushita Elec. Ind. Co.*, 402 F. Supp. 251 (E.D. Pa. 1975). The only prior reported case filed under the Act, *H. Wagner & Adler Co. v. Mali*, 74 F.2d 666 (2d Cir. 1935), produced no more enlightenment than an opinion on an issue of discovery before it was settled.

178. *Zenith Radio Corp. v. Matsushita Elec. Ind. Co.*, 402 F. Supp. 251, 254 (E.D. Pa. 1975). Significantly, the court also sustained personal jurisdiction over the foreign parties. *Zenith Radio Corp. v. Matsushita Elec. Ind. Co.*, 402 F. Supp. 262, 328-29 (E.D. Pa. 1975); see Victor & Hood, *Personal Jurisdiction, Venue and Service of Process in Antitrust Cases Involving International Trade: Amenability of Alien Corporations to Suit*, 46 ANTITRUST L.J. 1063 (1978).

expeditious, and more frequently favorable to the petitioning parties. The burden of proving intent to injure a domestic industry or restrain trade, however, remains an unknown factor.¹⁷⁹

The Wilson Tariff Act of 1894¹⁸⁰ is specifically defined as one of the antitrust laws in section 1 of the Clayton Act,¹⁸¹ with all of the inherent implications for private treble damage¹⁸² and injunction actions,¹⁸³ plus costs and attorney fees.¹⁸⁴ Section 73 of the Wilson Tariff Act prohibits contracts, combinations, and conspiracies in restraint of trade where one of the parties is engaged in importing.¹⁸⁵ Like the Antidumping Act of 1916, the Wilson Tariff Act provides for private treble damages in addition to criminal penalties. A particularly harsh further penalty under the Wilson Tariff Act subjects any property involved in the violation to forfeiture.¹⁸⁶ Although most actions under this law have been brought by the Government,¹⁸⁷ the statute's remedial provisions are also available to private parties.

In addition to the 1916 Act and the Wilson Tariff Act, other general provisions of the antitrust laws apply to the practices that are often the subject of administrative import procedures. Thus, for example, section 2 of the Sherman Act forbids monopolization, attempts to monopolize, and conspiracies to monopolize "any part of the trade or commerce . . . with foreign nations."¹⁸⁸ That law covers both domestic and foreign corporations.¹⁸⁹ Similarly, section 3 of the Robinson-Patman Act¹⁹⁰ declares it unlawful to sell goods at "unreasonably low prices for the purpose of destroying competition or eliminating a competitor." Both of these statutes address the same elements as those that can be involved in an antidumping or section 337 case. While proof of intent may be an additional hurdle, it has hardly hindered vigorous private antitrust enforcement between domestic parties. Thus the antitrust laws may be more regularly invoked if the administrative results are not more satisfactory in the future.

179. S. 938, 96th Cong., 1st Sess. (1979), introduced by Senator Mathias in April 1979, would eliminate the intent requirement and add the 1916 Act to the definition of the antitrust laws. See notes 181-84 *infra* and accompanying text.

180. 15 U.S.C. §§ 8-11 (1976).

181. *Id.* § 12.

182. Clayton Act § 4, 15 U.S.C. § 15 (1976).

183. *Id.* § 16, 15 U.S.C. § 26.

184. *Id.* §§ 4, 16, 15 U.S.C. §§ 15, 26.

185. Wilson Tariff Act § 73, 15 U.S.C. § 8 (1976).

186. *Id.* § 76, 15 U.S.C. § 11.

187. See notes to 15 U.S.C.A. § 8 (1973 & Supp. 1979).

188. 15 U.S.C. § 2 (1976).

189. *Id.* § 7.

190. *Id.* §§ 13, 13a, 13b, 21a.

V

JOINT INDUSTRY ACTION

A small domestic manufacturer may be reluctant to begin an antitrust case, fearing its disruptive effect, expense, and reputation of delay.¹⁹¹ However, his alternatives are both expensive and somewhat susceptible to political manipulation. How, then, can a small company fight unfair foreign competition?

Almost every law discussed thus far requires evidence of impact by imports on an entire industry. Even an antitrust case requires extensive market and economic evidence. To fight unfair competition effectively, a manufacturer may need the cooperation of other companies in the industry and of trade associations. Joint action eases not only the burden of gathering proof, but also costs. Collaboration by competitors to initiate an antidumping proceeding, or to seek another form of governmental relief from alleged unfair import competition, is lawful under the U.S. antitrust laws.

The Supreme Court has recognized the right of business competitors to act together to invoke enforcement of existing laws without incurring liability themselves for antitrust violations. This right to participate in the governmental process without antitrust liability is known as the *Noerr-Pennington* doctrine. In the leading case of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,¹⁹² the Court held that the exercise of political rights, *even where anticompetitive effects might follow*, is exempt from the prohibitions of the Sherman Act. The Court declared that “[t]he right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms.”¹⁹³ The Court concluded: “We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or monopoly.”¹⁹⁴ In *United Mine Workers of America v. Pennington*,¹⁹⁵ the Supreme Court, relying on *Noerr*, held that “[j]oint efforts to influence pub-

191. This common assumption often overlooks the opportunities for a preliminary injunction that can provide more flexibility and expeditious relief than anything available administratively.

192. 365 U.S. 127 (1960).

193. *Id.* at 138.

194. *Id.* at 136.

195. 381 U.S. 657 (1965).

lic officials do not violate the antitrust laws even though intended to eliminate competition."¹⁹⁶

In a more recent action, *California Motor Transport Co. v. Trucking Unlimited*,¹⁹⁷ the Court held that use of administrative and judicial proceedings by a group of competitors is also exempt from antitrust prohibitions under the *Noerr-Pennington* doctrine. The Court stated that the *Noerr-Pennington* "philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government. Certainly the right to petition extends to all departments of the Government."¹⁹⁸

In *Noerr*, the Supreme Court noted only one exception to the general antitrust exemption for a petition to the Government. There is no protection from the operation of the antitrust laws if an attempt to influence the Government is only a "sham" and not a bona fide effort to obtain governmental assistance or to protect legal rights.¹⁹⁹ Filing a good faith lawsuit or administrative petition, which may have anticompetitive effects, does not bring such conduct under the exception to the *Noerr-Pennington* doctrine, however.²⁰⁰ Thus a bona fide joint effort to enforce import regulations against apparent unlawful practices by foreign sellers falls clearly within the *Noerr-Pennington* antitrust exemption.²⁰¹

CONCLUSION

The last year culminated a decade of growing familiarity in the United States with the dislocations that foreign trade deficits can inflict on the national economy and domestic business. The discomfort is not only more pronounced, but less tolerable, when difficult competitive adjustments are

196. *Id.* at 670.

197. 404 U.S. 508 (1972).

198. *Id.* at 510.

199. 365 U.S. at 144.

200. Thus, in *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076 (9th Cir. 1976), the "sham" exception did not apply when a coalition of restaurant owners went before a building permit board to oppose the issuance of building permits to McDonald's restaurants. The Ninth Circuit found that "[t]he activities . . . consist entirely of attempts to lobby and petition a governmental body. Under *Noerr* and *Pennington* . . . these activities are absolutely immune from antitrust liability." *Id.* at 1080; see *Rush-Hampton Indus., Inc. v. Home Ventilating Inst.*, 419 F. Supp. 19 (M.D. Fla. 1976).

201. Even the Antitrust Division, despite its expressed concern "with the possible anticompetitive effects of increased resort to the antidumping law," acknowledges the right of either a single domestic monopolist or a group of several companies lawfully to seek import relief, provided there are reasonable grounds to believe the facts alleged are true and that administrative relief proceedings do not serve simply as a backdrop for private negotiations with foreign competitors. Statement by D. Rosenthal, Chief, Foreign Commerce Section, Antitrust Division, to P.L.I., in Washington, D.C. (Nov. 9, 1979).

exacerbated by noticeable—and sometimes glaring—practices that have traditionally been considered unfair. It is therefore not surprising to find fresh efforts to employ U.S. laws to minimize the impact of import competition that cannot be effectively countered through normal business responses.

But 1979 also marked the conclusion of prolonged multilateral negotiations to refine and codify the accepted definitions of unfairness in international trade and the legal procedures to resolve disputes on these issues. So the United States faced, on the one hand, a challenge to satisfy increased utilization of many domestic laws and regulations accumulated and often ignored over generations and, on the other hand, an obligation to bring these laws into conformity with internationally accepted norms. Although it may be somewhat premature to reach a conclusion, an observation on the ultimate juxtaposition of these forces is possible.

The net result seems to be that a great deal of effort went into very few significant changes in U.S. law. The legal alternatives available for domestic industries to obtain redress from unfair import competition are substantially the same as they were before passage of the Trade Agreements Act of 1979. To be sure, some administrative procedures have been modified, a few administrators have changed desks, some time periods may have been shortened, more judicial review is available, and a few elusive conceptual problems have received new or modified labels. Still, until experience with the changes in the law has been sufficient to generate comparative statistics, it is unlikely that the underlying legal advice that a knowledgeable practitioner will give to a domestic client will vary in any material respect from that given over the last few years. And that advice must be to review carefully the available facts concerning a foreign seller's business practices, to evaluate realistically the impact of these imports on the domestic competitor and industry, and then to proceed systematically through the array of alternative legal proceedings to find the most suitable form of relief. While a vast quantity of legal resource material was certainly generated during the year 1979, it will be the rare case where the conclusions reached in 1980 will not be the same as those that would have been reached in 1978.