Cornell International Law Journal

Volume 13
Issue 2 *Summer 1980*

Article 5

Subsidies, Countervailing Duties and Antidumping After the Tokyo Round

John J. Barcelo

SUBSIDIES, COUNTERVAILING DUTIES AND ANTIDUMPING AFTER THE TOKYO ROUND*

John J. Barceló III†

The law of subsidies, countervailing duties and antidumping has been altered by the GATT[1] Tokyo Round Agreements[2] and the United States implementing legislation, the Trade Agreements Act of 1979.[3] This article analyzes whether the new law of unfair trade practices advances the conditions for liberal trade or edges toward "cooperative protectionism." The analysis proceeds primarily from a United States perspective. Consequently, the article focuses predominantly on the 1979 Act and only indirectly on the new GATT agreements.

The analysis addresses, in decreasing order of consistency with liberal trade policy—or so the article concludes—three parts of the new unfair trade law of the United States: (1) trade retaliation under amended section 301 of the 1974 Trade Act[4] (authorizing trade barriers against countries

---

† Professor of Law and Director of International Legal Studies, Cornell University. B.A. 1962, J.D. 1966, Tulane University; S.J.D. 1977, Harvard University.

1. The acronym GATT refers to the General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 194, and the organization that implements the agreement. The text of the basic agreement and various annexes are reprinted in 4 GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS (1969) [hereinafter cited without cross reference as GATT].

2. Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, GATT Doc. MTN/NTM/W/236 [hereinafter cited as Subsidies Code], *reprinted in* AGREEMENTS REACHED IN THE TOKYO ROUND OF THE MULTILATERAL TRADE NEGOTIATIONS, H.R. Doc. No. 153, 96th Cong., 1st Sess. 257 (1979) [hereinafter cited without cross reference as H.R. Doc. No. 153]; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, GATT Doc. MTN/NTM/W/232 [hereinafter cited as 1979 Antidumping Code], *reprinted in* H.R. Doc. No. 153, at 311.

3. Pub. L. No. 96-39, 93 Stat. 144 (codified in scattered sections of 19 U.S.C.A. (West 1980)).

4. 19 U.S.C. § 2411 (1976), *as amended by* Trade Agreements Act of 1979, § 901, 19 U.S.C.A. § 2411 (West 1980).

whose subsidies and other measures adversely affect United States trade, including exports); (2) countervailing duty law under the new 1979 Act[5] (authorizing special duties to offset foreign subsidies on imports into the United States); and (3) antidumping law under the 1979 Act[6] (authorizing special antidumping duties to offset the amount by which imports to the United States undersell their home price or cost of production).[7]

The dominant issue in the paper is whether one can justify treating so-called "unfair" trade more harshly than fair trade. The paper inquires whether differentially harsh treatment of unfair trade advances the underlying efficiency goals of a liberal trading system. It also inquires whether there are principled notions of fairness that could support a differentially harsh regime for unfair trade, even if the efficiency arguments are inconclusive or unsupportive.

The next section develops the rationale within a liberal trade order for an importing country to restrict *fair* trade which causes serious injury to domestic producers. That serves as a backdrop for analyzing why, if at all, *unfair* imports should be treated more harshly. The next section also introduces the distinction between export and domestic subsidies affecting trade. As the later discussion explains, both the new GATT Code and the United States law treat export subsidies more harshly than domestic subsidies. The paper examines whether this distinction is sound.

The article concludes that unfair trade law aimed at subsidized or dumped imports is largely protectionist. There are no efficiency justifications and only weak, if any, fairness claims for such differentially harsh treatment. Hence the article concludes that through their acceptance of countervailing duty and antidumping laws, the GATT countries have, in effect, entered a market sharing arrangement under which, for protectionist purposes, they have restricted the share accorded to subsidized and dumped goods in their respective markets.

The article urges for reasons of simplicity, administrative efficiency and greater consistency with liberal trade goals that a single safeguard law be adopted as the sole standard for relief against all injurious imports. For that purpose, the article favors the current or a slightly modified version of

5. Trade Agreements Act of 1979, § 101, 19 U.S.C.A. §§ 1671-1671f (West 1980) (adding new §§ 701-707 to the Tariff Act of 1930).

6. Trade Agreements Act of 1979, § 101, 19 U.S.C.A. §§ 1673-1673i (West 1980) (adding new §§ 731-740 to the Tariff Act of 1930).

7. The cost of production standard was added by the Trade Act of 1974, § 321(d), 19 U.S.C. § 164(b) (1976) (amending the Antidumping Act of 1921, ch. 14, § 205, 42 Stat. 11) and has been reenacted in the Trade Agreements Act of 1979, § 773(b), 19 U.S.C.A. § 1677b(b) (West 1980).

the United States escape clause.[8] Under the escape clause, in contrast to the unfair trade laws, the injury standard is higher, increased tariffs or adjustment subsidies are temporary and relief is discretionary with the President and Congress. The article supports retention of a trade retaliation law in addition to the escape clause, especially when the former is used to prevent foreign subsidies from displacing United States exports. It also agrees with harsher treatment, under the retaliation law, for export as opposed to domestic subsidies.

The analysis underlying these conclusions is given in Sections II (trade retaliation), III (countervailing duties) and IV (antidumping).

I

FAIR AND UNFAIR TRADE

A. Protection Against Market Disruption

The repeated efforts of GATT signatories to reduce trade barriers through multilateral agreement[9] is premised on the comparative advantage theory that all nations will gain in wealth from specialization and trade. Despite this commitment to the long-term benefits of liberal trade, no nation is prepared to pay heavy short-term costs when market disruption from imports reaches an excessive level. The costs take the form of unemployment, increased welfare payments, under-utilized resources, relocation expenses and the intangible individual burdens of sudden uprootment. In this situation, a nation might improve its welfare by temporarily denying itself the benefit of cheap imports so that its own producers may adjust gradually to increased import competition. The adjustments might consist of investment for increased efficiency, or a gradual shifting of resources into other lines of production. Optimal government intervention would take the form of temporary subsidies to the ailing industry to encourage the appropriate adjustment, thus allowing consumers to continue to enjoy cheap imports. For fiscal, administrative and political reasons, however, governments often opt for increased trade barriers instead.[10]

There is nothing normatively wrongful or unfair about "disruptive" trade. The restrictions imposed by the importing country are against "fair" imports which, if absorbed within a short period, cause excessive adjustment costs. Since this logic will not support selective barriers against partic-

---

8. 19 U.S.C. §§ 2251-2253 (1976).

9. *See generally* K. DAM, THE GATT, LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 56-78 (1970); J. JACKSON, WORLD TRADE AND THE LAW OF GATT 217-23 (1969).

10. For a general discussion of the theoretical basis for protection against market disruption, see Meier, *Externality Law and Market Safeguards: Applications in the GATT Multilateral Trade Negotiations,* 18 HARV. INT'L L.J. 491, 500-06 (1977).

ular countries, the GATT requires that restrictions against fair trade conform to the Most Favored Nation (MFN) principle (nondiscrimination).[11] Thus, the reduced trade flow will continue to come from the most efficient producer countries. Under current rules the country invoking protection against fair trade should also offer trade concessions on other products to offset the damage to the exporting countries.[12] The principle is one of equitable sharing of the temporary burdens of adjusting to altered trade flows consistent with an overriding concern for efficiency.

By contrast, protection against "unfair" trade seems to rest on the belief that subsidization or dumping is wrongful.[13] Under current GATT rules, no country need adjust substantially to such practices; protection must be selective (against only the wrongful imports) and may be permanent.[14] The importing country need not compensate trading partners for action against unfair trade, and those partners, correspondingly, have no right of retaliation.[15] Most tellingly, the threshold of injury required to trigger barriers against "unfair" imports is lower than that for "fair" imports.[16]

This description of the unfair trade concept underscores that it is not the excessive cost of market disruption *per se* which justifies the countervailing action, but essentially the wrongfulness of the unfair practice. Thus, to be sound, differentially harsh treatment of unfair trade requires some principled notion of why subsidies and dumping are wrongful. (This paper concentrates primarily on the problem of subsidies, and discusses the new antidumping law only briefly in the last section.)

The search for a principled notion of wrongfulness proceeds in the paper along two avenues. One inquiry seeks to identify "extra" costs to a complaining country caused by subsidies—costs that are different from those of non-subsidized trade. A second inquiry seeks some principled no-

11. *See, e.g.,* GATT Arts. I, XIX; J. JACKSON, *supra* note 9, at 564.

12. *See* GATT Art. XIX; J. JACKSON, *supra* note 9, at 565-66. If agreement on compensation is not reached, an exporting country is authorized to retaliate.

13. For an explanation of the United States antidumping law (and implicitly the countervailing duty law) in similar terms, see Hudec, *United States Compliance with the 1967 GATT Antidumping Code,* 1 MICH. Y.B. INT'L LEGAL STUDIES 205, 206-07 (1979).

14. Contrast the permanent and selective nature of antidumping and contervailing duties in GATT Art. VI, with the impliedly temporary and nondiscriminatory escape clause action authorized in GATT Art. XIX.

15. GATT Article VI authorizes countervailing and antidumping duties without any reference to compensation or a right of retaliation.

16. The GATT calls for "serious injury" under the escape clause, GATT Art. XIX(1)(a), but only "material injury" for countervailing and antidumping duties, GATT Art. VI(6)(a). For a discussion of the different tests under United States law, see the text accompanying notes 75-82 *infra.*

tion of equity or fair play that could justify harsher treatment of subsidized trade.

The paper concludes that harsh reaction to subsidized trade is more justified when the complaint involves loss of markets in third countries (the subject in part of trade retaliation law) than when it concerns incursions of subsidized imports into the home market of (the subject of the countervailing duty law). Important distinctions between export and domestic subsidies are discussed in the next subsection because they cut across the later analysis of the trade retaliation and countervailing duty laws.

B. EXPORT AND DOMESTIC SUBSIDIES

The term "export subsidy," as used throughout this article, means a subsidy conditioned on export of the product or on export performance. Domestic subsidies—primarily production subsidies—are those granted without respect to output destination.[17]

Traditionally, the GATT has been more hostile to export than to domestic subsidies[18] for several reasons. First, an export subsidy appears aggressive, especially to an importing country facing serious market disruption from imports. Although the exporting country will almost never aim such subsidies specifically at a troubled market, the subsidy nevertheless represents a direct attempt by the subsidizing government to gain a greater share of foreign markets. Second, export subsidies help national products climb foreign tariff walls. Such subsidies may thus seem to subvert the legitimate tariff policy of an importing country.[19] Third, an export subsidy, as an intervention confined to the trade sector, is equivalent to a negative tariff. Like a tariff, it clashes with the efficiency goals of liberal trade.[20] It distorts resource allocation and, by opening a gap in price (or

17. For a similar distinction between domestic (production) and export subsidies, see H. MALMGREN, INTERNATIONAL ORDER FOR PUBLIC SUBSIDIES 28 (1977); W. WALKER, INTERNATIONAL LIMITS TO GOVERNMENT INTERVENTION IN THE MARKETPLACE 8 (1976). Although neither GATT nor the Subsidies Code defines the term "export subsidy," all of the practices on the illustrative list of prohibited "export subsidies" in the Code Annex meet the definition in the text. *See* Subsidies Code, *supra* note 2, Annex ("Illustrative List of Export Subsidies"), H.R. DOC. No. 153, at 295-97. This list appears at note 32 *infra*.

18. *See* Barceló, *Subsidies and Countervailing Duties—Analysis and a Proposal,* 9 LAW & POL'Y INT'L BUS. 779, 782-85 (1977).

19. *See* WALKER, *supra* note 17, at 10. *See also* P. BIDWELL, THE INVISIBLE TARIFF 87 (1939).

20. For a more thorough development of this point, see Barceló, *supra* note 18, at 794-99. That article discusses several exceptions to the general rule that export subsidies are distortive and should be prohibited. *Id.* at 801-23. The new Code is consistent with several of the proposed exceptions. The prohibited list in the Code Annex excludes the rebate of excise taxes, if nonexcessive, and includes export credit terms only if in violation of international undertak-

its equivalent) between export and domestic sales,[21] also distorts consumption.

One cannot meet the efficiency challenge to export subsidies by arguing that the subsidy advances a collective purpose or noneconomic goal. Except for cases of economic or military aid, no country has a plausible collective interest in exporting an above-market quantity of a particular good.[22] An export subsidy is also not an efficient corrective policy for a market distortion in the internal economy. If a government seeks corrective action, that action should be tied closely to the original distortion; hence, if a subsidy is entailed, it should be a domestic, not an export subsidy.[23]

Ironically, the inefficiencies stemming from misguided subsidies afflict primarily the subsidizing country itself. Thus, GATT rules prohibiting ex-

---

ings. Developing countries need only agree to eliminate export subsidies gradually. *See* Subsidies Code, *supra* note 2, art. 14(5)-(6), H.R. Doc. No. 153, at 284-85.

For an analysis challenging the argument that export subsidies are inefficient, see Schwartz, *Zenith Radio Corp. v. United States: Countervailing Duties and the Regulation of International Trade,* 1978 SUP. CT. REV. 297, 304-08. Schwartz emphasizes the theoretical possibility of externalities in the export sector, and the complexity and cost of deciding that "too much" subsidy has been paid or the net preference effect on any product, given the magnitude and variety of government action affecting production.

Although the suggestion that externalities in the export sector justify export subsidies is theoretically sound, few commonly found export subsidies seem consistent with that rationale. Government information aids and promotional fairs for exports are possible exceptions. *See* note 23 *infra*; Barceló, *supra* note 18, at 802. Disregarding these exceptions, however, the unwillingness of governments to rely upon non-discriminatory market principles to handle balance of payments difficulties and the political influence of particular export industries who argue the need to expand exports for the health of the industry appear more readily to explain the export subsidies found in practice. Such industries also occasionally argue the need to overcome the disadvantages of an "overvalued" exchange rate. This last argument might justify a uniform percentage subsidy for all exports, but not a selective subsidy limited to certain industries.

21. There will be a price gap because transport costs or government regulation (including possibly a tariff) will prevent the re-importation of the subsidized goods at a price undercutting the domestic market. Otherwise, the subsidy policy would defeat its purpose.

22. Political, fiscal and administrative reasons may support the use of an export subsidy instead of domestic subsidy when a country seeks a noneconomic internal goal. It may be politically possible to enact an export subsidy, but not a domestic subsidy. This argument is weak, however, since fiscal and administrative factors appear roughly equivalent when choosing between applying a given government expenditure to *all* production, or only to that production exported.

23. Only if a distortion is confined to the export sector would an export subsidy be optimal policy. For example, in an infant export industry no single firm may have an incentive to develop an export market because other firms will gain cost-free access once the market is opened. Perhaps in this situation, government information aids, market surveys and promotional fairs for exports should not be considered presumptively inefficient. Of course, such subsidies should only be temporary. *See* Schwartz & Harper, *The Regulation of Subsidies Affecting International Trade,* 70 MICH. L. REV. 831, 847 (1972) (arguing that subsidies, including export subsidies are not presumptively distortive); *see also* Barceló, *supra* note 18, at 802. Other examples of distortion-corrective export subsidies, however, are not readily apparent.

port subsidies benefit the very countries against whom they operate. Such rules, like those limiting import barriers, increase a government's bargaining position with highly organized special interests who may benefit from export subsidies at the expense of the general interest. The inefficiencies of export subsidies, however, also reduce global welfare. How such global inefficiencies affect the interests of non-subsidizing countries is analyzed below in connection with the trade retaliation and countervailing duty laws.[24]

Domestic subsidies are not as vulnerable to arguments of aggressiveness and inefficiency. Domestic subsidies are the counterpart of domestic taxes, which, unlike tariffs, are not closely regulated by GATT.[25] Although domestic subsidies may increase the subsidizing country's export flow, they generally carry none of the aggressive overtones of export subsidies. They are normally aimed at legitimate internal socio-economic goals, not at expanding the country's share of foreign markets.

In addition, domestic subsidies are not presumptively inefficient or distortive of "proper" trade flow. In the first place, "market imperfections" riddle the economy of every country, thus preventing the real-world market from operating under conditions of perfect competition to achieve the social optimum in resource allocation and output distribution. Such market imperfections may consist of monopolistic influences in product or factor markets, or external costs or benefits to society not captured by the private market. Under these conditions, a domestic subsidy may be the optimal corrective policy. A domestic subsidy would expand production or factor-use restricted by monopolies or allow society to reap benefits denied it by private decision-making. When distortions or imperfections in the market are not confined to the export sector—and generally they are not—export subsidies are a non-optimal solution. They may encourage increased production, but they simultaneously distort the market by preventing consumers from buying at the lower world price. If a subsidy is entailed, a domestic subsidy, as the policy tied most closely to the source of the problem,[26] will best correct internal market distortions.

Second, governments often intervene in the market to pursue so-called noneconomic goals or "collective goods."[27] For example, a nation may desire self-sufficiency in oil for enhanced national security, redistribution of wealth to depressed regions, or a more prosperous farm population. The

24. *See* notes 53-54, 119-39 *infra* and accompanying text.

25. GATT Article III(2) merely requires that such taxes not discriminate against imports.

26. For more thorough discussion of this essential point, see Barceló, *supra* note 18, at 788-92.

27. "Collective goods," sometimes termed "public goods," are those goods desired or demanded by the nation as a whole but unachievable through the private market. *See generally* C. KINDLEBERGER, GOVERNMENT AND INTERNATIONAL TRADE (1978).

private market alone may be inadequate for these purposes. A government policy advancing such aims is "inefficient" only if the goal is nationally undesirable or if the cost is excessive. But the existence of a subsidy *per se* cannot establish, or even suggest, either of these conclusions. Since any government can defend a domestic subsidy as a collective payment for a public good its people desire and "consume" collectively, notions of presumptive inefficiency seem untenable.

Nevertheless, domestic subsidies may have adverse effects on other countries. They may reduce the exports of those countries to third country markets, or to the subsidizing country itself. They may also increase the flow of imports into a country complaining of market disruption. If the subsidy eliminates a market distortion in the subsidizing country, however, it is entirely consistent with comparative advantage and not in any sense "wrongful."

On the other hand, if the subsidy is for a socio-economic, collective purpose, such as full employment in a certain region or industry, the issue of wrongfulness or unfairness is more complex. Countries frequently share the collective goals underlying domestic subsidies. For example, when an important industry, such as steel, faces global overcapacity, each producing country wants to avoid diminished production and serious unemployment in its own industry. Thus, more of the collective good desired by country *A* may mean less of the collective good available for country *B*. This classic pattern calls for compromise and agreed solutions, however, not rules of presumptive wrongfulness or unfairness. The 1979 trade retaliation law takes the former approach, whereas the 1979 countervailing duty law takes the latter. The next two sections turn to a separate analysis of these different statutory approaches to unfair trade.

II

TRADE RETALIATION

The 1979 Act amends the President's trade retaliation authority in section 301 of the Trade Act of 1974[28] to allow the United States to enforce its rights under the so-called Track II provisions of the Subsidies and Countervailing Duty Code.[29] Those rights derive from Code provisions limiting the

28. 19 U.S.C. § 2411 (1976), *as amended by* the Trade Agreements Act of 1979, § 901, 19 U.S.C.A. § 2411 (West 1980). For a general discussion of trade retaliation under section 301 of the Trade Act of 1974 before the 1979 Act changes, and of the relationship of the prior law to GATT, see Hudec, *Retaliation Against "Unreasonable" Foreign Trade Practices: The New Section 301 and GATT Nullification and Impairment*, 59 MINN. L. REV. 461 (1975).

29. Subsidies Code, *supra* note 2, H.R. DOC. No. 153, at 257. "Track II" is the term used by government negotiators for the government-to-government complaint procedure. *See* AM.

use of certain subsidies. For example, the Code contains an outright prohibition on "export subsidies" to manufactured and mineral products,[30] which does not depend, as before, on exports being at a lower price than domestic sales.[31] The Annex to the Subsidies Code contains an illustrative list of prohibited export subsidies, all of which condition the subsidy in some manner on export or export performance.[32] On the other hand, the Code recognizes domestic subsidies as legitimate for internal social and ec-

---

SOC. OF INT'L LAW, PROCEEDINGS OF THE 73RD ANNUAL MEETING 66-70 (1979) (remarks of C. Fred Bergsten, Asst. Secty. for Int'l Affairs, U.S. Dept. of the Treasury). Track II includes Articles 7-19 of the Subsidies Code, *supra* note 2, H.R. Doc. No. 153, at 276-94.

30. Subsidies Code, *supra* note 2, art. 9, H.R. Doc. No. 153, at 278. The Code imposes less severe restrictions on export subsidies to agricultural products. These are impermissible only if they give the subsidizing country "more than an equitable share of world export trade" in the subsidized product, Subsidies Code, *supra* note 2, art. 10(1), H.R. Doc. No. 153, at 278, measuring the market shares in "the three most recent calendar years in which normal market conditions existed." *Id.* arts. 10(1), (2)(c), H.R. Doc. No. 153, at 278, 279. "More than an equitable share" includes any case where the subsized goods "displace the exports of another signatory" in established markets. *Id.* art. 10(2)(a), H.R. Doc. No. 153, at 279. In determining "equitable share" in new markets, the Code takes into account "traditional patterns of supply of the product concerned to the world market, region, or country in which the new market is situated." *Id.* art. 10(2)(b), H.R. Doc. No. 153, at 279. The Code also prohibits export subsidies on agricultural products to a particular market which result in "prices materially below those of other suppliers to the same market." *Id.* art. 10(3), H.R. Doc. No. 153, at 279. Reference throughout this article to "prohibited export subsidies" means export subsidies to manufactured and mineral products, and those to agricultural products that violate the Subsidies Code principles outlined above.

31. The prior rule still applies to GATT signatories who are not signatories of the Subsidies Code. *See* GATT Art. XVI(B)(4).

32. Subsidies Code, *supra* note 2, Annex, H.R. Doc. No. 153, at 295-97. This list contains—with some additions, clarifications and minor changes—all the items on the 1960 GATT Working Party list generally understood to have been prohibited by GATT Article XVI(B)(4). *See* BISD (9th Supp.) 185, 186-87 (1961). For a reprint of the list and discussion, see J. JACKSON, *supra* note 9, at 382-87. The new list contains the following prohibitions:

(a) Direct subsidies to firms contingent on export performance.
(b) Currency retention schemes involving a bonus on exports.
(c) Internal transport charges—mandated by government—for export shipments on terms more favorable than for domestic shipments.
(d) Delivery by government of goods or services for production of exported goods on terms more favorable than for domestic goods and than commercially available.
(e) On exports, rebate or deferral of direct taxes or social welfare charges.
(f) Allowance of special deductions directly related to exports in calculating direct taxes.
(g) On exports, rebate of indirect taxes in *excess* of those levied on goods consumed domestically.
(h) On exports, rebate or deferral of prior stage cumulative indirect taxes, unless levied on goods physically incorporated in the exported product (not applicable to value-added-tax, which may be rebated under (g) above, *see* Code Annex, note 3).
(i) Drawback of import duties *in excess* of those levied on imported goods physically incorporated in the exported product.
(j) Government export credit or guarantees against cost increases or exchange risk at rates inadequate to cover long-term operating costs of the program.

onomic purposes.[33] Under the Code, the subsidizing country agrees to try to avoid causing adverse effects to the interests of other signatories, particularly "where such subsidies would adversely affect the conditions of normal competition."[34] Thus, the Track II provisions reflect the differences between export and domestic subsidies just discussed.

The trade retaliation provisions of section 301 constitute the only realistic remedy for damage to U.S. trade interests when foreign subsidies displace or impede American exports. Section 301 is also available when foreign subsidies increase the flow of imports into the United States. In that case, however, the retaliation law overlaps the countervailing duty law (Track I of the Code),[35] and either remedy is available.

The deterrent force of Track II is maximized when a signatory uses an export subsidy inconsistent with the Code. The Track II provisions authorize a government-to-government complaint and a dispute settlement procedure subject to strict time limits.[36] If the complaining government establishes that a signatory has used a prohibited export subsidy, the Code creates a presumption of adverse effects to the complainant.[37] If the subsidizing country fails to rebut that presumption[38] or reach a settlement, the Committee of Code Signatories would presumably authorize trade retaliation.[39]

(k) Government export credit at rates below the cost of funds employed, unless consistent with an international undertaking on export credits to which 12 of the original signatories of the Code are parties.

(l) Any other charge on the public account constituting an export subsidy under GATT Article XVI.

33. The Subsidies Code expressly approves the following objectives of subsidy programs: aid to disadvantaged regions; decentralization of industry; adjustment assistance to ailing sectors; encouragement of research and development; implementation of development plans by developing countries; and sustaining employment and encouraging employment programs. Subsidies Code, *supra* note 2, art. 11(1), H.R. Doc. No. 153, at 279-80.

34. Subsidies Code, *supra* note 2, art. 11(2), H.R. Doc. No. 153, at 280-81.

35. Track I includes Articles 1-6 of the Subsidies Code, *supra* note 2, H.R. Doc. No. 153, at 261-75. *See generally* notes 55-118 *infra* and accompanying text.

36. *See* Subsidies Code, *supra* note 2, arts. 12, 13, 17-19, H.R. Doc. No. 153, at 282, 283, 288-94.

37. Although Article 8, n.4 provides that such a presumption "may" arise, Articles 12(1) and 13(4) plainly imply that the complaining government has no burden of showing adverse effects if a prohibited export subsidy has been used. *Cf.* Subsidies Code, *supra* note 2, art. 14(4), H.R. Doc. No. 153, at 284 ("There shall be no presumption that export subsidies granted by *developing* country signatories result in adverse effects . . .") (emphasis added).

38. Subsidies Code, *supra* note 2, art. 8 n.4, H.R. Doc. No. 153, at 277.

39. *Id.* arts. 13(4), 17, 18, H.R. Doc. No. 153, at 283, 288, 288-91. Since the Committee must consider "the nature and degree of the adverse effects found to exist" before authorizing "appropriate countermeasures," Subsidies Code, *supra* note 2, arts. 18(9), 13(4), H.R. Doc. No. 153, at 291, 283, a complaining government might have to introduce some evidence of adverse effects before the Committee will authorize retaliation.

If the complaint attacks a domestic subsidy, however, the complaining government must prove that the subsidy has adversely affected its interests, either by reducing its exports or by damaging its domestic industry through increased imports.[40] Even if the complainant makes such a showing, the Committee of Signatories could still conclude that the subsidy did not "cause injury, nullification or impairment, or serious prejudice," and refuse to authorize retaliation.[41] That conclusion might result from a finding that the subsidy did not "adversely affect the conditions of normal competition."[42] Presumably, the Committee might so find if the domestic subsidy merely corrected a prior market distortion, or, in the case of a regional subsidy, for example, merely offset the added expense of locating in the disadvantaged region.

Under the 1979 Act, a private petition to the United States Trade Representative (formerly the Special Representative for Trade Negotiations)[43] can trigger United States retaliation rights under Track II of the Code.[44] If the Trade Representative decides to open an investigation, the Act instructs him to invoke the Track II dispute settlement procedure simultaneously. Failing a negotiated settlement, the Trade Representative must recommend to the President appropriate retaliatory action.[45] The Act carefully coordinates the time limits for such a recommendation to permit exhaustion of the Code's dispute settlement procedure.[46] In a private petition case, the President must decide what action to take, if any, within twenty-one days of the Trade Representative's recommendation,[47] which has no binding force. Counting that period and the initial forty-five days allowed for the decision whether to open an investigation, the Act limits the total lapsed time from petition to Presidential decision in an export subsidy case to approximately

40. Subsidies Code, *supra* note 2, arts. 12(3)-(4), 8(3)-(4), H.R. Doc. No. 153, at 282, 277-78.

41. Subsidies Code, *supra* note 2, art. 13(4), H.R. Doc. No. 153, at 282.

42. Subsidies Code, *supra* note 2, art. 11(2), H.R. Doc. No. 153, at 280-81.

43. *See* Exec. Order No. 12,188, 45 Fed. Reg. 989 (1980).

44. 19 U.S.C.A. §§ 2412-2413 (West 1980). For the Trade Representative's new regulations under amended section 301, see 45 Fed. Reg. 34,870 (1980) (to be codified in 15 C.F.R. pt. 2006).

45. 19 U.S.C.A. § 2414 (West 1980).

46. *Compare* 19 U.S.C.A. § 2414(a)(1)(A) (West 1980) (allowing 7 months for the Trade Representative's recommendation in a case involving an export subsidy prohibited by the Subsidies Code) *with* Subsidies Code, *supra* note 2, arts. 13(1), 17 and 18, H.R. Doc. No. 153, at 283, 288, 288-91 (allowing 180 days from preliminary request for consultation to final Committee recommendation), and *compare* 19 U.S.C.A. § 2414(a)(1)(B) (West 1980) (allowing 8 months for the Trade Representative's recommendation in a case involving a domestic subsidy) *with* Subsidies Code, *supra* note 2, arts. 13(2), 17 and 18, H.R. Doc. No. 153, at 283, 288, 288-91 (allowing 210 days).

47. 19 U.S.C.A. § 2411(c)(2) (West 1980).

nine months,[48] and in a domestic subsidy case to approximately ten months.[49]

The President has complete discretion whether to retaliate against the trade of an offending country.[50] The Act does not expressly condition his authority upon the Committee of Signatories' authorization nor does it limit the degree of retaliation he may employ. On the other hand, the Code obligates the United States not to retaliate against signatories without authorization of the Committee of Signatories.[51] If the Committee authorizes retaliation, it must take into account the nature and degree of the subsidy-caused adverse effect to the interests of the complaining government.[52]

These new provisions of the 1979 Act comport reasonably well with liberal trade policy. The Act reserves harshest treatment for export subsidies, which are generally inconsistent with the efficiency principles underlying comparative advantage. When such subsidies curtail American exports to third countries, they reduce global efficiency and unambiguously injure United States interests. Such subsidies force U.S. producers to shift resources into less efficient lines of output, American consumers do not benefit from low-priced imports, and the subsidy-created inefficiencies may indirectly increase the cost of other imports to the United States.[53] These detrimental effects coupled with the general absence of independent justification for export subsidies support placing the burden on the subsidizing country to show an absence of displacement, as provided under Track II of the Code.

Domestic subsidies abroad can have similar adverse effects upon U.S. interests by deterring American exports to third countries and to the subsidizing country itself. But whether such subsidies are inefficient, unfair in a broader sense, or unjustified will rarely be unambiguous. To resolve disputes, the Code requires the Committee of Signatories to decide—with the complainant country bearing the burden of proof—whether a given domestic subsidy seriously displaces a complainant country's exports and perhaps

48. *See* 19 U.S.C.A. § 2412(a) (West 1980) (45 days for Trade Representative to decide whether to initiate investigation); 19 U.S.C.A. § 2414(a)(1)(A) (West 1980) (7 months for recommendation of the Trade Representative); 19 U.S.C.A. § 2411(c)(2) (West 1980) (21 days for President's decision).

49. *See id.,* except that in a domestic subsidy case 19 U.S.C.A. § 2414(a)(1)(B) (West 1980) allows 8 months for the recommendation of the Trade Representative.

50. 19 U.S.C.A. § 2411 (West 1980). The President may act under any existing authority, for example, that granted in § 125 of the Trade Act of 1974, 19 U.S.C. § 2135 (1976), or under the express grant of retaliatory authority in the 1979 Act. *See* 19 U.S.C.A. § 2411(b) (West 1980).

51. Subsidies Code, *supra* note 2, art. 19(1), H.R. Doc. No. 153, at 291.

52. Subsidies Code, *supra* note 2, arts. 18(9), 13(4), H.R. Doc. No. 153, at 291, 283. *See* note 39 *supra.*

53. *See* notes 133-39 *infra* and accompanying text.

also whether it "adversely affects the conditions of normal competition."[54] The incentive to compromise likely to emerge from this process seems a reasonable and necessary approach to the potential clash of legitimate sovereign policies.

The case against export and domestic subsidies is much weaker, however, when they feed imports into the United States, although neither the Act nor Track II of the Code makes this distinction. The President can take consumer benefits into account, however, when exercising his discretion under the trade retaliation law. The nondiscretionary countervailing duty law, on the other hand, raises more acutely the question whether special restrictions on bounty-fed imports are sound.

III

COUNTERVAILING DUTIES

A. The Trade Agreements Act of 1979

The new countervailing duty law under the 1979 Act has four distinctive features: (1) a more explicit and broad ranging definition of the term "subsidy;"[55] (2) a new injury test for dutiable imports;[56] (3) a new provisional remedy available early in the investigation;[57] and (4) a new adjudicatory cast to the proceedings, including restricted agency discretion to define subsidies and a right to Customs Court review of various preliminary and final decisions.[58] The new law applies only to signatories of the Tokyo Round Subsidies and Countervailing Duty Code, or countries that have accepted equivalent obligations.[59] Prior United States law—including the absence of an injury test on dutiable imports—will apply to countries that reject the Code and its prohibition of export subsidies.[60] The 1979 Act also expedites the procedure so that normal cases will last no longer than eight

54. Subsidies Code, *supra* note 2, art. 11(2), H.R. Doc. No. 153, at 280-81.

55. 19 U.S.C.A. § 1677(5)-(6) (West 1980). *See* notes 83-91 *infra* and accompanying text.

56. 19 U.S.C.A. §§ 1671, 1677(7) (West 1980). The prior law provided an injury test only for non-dutiable products. *See* 19 U.S.C. § 1303 (1976) (amended 1979). *See* notes 75-82 *infra* and accompanying text.

57. 19 U.S.C.A. § 1671(b) (West 1980). *See* notes 92-95 *infra* and accompanying text.

58. For the provision authorizing Customs Court review, see 19 U.S.C.A. § 1516(a) (West 1980). *See* notes 96-114 *infra* and accompanying text.

59. 19 U.S.C.A. § 1671(b)(1)-(2) (West 1980). The new law also applies to a limited group of countries who are not GATT members but to whom the United States owes unconditional MFN treatment under other trade agreements. *Id.* § 1671(b)(3). Countries includable in this latter category are listed in S. Rep. No. 249, 96th Cong., 1st Sess. 45 [hereinafter cited as Senate Report] (El Salvador, Honduras, Liberia, Nepal, North Yemen, Paraguay, and Venezuela).

60. 19 U.S.C.A. § 1671(c) (West 1980). The old law requires that countervailing duties on dutiable products be imposed without an injury test. *See* 19 U.S.C. § 1303 (1976).

months[61] and "extraordinarily complicated" cases no longer than ten months.[62] Although the new injury test discourages countervailing duty relief, the weakness of that test, the expedited procedure, the new provisional remedy, the reduced agency discretion and the general adjudicatory cast to the proceedings seem likely, in the balance, to increase the number of complaints filed.

Even if the injury test, despite its weakness, counterbalances the other features of the 1979 law so that on the whole the new law is not more protectionist than past countervailing duty law,[63] the question remains whether *any* such law can be justified. A comparison of the new countervailing duty law with the escape clause provisions applicable to all trade illustrates that the former remedy is plainly more protectionist than the latter.

For escape clause relief against "fair trade" a complainant must first prove before the International Trade Commission (ITC) that increased imports have been a "*substantial cause*" of "*serious injury*" to a domestic industry.[64] The ITC must then recommend to the President the degree and form of trade restriction needed to remedy the injury. Finally the President, at his discretion,[65] must decide whether to adopt: (1) the trade restriction recommended; (2) a different kind or degree of restriction; (3) adjustment assistance (various forms of financial and technical assistance to firms and workers);[66] or (4) no remedy.[67] The President's decision is not reviewable. If that decision differs from the relief recommended by the ITC, however, Congress may by concurrent resolution reject it and adopt

61. *See* 19 U.S.C.A. § 1671(b) (West 1980) (after petition is filed 85 days for preliminary decision on existence of a subsidy); *id.* § 1671d(a) (75 days for final determination of existence of a subsidy); *id.* § 1671(b)(3) (75 days for final injury determinations).

62. An "extraordinarily complicated" case adds an extra 65 days to the time for the preliminary determination of whether a subsidy exists. 19 U.S.C.A. § 1671b(c)(1) (West 1980).

63. The former Deputy Assistant Secretary for Tariff Affairs at the Department of Treasury, Peter D. Ehrenhaft, has recently observed that the expected flood of complaints under the 1979 countervailing duty law has not as yet occurred. U.S. IMPORT WEEKLY (BNA), at B-4 (July 16, 1980) (interview with Ehrenhaft). Some of the recent no injury findings of the ITC to which Ehrenhaft attributed the fall off in complaints were nevertheless explained by the ITC chairman, William Alberger, as owing in part to the presence in the caseload of several complaints initiated under the old law, which required no evidence of injury. U.S. IMPORT WEEKLY (BNA), at B-3 (July 23, 1980) (interview with Alberger).

64. 19 U.S.C. §§ 2251-2253 (1976). A "substantial cause" is one that is important and not less than any other cause. *Id.* § 2251(b)(4).

65. The President's discretion under the escape clause allows him to weigh the effects of compensating tariff concessions, which under GATT, must be offered to adversely affected countries. If the United States does not offer acceptable concessions, those countries have a right to retaliate against U.S. trade. GATT Art. XIX. *See* J. JACKSON, *supra* note 9, at 564-66.

66. *See generally* 19 U.S.C. §§ 2271-2322 (1976) (adjustment assistance to workers); 19 U.S.C. §§ 2341-2354 (1976) (adjustment assistance to firms).

67. *See generally* 19 U.S.C. §§ 2252-2253 (1976) (President's range of choices and discretion).

the ITC's recommendation.[68] Escape clause trade restrictions are limited to five years, although a three-year extension is possible.[69]

In contrast, the 1979 countervailing duty law *mandates* relief if the appropriate agencies make the necessary statutory findings. Presidential discretion plays no part in the process. The Administering Authority (now the Commerce Department)[70] determines whether imports are subsidized[71] and the ITC decides if a domestic industry is "materially injured . . . by reason of" subsidized imports.[72] If Commerce and the ITC answer these questions affirmatively, customs officers must levy countervailing duties equal to the *ad valorem* amount of the subsidy on all offending imports.[73] The extra duties remain in effect as long as the imports are subsidized and cause injury. Under GATT and the Subsidies Code, the subsidizing government has no right of retaliation.[74] A closer look at the concepts and procedures of the new countervailing duty law just summarized will better illustrate the greater restrictiveness of that law by comparison with the escape clause.

1. Material Injury and Causation

United States adherence to the Subsidies Code satisfied a long-standing effort of the other Code signatories to have the United States include a material injury test in its countervailing duty law.[75] In the 1979 Act implementing the Code, however, Congress partly undercut that achievement by defining "material injury" as "harm which is not inconsequential, immaterial, or unimportant."[76] Both the Senate and House Reports explained that the "material injury" standard was to be generally the same as the test the ITC applied in antidumping cases after the Trade Act of 1974.[77] That

68. 19 U.S.C. § 2253(c) (1976).

69. 19 U.S.C. § 2253(h) (1976).

70. Reorg. Plan No. 3 of 1979, § 5(a)(1)(C), 44 Fed. Reg. 69,273 (1979).

71. 19 U.S.C.A. § 1671(a)(1) (West 1980). For Commerce's new countervailing duty regulations, see 45 Fed. Reg. 4,937-52 (1980) (to be codified in 19 C.F.R. §§ 355.0-355.44).

72. 19 U.S.C.A. § 1671(a)(2) (West 1980). The new Act authorizes the imposition of countervailing duties upon a showing of material injury, threat of material injury, or material retardation of the establishment of a United States industry. *Id.* This article will use the term "material injury" to include all three concepts. For the ITC's new regulations on the material injury determination, see 44 Fed. Reg. 76,458-76 (1980) (to be codified in 19 C.F.R. §§ 207.1-207.51).

73. 19 U.S.C.A. § 1671e (West 1980).

74. *See* GATT Art. VI; Subsidies Code, *supra* note 2, art. 4, H.R. Doc. No. 153, at 267-70.

75. *See* SENATE REPORT, *supra* note 59, at 40.

76. 19 U.S.C.A. § 1677(7)(A) (West 1980). Assuming the concept "material injury" covers a range of business injury, Congress's definition plainly aims at the very lowest end of that range.

77. *See* SENATE REPORT, *supra* note 59, at 87; H.R. REP. No. 317, 96th Cong., 1st Sess. 46 (1979) [hereinafter cited as HOUSE REPORT].

cutoff date omits some of the most indefensible ITC injury decisions in the late sixties and early seventies,[78] but the post-1974 decisions still apply a weak test, clearly softer than the "serious injury" standard under the escape clause.[79]

The new Act also adopts the causation requirement of the prior antidumping law; material injury must be "by reason of" the subsidized imports.[80] The Senate and House Reports state explicitly that this standard is to be less demanding than the "substantial cause" test under the escape clause.[81] Unlike the escape clause, the new Act omits a weighing of the effects from subsidized imports against other causes of business harm.[82]

Taken together, the material injury and causation requirements of the 1979 Act significantly relax the more rigorous injury threshold of the escape clause. To keep these two thresholds distinct, the analysis below will refer to the higher standard under the escape clause as *first-level injury,* and the lower standard under the countervailing duty law as *second-level injury.*

2. *Definition of Subsidies*

The broad-ranging and inflexible definition of subsidies introduced by the new law compounds the effect of the soft injury test. The new Act defines "subsidy" to include the terms "bounty or grant" under the prior law and incorporates expressly, but nonexclusively, the Code's list of prohibited export subsidies.[83] That list is generally consistent with the prior interpretation of the "bounty or grant" concept.[84] The major change under the

78. The House Report expressly rejected the "de minimis" test employed in ITC decisions in the late sixties. *See* HOUSE REPORT, *id.* at 46. *See also* SENATE REPORT, *supra* note 59, at 87. For a discussion of the ITC cases, see Barceló, *Antidumping Laws as Barriers to Trade—The United States and the International Antidumping Code,* 57 CORNELL L. REV. 491, 544-58 (1972).

79. *See* Barceló, *The Antidumping Law: Repeal It or Revise It,* 1 MICH. Y.B. INT'L LEGAL STUDIES 53, 54-57 (1979) (comparing the injury test under the escape clause with the injury test under the antidumping law, as amended by The Trade Act of 1974).

80. 19 U.S.C.A. § 1671(a)(2) (West 1980).

81. SENATE REPORT, *supra* note 59, at 57-58, 74-75; HOUSE REPORT, *supra* note 77, at 47.

82. *Id.*

83. 19 U.S.C.A. § 1677(5) (West 1980).

84. *Compare* the list, summarized in note 32 *supra, with* the discussion of prevailing countervailing duty policy in Feller, *Countervailing Duties,* in 1 LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS 123-34 (W. Surrey & D. Wallace 2d ed. 1977). *See also* Butler, *Countervailing Duties and Export Subsidization: A Re-emerging Issue in International Trade,* 9 VA. J. INT'L L. 82, 96-124 (1969); Feller, *Mutiny Against the Bounty: An Examination of Subsidies, Border Tax Adjustments, and the Resurgence of the Countervailing Duty Law,* 1 LAW & POL'Y INT'L BUS. 17, 19-38 (1969).

The Code's allowance of non-excessive rebates of excise taxes, *see* Subsidies Code, *supra* note 2, Annex (g), H.R. DOC. No. 153, at 295, is consistent with prior Treasury practice recently affirmed by the Supreme Court in Zenith Radio Corp. v. United States, 437 U.S. 443, new law lies in the definition of domestic subsidies. Prior to the *Michelin Tire* case in 1973,[85] Treasury had never countervailed against a domestic subsidy.[86] Although it has done so increasingly since then,[87] Treasury has consistently attempted to maintain flexibility and discretion, and to emphasize "trade distortion" effects rather than the mere conferral of a government benefit.[88] The new law tightens the definition of domestic subsidies, and tilts toward the government benefit theory by failing to include a "trade distortion" requirement[89] and by narrowing the permissible offsets in calculating the "net subsidy."[90] For example, government grants to encourage location in a depressed region can no longer be reduced by offsetting the increased costs of locating in the region.[91] The upshot is that more government benefits to industry—especially domestic benefits—will be considered "subsidies" subject to countervailing action than under prior law.

461-62 (1978). For a cogent analysis of the *Zenith* case and a penetrating critique of the countervailing duty law, see Schwartz, note 20 *supra*.

The Code's disallowance of rebates of prior stage cumulative indirect taxes unless levied on goods physically incorporated in the exported product, is also consistent with a recent refinement in Treasury treatment of this issue (the *taxes occultes* issue). *See* 44 Fed. Reg. 3,478 (1979). Treasury (now Commerce) adopted this approach in its proposed countervailing duty regulations. *See* Countervailing Duties, 44 Fed. Reg. 57,047 (1979) (to be codified in 19 C.F.R. § 155.1). The applicable rule (§ 155.1) is not yet final, although Commerce officially promulgated most of the new countervailing duty regulations. *See* 45 Fed. Reg. 4,937-52 (1980) (to be codified in 19 C.F.R. §§ 355.0-355.44). Regulations concerning the determination and calculation of net subsidies, specifically §§ 155.1-.4, 155.7(j), 155.51, and 155.60-.64 are deferred. *See* 45 Fed. Reg. 4,932, 4,933, 4,937 (1980). (These sections, when promulgated, will be renumbered to §§ 355.1-.4, etc.). The physical incorporation rule for prior stage taxes, however, has been formally proclaimed by Commerce in an annex to the promulgated rules. *See* Annex 1, 45 Fed. Reg. 4,949 (1980).

85. X-Radial Steel Belted Tires from Canada, 7 Cust. B. & Dec. 24, 38 Fed. Reg. 1,018 (1973).

86. *See* 6 LAW & POL'Y INT'L BUS. 237 (1974).

87. *See, e.g.,* Tomato Products From the European Community, 13 Cust. B. & Dec. 24, 44 Fed. Reg. 49,248 (1979) (production subsidy to offset price supports on tomatoes); Certain Optic Liquid Level Sensing Systems From Canada, 44 Fed. Reg. 1,728 (1979) (research and development grant); Certain Fish From Canada, 44 Fed. Reg. 1,372 (1979) (regional and other grants to fishing industry); Float Glass From Italy, 10 Cust. B. & Dec. 23, 41 Fed. Reg. 1,274 (1976) (regional subsidy).

88. The Court of Customs and Patent Appeals recently struck down the Treasury's "trade distortion" test under the pre-1979 law. The case involved regional development grants in West Germany which benefited German float glass producers. *See* ASG Industries, Inc. v. United States, 610 F.2d 770 (C.C.P.A. 1980), *reversing* 467 F. Supp. 1187 (Cust. Ct. 1979).

89. The closest the new law comes to the "trade distortion" concept is the requirement that a domestic subsidy be provided to a specific enterprise or industry. *See* 19 U.S.C.A. § 1677(5)(B) (West 1980). The Act thus excludes general government benefits such as public education and public works.

90. 19 U.S.C.A. § 1677(6) (West 1980). For clear evidence that Congress intended to narrow and restrict permissible offsets, see SENATE REPORT, *supra* note 59, at 85-86; HOUSE REPORT, *supra* note 77, at 74.

91. SENATE REPORT, *supra* note 59, at 86. That Treasury had allowed such offsets in the past is evident in ASG Industries, Inc. v. United States, 610 F.2d 770 (C.C.P.A. 1980).

3. Suspension of Liquidation

The addition of a provisional remedy, borrowed from prior practice under the antidumping law and not available under the escape clause, makes the new countervailing duty law especially attractive to domestic industry. The ITC has forty-five days, and Commerce has eighty-five days from the date of the complaint to make preliminary determinations whether there is a "reasonable indication" of injury and subsidization, respectively.[92] At this stage, the test is weaker than for the final decisions.[93] If these determinations are positive, customs officers suspend liquidation of entries, and the importer must post security for the estimated amount of countervailing duty.[94] This estimated duty immediately dampens imports, and the possibility of even higher final levies increases the dampening effect. Under prior antidumping practice, the uncertainty surrounding suspension of liquidation (formerly withholding of appraisal) frequently caused imports to cease altogether.[95]

4. Procedure and Judicial Review

The strict time limits placed on countervailing duty decisions and the express authorization for Customs Court review of various preliminary and final decisions should also encourage resort to the new law. These provisions should deny the enforcing agencies, particularly the Commerce Department, the range of discretion previously exercised by Treasury in defining "bounty or grant," and thus increase the certainty of relief. This reduced discretion contrasts sharply with that exercised by the President under the escape clause.

There are four primary stages in a countervailing duty proceeding under the new law. First, a petition is filed simultaneously with Commerce

92. 19 U.S.C.A. § 1671b(a), (b) (West 1980). In "extraordinarily complicated cases," as defined by the statute, the deadline for the preliminary determination that a subsidy exists may be deferred 150 days. 19 U.S.C.A. § 1671b(c) (West 1980).

93. Indeed, the Senate Report indicates that the standard "whether there is a reasonable basis to believe or suspect" is less rigid than that applied by Treasury in preliminary determinations under the antidumping law. SENATE REPORT, *supra* note 59, at 50.

94. 19 U.S.C.A. § 1671b(d) (West 1980). If the ITC determines that there is a reasonable basis to believe that "critical circumstances" exist, it may suspend liquidation retroactively on unliquidated items entered up to 90 days prior to the preliminary decision triggering the provisional remedy. Critical circumstances exist when the ITC finds a subsidy inconsistent with the Subsidies Code (presumably an export subsidy) and "massive imports" of the subsidized goods "over a relatively short period." 19 U.S.C.A. § 1671b(e)(1)(A)-(B) (West 1980).

95. *See* Prosterman, *Withholding of Appraisement Under the United States Antidumping Act: Protectionism or Unfair-Competiton Law?*, 41 WASH. L. REV. 315, 319 (1966).

and the ITC.[96] It must allege both the existence of a subsidy and material injury.[97] In addition, it must contain supporting information "reasonably available to the petitioner."[98] Within twenty days Commerce must decide—based on the sufficiency of the complaint—whether to initiate an investigation.

Second, the ITC and Commerce must decide preliminarily on injury and the existence of a subsidy, respectively. The tests are whether there is a "reasonable indication" of injury and whether there is a "reasonable basis to believe" a subsidy exists.[99] If both decisions are positive, Commerce orders suspension of liquidation.[100] A negative preliminary finding by the ITC (on injury) causes the proceeding to terminate.[101] A negative preliminary decision solely by Commerce (on the presence of a subsidy) means that liquidation is not suspended, but the investigation continues.

Third, Commerce and the ITC must make respective final decisions on the existence of a subsidy and injury.[102] The Act provides different time limits depending upon whether the preliminary Commerce decision is positive or negative.[103] In any event, no case may continue longer than 235 days after the petition is filed, or 300 days in an "extraordinarily complicated" case.[104] Should both final decisions be positive, customs officers must levy countervailing duties (equal to the net subsidy) on all offending imports upon which duties have not been liquidated.[105]

Fourth, each of the above decisions and several other interlocutory decisions are subject to Customs Court review on petition by either party.[106] The review process begins within thirty days of the challenged decision, not, as under prior law, only when an entry is liquidated.[107] This gives the domestic industry the opportunity for rapid reversal of negative preliminary decisions which may have terminated a proceeding or failed to suspend liquidation. The Customs Court may also protect an industry

96. 19 U.S.C.A. § 1671a(b) (West 1980). The new Act grants standing to file a petition to a domestic producer, a union or group of workers in the industry, and a trade association in the industry. *Id.*; 19 U.S.C.A. § 1677(9) (West 1980).

97. 19 U.S.C.A. §§ 1671a(b)(1), 1671(a) (West 1980).

98. *Id.* § 1671a(b)(1).

99. *Id.* § 1671b(a)-(b).

100. *Id.* § 1671b(d).

101. *Id.* § 1671b(a).

102. *Id.* § 1671d.

103. *Compare* 19 U.S.C.A. § 1671d(b)(2) (West 1980) (affirmative preliminary determination) *with id.* § 1671d(b)(3)(negative preliminary determination).

104. *See* SENATE REPORT, *supra* note 59, at 56.

105. 19 U.S.C.A. § 1671e (West 1980).

106. *Id.* § 1516a.

107. SENATE REPORT, *supra* note 59, at 250.

complainant by enjoining liquidation during the period of review.[108]

The Act excludes *de novo* review as a standard in countervailing duty proceedings.[109] In challenges to various initial or preliminary decisions when a formal record would not be well-developed, the standard of review is whether the decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[110] The standard for challenges to final decisions is whether the decision is "unsupported by substantial evidence on the record, or otherwise not in accordance with law."[111] The record for review must contain all information acquired by government officials during the course of the proceeding, including all government memoranda pertaining to the countervailing duty case.[112] The Act preserves the confidential status of certain information, although the reviewing court may examine such information *in camera*.[113]

Neither standard of review formulation makes clear (if that is indeed possible) the degree of deference the Customs Court should give to Commerce and ITC decisions. The Senate Report suggests that the standard of review should coincide with traditional administrative law principles.[114] Thus, the Customs Court should not substitute its judgment for that of the agency, and should proceed upon the basis of relevant information before the decision-maker at the time the decision was rendered. Nevertheless, the elaborate provisions for judicial review, as well as its increased availability, will tend to restrict agency discretion and flexibility.

5. Suspension of Proceeding by Acceptance of Agreement

The new law strongly encourages the United States to reach a negotiated settlement with the subsidizing country or individual exporters. This accords with the provisions and spirit of the Subsidies Code.[115] During the twenty-day delay between the filing of the petition and initiation of the proceeding, the United States should notify the appropriate government and

---

108. 19 U.S.C.A. § 1516a(c)(2) (West 1980).

109. *Id.* § 1516a(b); SENATE REPORT, *supra* note 59, at 247-48, 251-52; HOUSE REPORT, *supra* note 77, at 181. This overturns the result in several recent decisions holding under prior law that review of countervailing duty cases should be *de novo*. *See, e.g.,* ASG Industries, Inc. v. United States, 610 F.2d 770 (C.C.P.A. 1980); ASG Industries, Inc. v. United States, 467 F. Supp. 1200 (Cust. Ct. 1979); Michelin Tire Corp. v. United States, 469 F. Supp. 270 (Cust. Ct. 1979).

110. 19 U.S.C.A. § 1516a(b)(1)(A) (West 1980).

111. *Id.* § 1516a(b)(1)(B).

112. *Id.* § 1516a(b)(2)(A).

113. *Id.* § 1516a(b)(2)(B).

114. SENATE REPORT, *supra* note 59, at 252.

115. *See* Subsidies Code, *supra* note 2, arts. 3, 4(5), H.R. Doc. No. 153, at 266-67, 268-69.

begin consultations.[116] Should Commerce accept an agreement with the subsidizing government or foreign exporters: (1) to eliminate or offset the subsidy completely on exports to the United States; (2) to cease exports of the bounty-fed product to the United States; or (3) in "extraordinary circumstances" to "eliminate completely the injurious effect" of the subsidized exports to the United States, it may suspend the proceeding.[117]

Such agreements appear especially likely when the complaint involves an export subsidy prohibited under the Code. In such a case, the Track II procedure places the burden on the subsidizing country to show an absence of injury.[118] Since that burden will generally be very difficult to meet, the offending country may simply agree to eliminate the subsidy on exports to the United States. In any event, the pressure under the Code procedure, if it is invoked, will be in that direction.

This overview underscores that the new countervailing duty law is distinctly more hostile to subsidized imports than is the escape clause to nonsubsidized trade. The next two sections examine whether such hostility to bounty-fed imports is consistent with liberal trade policy. The analysis considers separately the justification for countervailing against domestic and export subsidies.

B. COUNTERVAILING AGAINST DOMESTIC SUBSIDIES

The argument for countervailing against domestic subsidies rests upon two propositions: first, that foreign production subsidies are distortive[119] (inefficient); and second, that it is unfair to force American producers to compete with foreign firms propped up by subsidies.[120] The distortion argument is less persuasive than the fairness point, even without considering why an importing country should care about distortions abroad.[121]

One cannot assume, *a priori,* that a domestic subsidy is inefficient or distortive. First, as discussed above, a domestic subsidy may be precisely the policy needed to correct a prior market distortion.[122] For example, if

116. *Id.* art. 3(1), H.R. Doc. No. 153, at 266.

117. 19 U.S.C.A. § 1671c (West 1980).

118. *See* notes 36-39 *supra* and accompanying text.

119. *See, e.g.,* SENATE REPORT, *supra* note 59, at 37; H. MALMGREN, *supra* note 17, at 28-29.

120. *See, e.g.,* W. WALKER, *supra* note 17, at 10-11; *Multilateral Trade Negotiations, Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means,* 96th Cong., 1st Sess. 31-33 (1979) (statement of the Ad Hoc Subsidies Coalition); Walters & Monsen, *State-Owned Business Abroad: New Competitive Threat,* 57 HARV. BUS. REV. 160, 164-67 (March-Apr. 1979).

121. For the effects of foreign distortions on an importing country, see notes 133-39 *infra* and accompanying text.

122. *See* notes 25-27 *supra* and accompanying text.

wage rates are artificially high because of the monopoly power of unions, a wage subsidy would correct the distortion and improve efficiency. Second, a domestic subsidy is often an appropriate government tool for pursuing national socio-economic goals (collective goods). Pursuit of such goals may well be the *raison d'etre* of government.[123]

Suppose Utopia grants two kinds of domestic subsidy: one to research and development, and a second to any industry locating in a depressed region. The first is intended to insure that Utopia maintains a high level of technological innovation, because, among other reasons, Utopia wants to produce the products of the modern world. The second is aimed at decentralizing industry to less advanced regions and at redistributing wealth to the populace of those regions. Such goals are not presumptively "ineficent" or "distortive," if Utopia as a nation desires them. The subsidy constitutes, in effect, collective payment for a collective good.

Suppose several firms manufacturing CB radios locate in the appropriate Utopian region and benefit from both kinds of subsidy. Why should the United States impose a countervailing duty upon CB's from Utopia at the point of second-level injury to the American CB industry? First-level injury occurs when short-term injury to the American industry outweighs short-term benefits to American consumers. At this point an escape clause remedy is available, at the discretion of the President. There is no apparent increased cost to the United States inherent in the Utopian subsidies that would justify trade barriers at only second-level injury. Justification for imposing countervailing duties against the subsidized products does not lie in notions of economic inefficiency or distortion.

The strongest argument for imposing such restrictions against domestic subsidies rests on claims of fairness. There are two strands to the argument. One concerns a government-to-government balance of interests; the other concerns fairness issues at the private firm level.

All GATT countries share similar socio-economic goals, often pursued through subsidy programs. All governments seek to avoid excessive unemployment and economic dislocation, to promote technological innovation and enhanced productivity, to aid, at least temporarily, ailing industries, to boost depressed regions or to prevent vulnerable regions from becoming depressed. Pursuit of such goals through production subsidies in country *A*, however, may interfere with or raise the cost of achieving the same goals in country *B*.

Problems of inter-governmental policy conflicts of this sort demand some framework or mechanism of harmonization. The European Commu-

123. *See generally* C. KINDLEBERGER, GOVERNMENT AND INTERNATIONAL TRADE (1978).

nity has approached the problem of conflicting domestic aids by seeking first, transparency in government aids so their effects can be measured; second, agreed quantitative limits on aid of different kinds; and finally, a program for gradual reduction of aids that are excessive.[124] Similar agreements may ultimately be needed at the GATT level. Until such agreements are reached, however, the ad hoc approach of the government-to-government complaint procedure in Track II of the Code seems a reasonable alternative. When the complaint involves a domestic subsidy, one touchstone under Track II will be whether the subsidized imports are causing "material injury" (not necessarily the weak second-level test under the 1979 Act) to the importing country's industry. A second may be whether the subsidy "adversely affect[s] the conditions of normal competition."[125] The Committee of Signatories may find it convenient to develop this last concept to increase the flexibility of the dispute settlement process. Similar concepts play a role in both the European Community's and the European Free Trade Association's mechanisms for settlement of disputes over domestic subsidies.[126]

None of this, however, is an argument for automatic countervailing duties whenever production subsidies abroad cause second-level injury in the United States. Not all foreign production subsidies are irresponsible or increase significantly the cost of pursuing domestic American policies. An important feature of the Track II procedure is the government's discretion as to when and how hard to press a claim. In contrast, countervailing duties under the 1979 law are triggered automatically at second-level injury. Conflicting government policies extraneous to the countervailing duty law itself do not explain this result.

A further claim for the countervailing duty regime rests upon notions of inequality and fair play at the private firm level. Domestic producers argue that it is unfair for them to compete against an entire foreign government or against foreign competitors propped up by subsidies. The United

124. *See generally* COMM'N OF THE EUROPEAN COMMUNITIES, FIRST REPORT ON COMPETITION POLICY (1972); SECOND REPORT (1973); THIRD REPORT (1974); FOURTH REPORT (1975); FIFTH REPORT (1976); SIXTH REPORT (1977); SEVENTH REPORT (1978); EIGHTH REPORT (1979) [hereinafter cited as COMM'N REPORTS]; H. MALMGREN, *supra* note 17, at 13-15.

125. Subsidies Code, *supra* note 2, art. 11(2), H.R. Doc. No. 153, at 280-81.

126. In the European Community, the equivalent concept is "aid . . . which distorts . . . competition." *See* Treaty Establishing the European Economic Community, art. 92, *opened for signature* March 25, 1957, 298 U.N.T.S. 11, 51. *See generally* COMM'N REPORTS, *supra* note 124; H. MALMGREN, *supra* note 17, at 13-15. In the European Free Trade Association, the concept is "frustration of benefits." *See* Convention Establishing the European Free Trade Association, art. 16(1), January 4, 1960, 370 U.N.T.S. 5, 16; H. MALMGREN, *supra* note 17, at 11-13. *See generally* R. MIDDLETON, NEGOTIATING ON NON-TARIFF DISTORTIONS OF TRADE (1975).

States requires its own producers to comply with the competitive market model—survival of the most efficient—and favors free trade as an extension of that principle. On the other hand, the expanded market, absent countervailing duty laws, brings in competitors who play by different rules and who are not subject to the discipline of the market. Common sense notions of fair play seem violated.

There are two primary weaknesses, however, in this fairness argument. First, if one includes the effects of all government action, not just isolated subsidies, the balance of fairness to any group of producers, domestic or foreign, becomes quite unclear or indeterminate.[127] Government action both at home and abroad benefits industry in innumerable ways: through public roads and education, sound fiscal and monetary management, maintenance of law and order, and so on. As these actions filter through, no one can say which firms derive a relative net benefit or burden. Of course, government policies with very generalized effects on an economy could easily be merged into the general background of factor endowments which condition all national output and thus, for trade purposes, ignored.[128] The 1979 Act in fact excludes from the subsidy definition government benefits with widespread economic effects.[129] Selective subsidies with visible, particularized effects, on the other hand, might be thought to raise the fairness problem more acutely.

Even accepting such an imprecise notion of inequality, however, there is a second weakness in the argument. Equalizing the terms of competitive rivalry between American and foreign firms imposes costs on American consumers. That is one of the clearest truths to emerge from the theory of comparative advantage. Any attempt to neutralize through a tariff either a "natural" advantage abroad, such as cheap labor, or a so-called "unnatural" advantage, such as a government subsidy, is not neutral in its effect on the American consumer. Even a competing subsidy to the American producer, although theoretically less costly than a tariff, would still distort production and impose an indirect cost on the consumer.

A staunch free trader would urge an importing country to pursue its own socio-economic goals, including redistribution of income (from consumers to producers, for example) through internal tax, subsidy, fiscal,

127. For a similar argument supporting the view that countervailing duties are without justification, see Schwartz, *supra* note 20, at 307.

128. *See* Cooper, *The Nexus Among Foreign Trade, Investment, and Balance-of-Payments Adjustment,* in II UNITED STATES INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD 515, 522-23 (U.S. Comm'n on Int'l Trade and Investment Policy, ed. 1971).

129. 19 U.S.C.A. § 1677(5)(B) (West 1980).

monetary, and other policies chosen *without regard to foreign subsidies.*[130] An importing country might want to limit injurious imports temporarily, but the *cause* of low prices on such imports should not influence the decision. In the long run, cheap imports increase the wealth of the importing nation, regardless of why they are cheap.

The clash between this argument and the anti-subsidy view is essentially a dispute over how much a country should pay for an imprecise notion of "fairness," which seems in part to require redistribution of income from consumers to producers because a foreign country, through its subsidy, has chosen a similar redistribution of income to its own producers. The weakness of such a fairness claim suggests that the 1979 countervailing duty law is weighted too heavily toward the "fairness" pole of the fairness-free trade continuum. The 1979 law is automatic; it provides no room for flexibility and executive discretion; it gives, in effect, permanent relief; and it is triggered at second-level injury. A different balance along that continuum would impose fewer costs on the consumer, without ignoring the welfare of producers and workers disadvantaged by imports.

Given the weakness of the fairness claim, one can make a strong argument for outright repeal of the countervailing duty law. Market disruption from imports would then be handled exclusively under the escape clause and adjustment assistance provisions, with no concern for the *cause* of low prices on imports. This would save the consumer not only the cost of excessive protectionism, but also the administrative cost of deciding whether imports have been subsidized and the causal consequences thereof—often complex issues requiring costly administrative determinations.

To give at least some recognition to the fairness claim of producers, one could argue for a more costly approach, but one stopping short of an inflexible countervailing duty law. This could involve a gentle modification of the escape clause. Once the ITC finds first-level injury under that clause, the President could be instructed, in the exercise of his discretion, to take into account whether the injurious imports are subsidized. An agency would, of course, need to report to the President whether a subsidy exists and the degree to which the subsidized imports are the source of the injury. Thus, some of the administrative cost of a countervailing duty law would be incurred. But provisions for elaborate judicial review would seem unnecessary. Presumably, the President could give more or less weight to the subsidy factor, depending upon the degree of causal nexus between the injury and subsidized imports. The President could also have discretion to impose duties only against the subsidized imports, but in that case presuma-

130. *Cf.* Schwartz, *supra* note 20, at 304-08 (arguing that no convincing case can be made for having a countervailing duty law).

bly only in the amount of the subsidy. To avoid abuse and to broaden the base of opinion controlling the decision whether to grant relief, Congress could retain its power under the current escape clause to override the President by adopting any contrary relief originally recommended by the ITC.

The discretionary solution just suggested seems an apt response to the ambiguity of a producer's fairness claim that imposes direct costs on innocent consumers. It also recognizes the potential for counter-reaction in the subsidizing country. The need for intergovernmental consultation and negotiation seems hardly less urgent here than when ordinary escape clause action is taken, although technically under the GATT rules the subsidizing country would have no automatic right of retaliation.[131] Moreover, a modified escape clause approach would emphasize injury to producers within the United States, not actions in a foreign country. Also, triggering relief only at first-level injury would preserve low prices to consumers until short-term injury to producers outweighs benefits to consumers—the point at which restricting trade enhances overall national welfare.[132]

One caveat should be raised. The logic of the proposals just outlined requires that the current standards of first-level injury be maintained. If a merger of countervailing and escape clause standards were politically feasible only in exchange for a diluted injury test, consumers on balance might gain nothing. The current dual level injury test seems preferable to a weaker test for all trade.

C. Countervailing Against Export Subsidies

The case against export subsidies differs from that against domestic subsidies, because the former are presumptively distortive and inefficient. Export subsidies misallocate resources in the producing country and misdis-

131. *Compare* GATT Art. VI (countervailing duties) *and* Subsidies Code, *supra* note 2, *with* GATT Art. XIX (escape clause). For a discussion of compensation and retaliation under the GATT escape clause, see J. Jackson, *supra* note 9, at 564-66.

132. This proposal differs somewhat from an earlier proposal offered by the author for countervailing against domestic subsidies. *See* Barceló, *supra* note 18, at 842-46. The major point of the earlier proposal—the need for an injury test—is now recognized in the 1979 law. The earlier proposal suggested a first-level test for degree of injury but a second-level causation link. This would have aligned the countervailing duty test with the weaker causation link applied for adjustment assistance (domestic subsidies to ailing firms). First, it seemed appropriate to authorize trade barriers against subsidized imports whenever competing subsidies in the United States were an authorized remedy. Second, it also seemed fairer to third country exporters, who plainly would prefer that subsidized imports be countered with countervailing duties rather than competing subsidies. On reflection, however, the argument for tariff-like protection seems persuasive only at the first-level point for both degree of injury and causal link to imports. Short of this point the government may provide adjustment assistance to individual firms who are more seriously injured than the industry as a whole. A Track II proceeding is also now available to protect the interests of third country exporters.

tribute the output between the domestic and foreign markets. They are not appropriate as corrections for prior market distortions—at least not internal market distortions—nor as tools for internal socio-economic goals. In short, they are inconsistent with comparative advantage and reduce global welfare.[133]

It follows that the GATT countries as a whole would be wealthier if all export subsidies were eliminated.[134] The welfare effect on individual countries is more complex, however, especially if only some, but not all, export subsidies are eliminated. Any country refusing to subsidize its exports will avoid distortions and inefficiencies and be better off. The effect on importing countries, however, is less clear.

A single country countervailing duty law will generally not improve the welfare of the importing country. It is true that the inefficiencies of foreign export subsidies may indirectly increase costs to an importing country. The misallocation of resources and misdistribution of output in the subsidizing country will cause higher prices in that country for some non-subsidized products (subsidy-disadvantaged goods).[135] The importing country might therefore pay more to import any of these products or third-country products incorporating them as components. Nevertheless, the importing country would also receive a cheaper price on the subsidized goods. The cost-benefit balance here would never be wholly determinable. If country *A* subsidized its exports only to country *B*, consumers in *B* would unambiguously benefit. They would substitute cheaper subsidized imports for more expensive subsidy-disadvantaged imports only if this improved their welfare. Normally, however, country *A* would subsidize exports to third countries as well. Thus, higher payments by country *B* for subsidy-disadvantaged imports would, in effect, partly underwrite the subsidized exports from *A* going to other countries.

The distortion-generated costs just identified are not, however, an explanation for the second-level injury test under the 1979 countervailing duty law. A countervailing duty will not eliminate those costs, because it will not prevent export subsidies on trade with third countries. Thus, inefficiencies will persist. Indeed, importing-country consumers will have the worst of both worlds: higher prices through added duties on the subsidized product, and higher prices on the subsidy-disadvantaged imports. A countervailing duty regime would contribute to increased efficiency only if the

133. *See* notes 17-24 *supra* and accompanying text.

134. *See* Barceló, *supra* note 18, at 794-801. The exceptions to this principle are discussed in *id.* at 801-35.

135. Higher costs in the subsidizing country will also prevail for products which incorporate the goods receiving an export subsidy, since its domestic price will be driven up.

threat of countervailing duties from several importing countries deterred the use of export subsidies altogether. A rule obligating all countries to countervail against export subsidies might seem to promise that result, but importing countries to whom cheap imports were a pure benefit would have a strong incentive not to take that obligation seriously.

Of the current Code rules, the Track II provisions are the most likely to improve efficiency by deterring export subsidies, especially when several countries join a complaint that concerns third-country markets. Recall that the subsidizing country would have the burden of showing no adverse effects to the complainants in those markets.[136] Even if the offending country removed the subsidy only on trade with certain third countries, and not completely, a complaining country would gain. Its more efficient export trade with the affected third countries would improve at no cost to its consumers.

If a country invokes Track II to attack an export subsidy on its imports, instead of on third-country trade, the analysis is identical to that for countervailing duties. Under either Track II or a countervailing duty proceeding, the subsidizing country is likely to remove the subsidy, but only on the complainant's import trade. In fact the new countervailing duty law especially encourages this result by allowing termination of an investigation if the offending country agrees to drop the subsidy on exports to the United States.[137] The upshot of this, however, will merely be increased costs to the American consumer, not improved efficiency.

Thus, even in the case of export subsidies, avoidance of distortions is not a persuasive argument for a single-country countervailing duty law. On the other hand, the fairness argument, which had weak persuasive force in the context of domestic subsidies, might seem stronger when addressed to export subsidies, because they are more aggressive and outward-looking. This may be reflected in the hostility of the 1979 Act to export subsidies. Not only is the Act especially explicit in defining subsidies as all items on the prohibited Code list (all export subsidies), but it also invites a finding of at least "threat of material injury" if an export subsidy inconsistent with the Code is used.[138] There are no similar provisions for domestic subsidies.

The proposals advanced above for the merger of countervailing duty and escape clause relief are nevertheless sound, even in the case of export subsidies. If the fairness argument is weightier when dealing with export subsidies, it is essentially because of government-to-government considerations, not fairness claims of the private firm. On government-to-govern-

136. *See* note 37 *supra* and accompanying text.
137. *See* notes 115-18 *supra* and accompanying text.
138. 19 U.S.C.A. § 1677(7)(E)(i) (West 1980).

ment issues, Track II would be the appropriate remedy. Moreover, attempts to deter export subsidies and raise the welfare of all GATT countries also seem best left to a Track II complaint, particularly against loss of third-country markets.[139] Of course, if the United States were forced to retaliate under Track II, the consumer would again pay higher prices. But at least the negotiating objective would be the removal of subsidies which impose unambiguous costs on the United States, *i.e.,* foreign export subsidies which displace American shipments to third countries.

IV

ANTIDUMPING DUTIES

The 1979 Act has broadly harmonized the antidumping and countervailing duty laws. The President's reorganization plan has substituted the Commerce Department for the Treasury as the agency for determining dumping,[140] or sales at less than fair value, but the Act has not significantly changed the applicable concepts and standards. Technically, the new Act abolishes the Antidumping Act of 1921,[141] but it reenacts almost all of the prior law.[142] The ITC injury decision in a dumping case follows the same standards described above for a countervailing duty case.[143] The procedural pattern, including extensive judicial review,[144] is the same.

This author has previously argued that dumping (a private firm decision to charge less for export than for home market sales) is not unfair or undesirable unless the practice is predatory.[145] The earlier discussion did not address directly any fairness arguments of the sort just discussed concerning subsidies, because it is difficult to imagine a plausible claim that private firm differential pricing in response to different market conditions raises a serious issue of inequality or lack of fair play at either the government-to-government or private firm levels. Claims that dumping arises be-

139. This treatment of export subsidies under countervailing duty laws differs from that proposed by the author in an earlier article. *See* Barceló, *supra* note 18, at 799-801. The earlier article recommended prohibiting export subsidies and, as a deterrent to their use, requiring GATT signatories to countervail against them. The alternate proposal, on the assumption that the GATT countries would not agree to mandatory countervailing duties, was to authorize such action without an injury test. The objective was deterrence, not directly improved efficiency within the importing country. Now that Track II of the Code has been adopted, however, it seems more consistent with liberal trade policy to look to complaints of loss of market share in third countries as the major source of deterrence to export subsidies.

140. Reorg. Plan No. 3 of 1979, § 5, 44 Fed. Reg. 69,273 (1979).

141. Trade Agreements Act of 1979, Pub. L. No. 96-39, § 106, 93 Stat. 144.

142. *See* 19 U.S.C.A. §§ 1673-1673i, 1677-1677b (West 1980).

143. *Compare* 19 U.S.C.A. § 1673 (West 1980) (antidumping), *with* 19 U.S.C.A. § 1671(a) (West 1980) (countervailing duties). *See* notes 75-82 *supra* and accompanying text.

144. *See* 19 U.S.C.A. § 1516a (West 1980).

145. Barceló, *supra* note 79, at 64-65.

cause of government export subsidies are really discussions of the subsidy problem. Similarly, claims that dumping results from enhanced monopoly power of foreign firms brought on by protectionism abroad should really be concerned with the cause (protectionism) rather than the symptom (dumping).[146]

The earlier argument urged repeal of the antidumping law. It suggested that producers could rely instead on section 2 of the Sherman Act and the escape clause for protection against predatory dumping.[147] Alternatively, the article urged Congress to amend the antidumping law to incorporate an antitrust concept of "injury to competition"—instead of to competitors—similar to that applicable under the domestic Robinson-Patman Act.[148]

The changes in the antidumping law under the 1979 Act move in the opposite direction. Although the 1921 Antidumping Act, now repealed, was amenable to an antitrust interpretation, the 1979 Act is not. It adopts the weak second-level injury threshold and prescribes an ordinary business injury test, that is, loss of sales, falling prices, loss of profits, and so on.[149] It rejects an "injury to competition" standard.

From a liberal trade standpoint, the Tokyo Round Antidumping Code[150] also amends the original 1967 Kennedy Round Code[151] in the wrong direction. The original Code required that dumping be the *principle* cause of material injury, entailing a weighing of the effects of dumping against the effects of all other causes of injury.[152] To conform to the weaker injury test under the Subsidies and Countervailing Duty Code, the new Antidumping Code eliminates the word "principle" and the "weighing of causes" concept.[153] Thus, a constraint on finding injury from dumping has been removed.

The antidumping law under the 1979 Act (and under the new Code) thus resembles a surrogate escape clause with a soft injury test and a streamlined, automatic remedy. As such it has a strong protectionist cast.

---

146. *Id.* at 76-77.
147. *Id.* at 66-67.
148. *Id.* at 67-69.
149. *See* 19 U.S.C.A. § 1677(7) (West 1980).
150. 1979 Antidumping Code, *supra* note 2, H.R. Doc. No. 153, at 311.
151. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, *done* June 30, 1967, 19 U.S.T. 4348, T.I.A.S. No. 6431 (effective July 1, 1968) [hereinafter cited as 1967 Antidumping Code]. The 1967 Antidumping Code is reprinted in 32 Fed. Reg. 14,962 (1967) and in 6 INT'L LEGAL MATERIALS 920 (1967).
152. 1967 Antidumping Code, *supra* note 151, art. 3(a), 19 U.S.T. at 4351, T.I.A.S. 6431, at 3.
153. 1979 Antidumping Code, *supra* note 2, art. 3(4), H.R. Doc. No. 153, at 315.

CONCLUSION

This discussion of subsidies, countervailing duties and antidumping has implicitly ranked the different parts of the new unfair trade law of the United States in the following order of decreasing consistency with liberal trade policy: (1) trade retaliation under amended section 301; (2) countervailing duty law under the 1979 Act; and (3) antidumping law under the new Act. To justify harsher treatment of unfair by comparison with fair trade, the analysis sought some concept of "extra cost" to the complaining country captured by the notion of wrongfulness underlying the unfair trade practice laws.

Subsidies unambiguously increase costs to a complaining country only when they displace that country's exports, not when they cause cheap imports. When a country loses part of its export trade, it must reduce its imports or purchase them at a higher price by exporting products on which its comparative advantage is lower. An export-displacing subsidy also offers no offsetting benefit to the complainant through cheaper prices on imports. Thus, opposition to such subsidies, the primary domain of the trade retaliation law (Track II of the Code), is sound.

When subsidies feed imports, the importing country will not be presumptively injured. This is so, even if a distortive export subsidy is involved. Here the importing country may indeed experience higher prices on subsidy-disadvantaged imports, those produced less efficiently because of distortive subsidies on other products. These costs, however, must be weighed against the lower price (or its equivalent) on the subsidized imports. The net cost-benefit outcome to the importing country will generally be ambiguous. Thus, harsh reaction to subsidized imports, the domain of countervailing duty law (Track I of the Code), cannot be convincingly grounded on avoidance of extra costs to the importing country owing to distortions or inefficiencies. The equity and fair play argument for countervailing duties raises different problems.

The fairness issue at one level involves clashing policies of different countries. In this context Track II and the trade retaliation provisions of the 1979 Act again seem to offer the soundest approach, one involving multilateral scrutiny and a framework for negotiated compromise. If an export subsidy is at issue, the subsidizing country bears the burden of proving the absence of adverse effects to the trade of complaining countries. The complainant bears the burden in the case of a domestic subsidy.

The fairness issue under the countervailing duty law, on the other hand, involves trade-offs between producers and consumers in the importing country. Fairness to the producer means higher costs to the consumer. The current tradeoff between those interests, reflected in the automaticity and soft injury test of the 1979 countervailing duty law, seems weighted toward protectionism. This article recommends either repealing the countervailing duty law or replacing it with a gently modified escape clause. The President could be required, in deciding whether to grant relief under the escape clause, to take into account the existence of subsidies and their contribution to the injury. This proposal would impose fewer costs upon the consumer while taking account of producer fairness claims when they are compelling.

The same automaticity and soft injury standards which seem out of place for countervailing duties inhere in the new antidumping law, without the justification of even a weak fairness argument for opposing dumping. Thus the antidumping law seems especially protectionist.

CORNELL INTERNATIONAL LAW JOURNAL

Volume 13 Summer 1980 Number 2

The *Journal* is pleased to announce the election of Officers for Volume 14, 1980-81: STEPHEN W. YALE-LOEHR, *Editor-in-Chief;* JAMES E. BRAZA, KEVIN W. GOERING, and MICHAEL S. SMITH, *Managing Editors;* JOSEPH A. CALABRESE, *Article & Book Review Editor;* MARY K. MULLENHOFF, ELIZABETH W. TAYLOR, and CHARLES R. WUNSCH, *Note & Comment Editors;* STEVEN M. FELDMAN and JEFFREY G. WRIGHT, *Research Editors;* JOSEPH C. WYDERKO, *Business Editor.*