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Antidumping and Countervailing Duties under the Trade Agreements Act of 1979: A Preliminary Analysis

In the spring of 1979, the parties of the Tokyo Round of Multilateral Trade Negotiations (MTN) reached agreement on various codes governing the conduct of international commerce, including codes for antidumping and countervailing duties. In July 1979, the United States Congress enacted legislation incorporating these agreements into United States law.¹ The main features of the new legislation, which took effect on January 1, 1980, include expedited investigation periods, adoption of the concept of "material injury" in both antidumping and countervailing duty cases, more opportunity for internal review and greater access to the courts. Although there are few major substantive changes from prior law, procedural differences are numerous and are likely to affect the administration of the laws in significant ways.

In the past, United States antidumping practice established in the Antidumping Act of 1921² differed in several respects from the practice in the General Agreement on Tariffs and Trade's (GATT) former International Antidumping Code. The code had been negotiated as an "Executive Agreement" which, unlike a treaty, does not take precedence over prior positive law.³

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¹Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (July 26, 1979) (hereinafter, the 1979 Act). The Commerce Department's extensive new Antidumping and Countervailing Duties regulations were not published until after this article was submitted to the printer. (Some final antidumping regulations will not be published until after a further comment period.) See 45 Fed. Reg. 4532-4552 (Jan. 22, 1980), (Countervailing) and 45 Fed. Reg. 8182-8208 (Feb. 6, 1980) (Antidumping). These regulations will be briefly analyzed in a further report in a later issue. For an overview of the MTN see, *The Tokyo Round, Its Meaning and Effect*, 9 GEORGIA J. OF INT'L & COMP. LAW 155-235 (1979).

²19 U.S.C. §§ 160-171 (hereinafter, the 1921 Act) repealed by the 1979 Act.

³In fact, Congress enacted the Renegotiation Amendments Act of 1968 (Pub. L. No. 90-634,

Some of the major differences between the GATT and United States practice involved:⁴

- a. differing requirements with respect to requisite injury to a domestic industry. The GATT required "material injury," while United States law did not;⁵
- b. differing concepts of "causality." The United States did not adopt the requirement that the sales at less than fair value (LTFV) be the "principal, major, or substantial cause of injury to domestic industry";⁶
- c. differing practices of retroactive assessment of dumping duties, *i.e.*, the United States withheld appraisal where only threatened injury was found,⁷ the GATT prohibited retroactive assessment of duties unless injury was found;
- d. the United States system failed to achieve simultaneous determinations of dumping and injury;⁸
- e. the United States used, at times, a market-segmentation approach to industry determination, under which certain regions could be considered to be a national market;⁹
- f. the United States disregarded, in certain cases, below cost sales in the home market. Japan and the European Commission (EC), for instance, took the position that such sales should not have been automatically excluded, since they might have been within the "ordinary course of trade" as contemplated by the GATT Code;¹⁰
- g. the United States rules regarding constructed value, in which minimum fixed percentages were set for allocable expenses and profits;¹¹ and

Title II, § 201, 82 Stat. 1345) which explicitly instructed federal agencies to adhere to the Code only insofar as such enforcement would be consistent with United States antidumping legislation.

⁴See Ch. 5, pp. 54-63, of the Report to the Congress by the General Accounting Office on "U.S. Administration of the Antidumping Act of 1921" (hereinafter, GAO Report).

⁵For an example of an ITC injury determination see *Perchloroethylene from Belgium, France, and Italy*, 44 Fed. Reg. 26217, 26218 (May 4, 1979).

⁶*Id.* This United States practice apparently will not change. In the ITC's summary of its new regulations setting forth procedures for the conduct of injury investigations in antidumping and countervailing duty cases, the Commission stated that it "will continue its practice of requiring a causal relationship without weighing the causes." 44 Fed. Reg. 76458, 76460 (Dec. 26, 1979). The Regulation, 19 C.F.R. § 207.27, *id.* at 76465, makes this point in more detail.

⁷This is set forth in the 1921 Act, 19 U.S.C. § 160 (b).

⁸Determination of injury only after a finding of LTFV sales was required under the 1921 Act. See 19 U.S.C. § 160.

⁹See, *e.g.*, the ITC's decisions in *Carbon Steel Plate from Taiwan*, 44 Fed. Reg. 29734 (May 22, 1979); *Sugar from Belgium, France, and West Germany*, 44 Fed. Reg. 29992 (May 23, 1979); *Sugar from Canada*, 44 Fed. Reg. 32049 (June 4, 1979); and *Carbon Steel Plate from Poland*, 44 Fed. Reg. 37564 (June 27, 1979). This concept has been retained in the 1979 Act. See 19 U.S.C. § 1677 (4)(C).

¹⁰GAO Report at 59.

¹¹See 19 U.S.C. § 165.

- h. the reluctance by the United States Treasury Department to accept voluntary undertakings aimed at terminating antidumping investigations due to the possibility that such agreements violate United States antitrust laws.¹²

In general, various GATT contracting parties criticized the American system for exposing foreign exporters to costs greater than they would have incurred under GATT code legislation.¹³

The American system was also criticized by American producers who argued that the system's inherent delays severely weakened the impact of the antidumping sanctions. Domestic interests had experienced delays in duty assessment of up to as much as three-and-a-half years¹⁴ and, they contended that delays in reaching even preliminary determinations permitted foreign exporters to engage in "free" or unsanctioned dumping for considerable periods of time.¹⁵ In particular, representatives of the steel, electronics and other industries argued that the 1921 Act did not adequately protect their interests.¹⁶ On the other hand, United States importers complained that the length of antidumping investigations created uncertainty and market instability.¹⁷ Unifying both segments of the American business community was a desire for more expeditious antidumping proceedings.

The antidumping and (as discussed below) countervailing duty legislation enacted in the Trade Agreements Act of 1979 reflect such foreign and domestic criticism; United States interests were recognized in a statute calling for more expeditious proceedings, while foreign criticism was recognized by the acceptance in United States law of the GATT concept of "material injury." The new act went into effect on January 1, 1980. It is too early to tell whether the changes in United States antidumping practice will be as significant as the legislation suggests. Indeed, even "material injury" is defined in a manner similar to that followed under prior practice. And, although it appears that

¹²Senior officials of the Justice Department's Antitrust Division have spoken on the interaction between antitrust and international trade. See, e.g., Assistant Attorney General Shenefield's speech entitled, Competition Advocacy and International Trade: A New Role for Antitrust Policy (May 26, 1978); Policy Planning Director Davidow's speech entitled, U.S. Competition Laws, Non-Tariff Barriers to Trade and the Role of the Antitrust Division (Oct. 19, 1979); Foreign Commerce Chief Rosenthal's speech entitled, Antitrust Risks in Abusing the Import Relief Laws (Nov. 9, 1979); and Trade Policy Director Sierck's speech entitled, The Antitrust Division's Activities in the Area of International Trade (Sept. 6, 1979).

¹³For recent general reviews of antidumping practice in the European Community, see Van Bael, *Ten Years of EEC Antidumping Enforcement*, 13 J. WORLD TRADE LAW (No. 5), 395-408 (Sept.-Oct. 1979) and De Smedt, *The EEC Antidumping Policy: New Developments*, *infra*, p. 223. The important Japanese Roller Bearing cases were decided by the European Court of Justice in March 1979. The judgments of the Court, and the report of the Advocate General, are printed in XXV Comm. Mkt. L. R. (Parts 190-191), June 12 and 19, 1979 (London).

¹⁴GAO Report at 10.

¹⁵According to the GAO Report, the average period of "free" dumping was about 10 months. *Id.* at 9. This was inherent in the statutory timetable.

¹⁶*Id.* at 10.

¹⁷*Id.* at 9.

the proceedings will be speedier under the new scheme, in fact, with the more extensive internal administrative review of decisions and increased access to the courts, the opposite may result.

Under the 1979 Act, an investigation of possible dumping by foreign exporters may be initiated either by the "Administering Authority"¹⁸ or by petition of an "interested party."¹⁹ Historically, self-initiated investigations by the Treasury have been rare,²⁰ and the steel "trigger price mechanism" (TPM) represents Treasury's one systematic attempt to initiate such investigations.²¹

In prior practice, it was necessary only to file a petition with the United States Customs Service, an arm of the Treasury Department.²² Under the 1979 Act, petitions by interested parties must be filed concurrently with the "Authority" and with the International Trade Commission (ITC), which is responsible for injury determinations.

In antidumping petitions under the 1979 Act it must be alleged that (1) imports are likely to be sold in the United States at less than fair value (LTFV)²³ and (2) "by reason of" such imports a domestic industry is "materially injured," is "threatened with material injury,"²⁴ or its establishment is being "materially retarded."²⁵ Within twenty days, the "Authority" must

¹⁸The legislation repeatedly refers to the "Administering Authority," or "Authority." Section 771(1) of the 1979 Act, 19 U.S.C. § 1677(1), defines this to mean the "Secretary of the Treasury, or any other officer of the United States to whom the responsibility for carrying out the duties of the administering authority under this title are transferred by law."

The President has reorganized the United States trade bureaucracy, with enforcement responsibility for antidumping and countervailing duty legislation shifted from the Treasury Department to the Commerce Department. Trade policy coordination and trade negotiation are consolidated in the White House Office of the U.S. Trade Representative, formerly the Special Trade Negotiations Representative. Reorganization Plan No. 3 of 1979, 44 Fed. Reg. 69273 (Dec. 3, 1979). By Exec. Order No. 12188 of January 2, 1980, the relevant portions of the Reorganization Plan took effect that date. 45 Fed. Reg. 989, 993 (Jan. 4, 1980).

¹⁹19 U.S.C. § 1673a.

²⁰REPORT OF THE HOUSE COMMITTEE ON WAYS AND MEANS TO ACCOMPANY H.R. 4537, H.R. REP. NO. 96-317, 96th Cong. 1st Sess. 59 (1979) (hereinafter, HOUSE REPORT).

²¹The trigger price mechanism was a response to complaints of United States steelmakers about a virtual deluge of allegedly dumped steel exports to the United States. Under the trigger price system, instituted in 1978, comparison prices are based on information obtained from the world's most efficient producer of steel, Japan. Imports of steel below these prices trigger consideration as to whether a dumping investigation is warranted. GAO Report at 20. In *Davis Walker Corp. v. Blumenthal*, 460 F. Supp. 283 (D.D.C. 1978), the TPM was upheld against a challenge that it violated the 1921 Act and the Administrative Procedure Act, 5 U.S.C. §§ 553, 706.

²²As indicated in note 1 *supra*, the Commerce Department's new antidumping and countervailing duties regulations will be analyzed in the next issue.

²³Save for the "material injury" provision of the new act, the substantive provisions of the 1921 Act remain in the new legislation.

²⁴19 U.S.C. § 1673. One United States industry lobbied heavily for inclusion of the *threat* of material injury test, due to its alleged inability to prove actual injury with respect to allegedly dumped imports. See Samuelson, *The New Trade Bill—At Last, a Carter Victory*, 11 NAT'L J. 1117 (July 7, 1979) (hereinafter, NATIONAL JOURNAL).

²⁵The petitioner must only allege such elements from information that is "reasonably available." 19 U.S.C. § 1673a(c)(1). The petitioner will be expected, however, to use reasonable

determine whether sufficient facts have been alleged to commence an investigation (compared with the thirty days allowed under the old law).²⁶

The "material injury" test may not be the defensive tool the exporting interests sought, for in accepting "material injury," Congress defined it under the new legislation as "not inconsequential, immaterial or unimportant."²⁷ Section 771(7)(B) of the act, 19 U.S.C. § 1677(7)(B), outlines factors that the ITC is to consider, *e.g.*, the volume of imports of the subject merchandise, the effect of those imports on United States domestic prices for like products, and the impact of such imports on domestic producers of like products. Thus in its implementing regulations, the ITC discussed its standard for injury determination, stating that the factors newly specified in the 1979 Act "provide no basis for changing the causality relationships which must be found to exist under existing law."²⁸ Thus in one industry a relatively small volume of imports might have a significant impact upon the market, while in another the effect might be negligible. Price may be the crucial factor for the sales elasticity of one product, while for another product, the size of a dumping margin may have a far less dramatic impact.²⁹

The definition of "material injury" as "not inconsequential, immaterial, or unimportant" has reportedly concerned both importers and some EC interests, which would have preferred the commonly accepted international definition of "important, substantial and significant." Originally, the Senate Finance Committee proposed that the qualifier "material" be omitted from the definition of injury, but European interests, among others, success-

efforts to collect information from public and industry sources. President Carter's STATEMENT OF ADMINISTRATIVE ACTION TO IMPLEMENT THE TRADE AGREEMENTS, H.R. DOC. NO. 96-153, PART II, 96th Cong., 1st Sess. (July 19, 1979) *printed in* DAILY REPORT FOR EXECUTIVES (BNA) 9 (July 5, 1979) (hereinafter, STATEMENT OF ADMINISTRATIVE ACTION).

²⁶Shortened timetables appear throughout the 1979 Act.

²⁷19 U.S.C. § 1677(7)(A). Under the Trade Act of 1974, "injury" was defined by the Senate Finance Committee to mean more than "trifling immaterial, insignificant or inconsequential" impact. S. REP. NO. 93-1298, 4 U.S. CODE CONG. & AD. NEWS (1974) at 7317. Whether the injury test will differ in the new "material injury" formulation will depend in large measure on how the ITC interprets the new legislation in particular cases.

²⁸44 Fed. Reg. 76458, 76465, (Dec. 26, 1979); *see also* 19 C.F.R. § 207.27, *id.* at 76473. Article 3(d) of the Antidumping Code agreed to in the Tokyo Round indicates that before a dumping finding is appropriate, injuries caused by "other factors" must not be attributed to the dumped imports. Examples of such "other factors" include volume and prices of imports not sold at dumping prices, contractions in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry. The United States legislation has not incorporated these concepts, and as indicated, the International Trade Commission in its new regulations has stated its intention to continue prior United States practice. On the other hand, in actual cases, the ITC has been prepared to look to the existence of such "other factors." In *TITANIUM DIOXIDE FROM BELGIUM, FRANCE, THE UNITED KINGDOM, AND THE FEDERAL REPUBLIC OF GERMANY*, USITC Pub. 1009 (Nov. 1979), the Commission found "no injury" despite not insignificant LTFV margins of several producers; the United States market was dominated substantially by a single producer that had a significant depressant effect on domestic prices and much of the rise in imports was due to the shift of another American producer from domestic to EC production. (The author acted as counsel to certain British and French producers.)

²⁹STATEMENT OF ADMINISTRATIVE ACTION at 14.

fully argued for its inclusion. In the end, however, Congress compromised by defining "materiality" to mean "not inconsequential, immaterial, or unimportant." This language apparently was intended to reassure domestic United States producing interests, and to let the International Trade Commission find a workable definition on a flexible, case-by-case basis. How the ITC will accommodate both the "protectionists" and the "free traders" remains to be seen.³⁰

In general, the definition of "domestic industry" under the 1979 Act is the same as before.³¹ The 1979 Act defines it as those domestic producers "whose collective output of the like product constitutes a major proportion of the total domestic production of that product."³²

However, in determining injury, the ITC may divide the United States into two or more regional markets for a given product, in effect treating each such regional market's producers as a separate industry.³³ If the producers in that market sell all or almost all of their like products within the same market and the demand for such products in the market is not substantially fulfilled by producers outside this region and the dumped imports are concentrated in that market, then the ITC may find there is material injury, the threat thereof, or material retardation even absent injury to the entire domestic industry.³⁴

Importantly, the "regional market" concept does not apply to assessing duties once regional injury is found. In the event regional harm were identified, antidumping duties would not be limited to points of entry within the regional market. The United States Constitution requires that all duties be uniformly applied throughout the United States.³⁵

In a departure from current law, the 1979 Act requires the ITC to play an early role and to determine, within forty-five days of either the date on which the petition was filed or the date on which the "Authority" initiates an investigation, whether there is a reasonable indication of material injury, threat of material injury, or potential material retardation of the establishment of a domestic industry.³⁶ A negative finding by the ITC would terminate the in-

³⁰See NAT'L J., note 24 *supra*, at 1119.

³¹HOUSE REPORT at 73. See also REPORT OF THE SENATE COMMITTEE ON FINANCE ON H.R. 4537, S. REP. No. 96-249, 96th Cong., 1st Sess. 18 (1979) (hereinafter, SENATE REPORT). In its new regulations the ITC does not define the term.

³²19 U.S.C. § 1677(4)(A).

³³19 U.S.C. § 1677(4)(C). The concepts of relevant product and geographic market are well known in United States antitrust law and under both articles 85 and 86 of the Rome Treaty.

³⁴Concentration may be found to exist if there is a clearly higher ratio of imports to consumption in that market relative to the ratio of such imports to consumption in the remaining United States market. STATEMENT OF ADMINISTRATIVE ACTION at 13.

³⁵U.S. CONST. art I, § 8, cl. 1. See also *Imbert Imports, Inc. v. United States*, 475 F.2d 1189, 1192 (C.C.P.A. 1973).

³⁶19 U.S.C. § 1673b(a).

vestigation.³⁷ This is a significant reform, for a "no injury" result will spare both the domestic and exporting interests of lengthy and expensive LTFV investigations where no injury flowed from the imports in any event. On the other hand, it will place all parties under considerable time pressure to retain counsel and possibly other experts, and to investigate, prepare and present an injury case. For respondents, who normally would lack notice of a proceeding before the actual filing and who must anticipate international travel for consultation with counsel, this burden may be quite serious.

Under the 1921 Act, as amended, antidumping petitions were initially referred to the ITC for a preliminary injury hearing only if the Secretary concluded that there was a substantial doubt about injury; then the ITC had to determine within thirty days whether there was such a reasonable indication of injury. Without such an indication, the investigation would be terminated. In practice, however, the ITC had conducted its "thirty-day hearings" much as a "summary judgment" motion might be handled in civil litigation. Where the Commission, in the double negative, was "unable to find that there is no reasonable indication" of injury, the investigation would proceed.³⁸ Following a "fair value" investigation by the Customs Service, a finding of sales at "less than fair value" would cause appraisement on the goods to be withheld for ninety days pending a further ITC "injury" hearing. The effect of withholding (with the resulting uncertainty about ultimate duties) often was to drive the imports out of the market, because the importer could not risk liability for eventual dumping duties. Yet no injury finding would have been made.

The provision for automatic referral in the 1979 Act was intended to reduce this exposure. The House Ways and Means Committee explained that "[t]he purpose of the new provision is to make U.S. law more clearly consistent with the international agreement which permits the imposition of provisional measures . . . only after an affirmative preliminary determination has been made that there are sales at less than fair value and that sufficient evidence of material injury has been presented."³⁹ Whether the new procedure will in fact give different results is uncertain, but the ITC's new regulations make it clear that the function of a preliminary ITC investigation is to determine whether there is a "reasonable indication of injury." The removal of the double negative construction (inability to find the absence of a reasonable indication of injury) may affect the result, but it seems more likely that such semantic subtleties will be lost in the pressure of the ITC's timetable.

³⁷19 U.S.C. § 1673b(a)(2).

³⁸*See, e.g.,* TITANIUM DIOXIDE FROM BELGIUM, FRANCE, THE UNITED KINGDOM AND THE FEDERAL REPUBLIC OF GERMANY, USITC Pub. 930 (Nov. 1978). In a preliminary injury hearing following a Treasury Department "substantial doubt of injury" referral, the ITC decided, by a 3-2 vote, that it was "unable to find no reasonable indication of injury." Following a subsequent full investigation and LTFV findings by the Treasury Department, the ITC held another injury hearing and, by a 4-1 vote of the same Commissioners, decided that there had been no injury or threat of injury by reason of the challenged imports. USITC Pub. 1009 (Nov. 1979).

³⁹HOUSE REPORT at 60-61.

A further reason for skepticism is that preliminary ITC injury determinations are to be made, in practice, by the ITC's Director of Operations rather than by the Commission itself, although the Commission has retained a residual power to decide such questions.⁴⁰ But the demands on its own time make frequent intervention unlikely, and it seems equally unlikely that the staff often would recommend "no reasonable indication of injury," except in particularly weak cases. To do so would be to attract opposition to a single official who is not well-positioned to defend himself. Thus the prospect in most cases is for a two-stage "injury" proceeding, at only the second stage of which the ITC Commissioners are likely to devote any personal attention to the issue. Yet a respondent cannot prudently ignore the preliminary injury hearing, for to do so would permit the petitioner effectively to control the record at an important stage. Thus the new act may bring more, rather than less, litigation, particularly on injury issues.⁴¹

Within 160 days of the initiation of an investigation or of the filing of a petition, but subsequent to a preliminary finding of injury by the ITC, the "Authority" must determine "whether there is a reasonable basis to believe or suspect" that goods have been sold at less than fair value.⁴² In "extraordinarily complicated cases" this period may be extended to two hundred ten days.⁴³ If both parties waive the lengthy process of pricing data verification by Customs Service attachés based in the American Embassy in the producer's country, and if the "Authority" has sufficient information upon which to base the preliminary determination, a "fair value" determination can — indeed, "shall" — be made within ninety days after the commencement of an investigation.⁴⁴ There is an incentive for the petitioning domestic interest to advance the timetable — and arguably obtain more prompt substantive relief — by waiving verification. But field verification of foreign price data was an important aspect of the 1921 Act's administration, and it remains to be seen how willing domestic interests will be to eliminate it in particular cases.

⁴⁰19 C.F.R. §§ 207.16 and 207.17, 44 Fed. Reg. 76471 (Dec. 26, 1979). In its summary, the Commission stated that it "may choose to accept or reject . . . [the Director's] recommendation in whole or in part." *Id.* at 76463.

⁴¹In the first preliminary injury hearing under the new act, the Justice Department filed a statement contending that if allegedly weak cases "are permitted to continue beyond a preliminary stage, the result may invite frivolous complaints that expose importers to the unnecessary burden of substantial litigation expense, uncertainty, the imposition of estimated dumping duties and other collateral costs." Rail Passenger Cars and Parts from Italy and Japan, ITC Nos. 731-TA-5-6, (Statement of the United States Department of Justice (January 29, 1980) at 5).

⁴²19 U.S.C. § 1673b(b)(1).

⁴³19 U.S.C. § 1673b(c). This would reduce the prior Treasury/Customs practice of granting "complicated case" status and thereby extending the period of investigation from 6 to 9 months. The Customs Service often informally solicited applications for such extensions to accommodate its own workload. The new law apparently is intended to restrict this, but whether it can do so is questionable.

⁴⁴19 U.S.C. § 1673b(b)(2).

After an affirmative preliminary determination by the "Authority," it must suspend the liquidation of all entries of merchandise that either are entered, or withdrawn from warehouses, for use on or after publication of notice of such a determination. In addition, a "cash deposit, bond, or other security, as . . . [the "Authority"] deems appropriate," must be posted equal to the estimated margin of dumping.⁴⁵ The House Ways and Means Committee stated in its report that it understood that the "Authority" intended only to require cash deposits when other forms of security would not adequately protect the revenue. The Committee agreed with this practice as a means of alleviating the potential burden of cash deposits on importers.

The 1921 Act nominally provided for retroactive application of dumping duties for a period of four months prior to the initiation of proceedings.⁴⁶ In practice, this power was rarely, if ever, used and no real risk of duties arose until the effective date of any withholding of appraisement on the imported goods.⁴⁷ Under the 1979 Act, if "critical circumstances" are alleged by the petitioner, the "Authority" must determine whether there is a reasonable basis to believe that there is a history of dumping of the merchandise in the United States *or elsewhere*, or whether the person on whose behalf the merchandise was imported knew or should have known that the exporter was selling it at LTFV. In either case, the "Authority" is to determine whether there have been "massive imports" of the class or kind of subject merchandise over a "relatively short period" of time. If the "Authority" makes an affirmative finding of "critical circumstances" arising from such short-term "massive imports," suspension of liquidation, *i.e.*, withholding of appraisement, shall apply retroactively to ninety days *before* the date on which it was first ordered.⁴⁸

In the absence of a negative finding, *i.e.*, a finding of no LTFV sales, the "Authority" may end an investigation after the first petition is withdrawn⁴⁹ unless this would be contrary to the public interest.⁵⁰ The ITC similarly may

⁴⁵*Id.*

⁴⁶19 U.S.C. § 161(a).

⁴⁷See HOUSE REPORT at 63. Indeed, Customs officials had been willing informally to advise counsel for importing interests in particular cases that their clients did not have any practical exposure to dumping duties prior to withholding. This important assurance allowed a company some security in its market planning.

⁴⁸19 U.S.C. § 1673b(e).

⁴⁹19 U.S.C. § 1673c(a).

⁵⁰19 U.S.C. § 1673c(d)(1)(A); STATEMENT OF ADMINISTRATIVE ACTION at 10. In its comments on proposed Customs regulation governing termination, the Justice Department's Antitrust Division argued that the "Authority" should not agree to terminate an investigation without an evaluation of the possible anticompetitive effects of such action. Citing a line of Supreme Court cases, the most recent of which was *Gulf States Utilities Co. v. Federal Power Commission*, 411 U.S. 747, 759 (1973), the Division argued that a "public interest" standard encompasses "both the broad purposes of the act and the fundamental national economic policy expressed in the antitrust laws." Comments of the Department of Justice, Dec. 14, 1979 at 25 (hereinafter, Comments). The Department filed similar comments on the proposed countervailing duty regulations. For general expressions of Justice Department views, see note 12 *supra*.

suspend an investigation, but only after the "Authority" has made a preliminary determination of no sales at LTFV³¹ under sections 703(b) or 733(b) of the act, 19 U.S.C. §§ 1671b(b) or 1673b(b) respectively.

The 1979 legislation enacted significant changes concerning the suspension of an investigation based on exporter agreements.³² The 1979 Act permits the "Authority," at the time of or subsequent to its preliminary determination, to accept an agreement from the exporters who account for "substantially all of the imports of that merchandise"³³ under which the exporters agree either:

1. to cease exports of the subject merchandise to the United States within six months of the investigation's suspension,³⁴ or
2. to alter their prices to completely eliminate the dumping margin.³⁵

In "extraordinary circumstances," *i.e.*, "circumstances in which suspension of an investigation will be more beneficial to the domestic industry than continuation of the investigation, and [in which] the investigation is complex,"³⁶ the "Authority" may accept a price agreement that completely eliminates the injurious effect of the allegedly dumped imports, while not completely eliminating the price margin. The agreement, however, must provide that the price level of domestic products will not be undercut by such imports.³⁷

No such agreement may be accepted by the "Authority" unless it is satisfied that suspension of the investigation is in the "public interest"³⁸ and that "effective monitoring of the agreement by the United States is practicable."³⁹ To suspend, the "Authority" must consult with the petitioning party and notify all parties at least thirty days prior to the suspension; they may

³¹See 19 C.F.R. § 207.40, 44 Fed. Reg. 76474 (Dec. 26, 1979).

³²19 U.S.C. § 1673c.

³³The House Ways and Means Committee defined this to mean exporters accounting for "at least 85 percent of the imports during the most recent representative period. This is not a threshold requirement which need only be met as a precondition to acceptance of the agreement. The validity of the agreement depends on the continuous fulfillment of this requirement." HOUSE REPORT at 64.

³⁴19 U.S.C. § 1673c(b)(1). Section 734(d)(2) of the act, 19 U.S.C. § 1673c(d)(2), requires that any agreement providing for the cessation of exports must contain an "anti-surge" provision ensuring that the quantity of merchandise entered during the period provided for cessation does not exceed the quantity exported during the most recent representative period.

³⁵19 U.S.C. § 1673c(b)(2).

³⁶19 U.S.C. § 1673c(c)(2)(A). "For purposes of this provision, a case may be deemed 'complex' because there are a large number of transactions to be investigated or claims for adjustments to be considered, the issues raised are novel, or a large number of firms are involved." HOUSE REPORT at 65.

³⁷19 U.S.C. § 1673c(c)(1)(A)-(B). It must also provide a minimum price revision for the addition of each exporter to the agreement so the amount by which the estimated foreign market value is greater than the United States price must not exceed 15 percent of the weighted average dumping margin for all sales of the exporter examined during the investigation. *Id.*

³⁸In its report, the House Ways and Means Committee deemed this requirement to be "over-riding." HOUSE REPORT at 65. In its comments on the proposed Antidumping Regulations, the Justice Department warned that suspensions should not become vehicles for exchange of price information in violation of section one of the Sherman Act. See, Comments, note 50 *supra*, at 29-31, citing *United States v. United States Gypsum Co.*, 438 U.S. 422, 441, n.16 (1978).

³⁹19 U.S.C. § 1673c(d)(1).

submit comments for the record. If the suspension is based upon an agreement seeking to eliminate the injury caused by the allegedly dumped merchandise, the ITC may also review a suspension of investigation to determine whether the agreement will “completely” eliminate such injurious effect.⁶⁰

Violation of an agreement serving as the basis for suspension of an investigation may lead to: (1) suspension of liquidation for unliquidated entries of merchandise; (2) resumption of investigation; or (3) issuance of an anti-dumping duty order.⁶¹ In addition, the intentional violator will be subject to civil penalty.⁶²

Within twenty days after notice of suspension, a petition for continuation of the investigation may be submitted by either (1) exporters accounting for a “significant proportion of exports” of the merchandise, or (2) an interested party that is a party to the investigation.⁶³ This notice, filed with both the ITC and the “Authority,” enables the investigation to continue until determination by both bodies. The ITC’s regulations make clear that this provision is mandatory.⁶⁴ If either body finally determined that there were no LTFV sales or that there was no material injury or likelihood thereof, the investigation would end. On the other hand, if the final determinations were affirmative as to both LTFV and material injuries, the suspension agreement would remain in force, but the “Authority” would not impose antidumping duties as long as the agreement continued to meet statutory requirements and the parties fulfilled their obligations under it.⁶⁵

The “Authority” must make its final determination whether merchandise is, or is likely to be, sold in the United States at LTFV within *seventy-five days* under the 1979 Act (compared with *three months* under prior law).⁶⁶ Prior to such determination all interested parties to the proceedings must have an opportunity to present their oral and written views. The *seventy-five-day* period may be extended to a maximum of *one hundred thirty-five days* if requested by persons responsible for a significant proportion of exports of the merchandise (where the “Authority’s” preliminary determination was affirmative) or by the petitioner (where the “Authority’s” preliminary determination was negative).⁶⁷

If “critical circumstances,” *i.e.*, short-term “massive imports,” had been earlier alleged, the “Authority” also must determine the elements necessary for the imposition of retroactive duties.⁶⁸

⁶⁰19 U.S.C. § 1673c(h)(2).

⁶¹19 U.S.C. § 1673c(i)(1).

⁶²19 U.S.C. § 1673c(i)(2).

⁶³19 U.S.C. § 1673c(g). The “significant portion of exports” presumably may be less than the amount supplied by the exporters who account for “substantially all” of the merchandise for purposes of the suspension agreement itself. Compare 19 U.S.C. § 1673c(e).

⁶⁴19 C.F.R. § 207.42, 44 Fed. Reg. 76475 (Dec. 26, 1979).

⁶⁵19 U.S.C. § 1673c(f)(3).

⁶⁶19 U.S.C. § 1673d(a)(1).

⁶⁷19 U.S.C. § 1673d(a)(2).

⁶⁸19 U.S.C. § 1673b(e). The “Authority” must find either (1) a history of dumping “in the United States or elsewhere” of the class or kind of merchandise or (2) knowledge of LTFV sales by the importer or its principal and “massive imports” over a “relatively short period.”

Under the 1921 Act, the ITC was required to make a final injury determination within three months after the Treasury Department's final determination of sales at LTFV; the 1979 Act gives the ITC *one hundred and twenty days* after the "Authority" makes an affirmative preliminary determination or *forty-five days* after an affirmative final determination. If the "Authority's" affirmative final determination (*i.e.*, of LTFV sales) followed a negative preliminary determination, then the ITC would be given seventy-five days in which to determine injury.⁶⁹ If the ITC finds a *threat* of material injury, by reason of the imports, it must additionally determine whether injury would have occurred had the "Authority" not ordered suspension of liquidation following its first affirmative finding.⁷⁰

Before making its final determination, the ITC, like the "Authority," must allow interested parties to present oral and written views about the issues involved. In an important procedural change, the ITC regulations provide that the staff shall submit its report to the Commission before the hearing (time requirements vary with the overall schedule)⁷¹ and that the parties' own prehearing submissions set forth "[e]xceptions, if any" to the staff's preliminary findings of fact, plus "[a]ny additional or proposed alternative findings of fact," any "conclusions of law" or other relevant information and arguments.⁷² The conduct of hearings is prescribed in detail, including requirements for submitting post-hearing briefs (of not more than ten double-spaced pages) or other statements.⁷³

Should the ITC determine injury or threat of injury, it would publish notice of an antidumping duty order which would contain a requirement for the cash deposit of estimated duties and would direct customs officers to assess a duty equal to the amount by which the foreign market value of the dumped merchandise exceeds the United States price. This generally would take place within six months after the "Authority" received information sufficient for their assessment.⁷⁴

Under the new law, the difference between a cash deposit (collected after the "Authority's" preliminary determination of LTFV sales) and the amount of the duty finally assessed must be disregarded if the deposit is less, and must be refunded if the deposit is greater than the amount finally assessed.⁷⁵ Thereafter, once estimated duties are deposited pending finally determined antidumping duties, the amount of any underestimate will be assessed.⁷⁶

⁶⁹19 U.S.C. § 1673d(b).

⁷⁰19 U.S.C. § 1673d(b)(4)(B). In determining "threat of material injury," the Commission will consider "among other factors," the rate of increase of subsidized or dumped exports to the United States, the exporting country's capacity to generate exports, and the availability of other export markets. 19 C.F.R. § 207.26(d), 44 Fed. Reg. 76473 (Dec. 26, 1979).

⁷¹19 C.F.R. § 207.21, 44 Fed. Reg. 76472 (Dec. 26, 1979).

⁷²19 C.F.R. § 207.22, 44 Fed. Reg. 76472 (Dec. 26, 1979).

⁷³19 C.F.R. § 207.24, 44 Fed. Reg. 76472 (Dec. 26, 1979).

⁷⁴19 U.S.C. § 1673e(a)(1).

⁷⁵19 U.S.C. § 1673f(a).

⁷⁶19 U.S.C. § 1673f(b).

The "foreign market value" of imported merchandise is defined as the price, at the time of exportation, at which the same or similar merchandise is sold or offered for sale in the principal markets of the country from which exported.⁷⁷ If the merchandise is not sold or offered for sale in the foreign country, or if it is determined that the quantity sold is too small to form an adequate basis for comparison, then the foreign market value shall equal the price at which the product is sold or offered for sale for exportation to countries other than the United States.⁷⁸ This does not differ from the 1921 Act.

If the "Authority" decides that the foreign market value cannot be determined by referring to the sale price of the product in the foreign country, then it may alternatively find the foreign market value by determining a "constructed value."⁷⁹ In general, the 1979 Act defines constructed value as production cost plus general expenses and "profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise under consideration which are made by producers in the country of exportation, in the usual wholesale quantities and in the ordinary course of trade"⁸⁰ But if the "Authority" concludes that sales made in the home market at less than production cost over an extended time period and in substantial quantities are not at prices permitting recovery of all costs within a reasonable time in the normal course of trade, such sales would not be included.⁸¹

As in the 1921 Act, special rules also exist to determine foreign market value for state-controlled economies⁸² and for products produced or marketed by multinational corporations.⁸³

Under the new law, the "United States price" is defined as "the purchase price, or the exporter's sales price, of the merchandise, whichever is appropriate."⁸⁴ The "purchase price" is defined as the price at which the merchandise is either purchased or agreed to be purchased prior to the date of importation from the manufacturer or producer.⁸⁵ The House Ways and Means Committee stated in its accompanying report that the executive branch intends to issue regulations consistent with current practice "under which sales

⁷⁷19 U.S.C. § 1677b(a)(1)(A).

⁷⁸Compare 19 U.S.C. § 1677b(a)(1)(B) with 19 U.S.C. § 164.

⁷⁹19 U.S.C. § 1677b(a)(2). The comparable provision in the 1921 Act is 19 U.S.C. § 165. The administration has stated that the use of third country prices will be preferred to constructed value. STATEMENT OF ADMINISTRATIVE ACTION at 8.

⁸⁰19 U.S.C. § 1677b(e)(1)(B).

⁸¹19 U.S.C. § 1677b(b).

⁸²19 U.S.C. § 1677b(c). "Home market prices" in a comparable non-state-controlled economy have been used. See, e.g., Carbon Steel Plate from Poland, 44 Fed. Reg. 23619 (April 20, 1979) (Treasury Dept. Determination of sales at less than fair value after investigation under steel TPM program.) For discussions of a leading recent application of United States antidumping law in this area, see Note, *Dumping from "Controlled Economy" Countries: The Polish Golf Car Case*, Vol. II LAW & POL'Y IN INT'L BUS. pp. 777 and ff, (1979); and *International Trade: Dumping—Outboard Marine Corp. v. Pezetel*, 20 HARV. INT. L.J. 193 (1979).

⁸³19 U.S.C. § 1677b(d).

⁸⁴19 U.S.C. § 1677a(a).

⁸⁵19 U.S.C. § 1677a(b).

from the foreign producer to middlemen and any sales between middlemen before sale to the first unrelated U.S. purchaser are examined to avoid below cost sales by the middlemen."⁸⁶

The new legislation changes the administrative review procedure, requiring mandatory review by the "Authority" at least once during each twelve-month period (beginning one year after an antidumping duty order or a notice of an investigation's suspension is published) of the amount of any antidumping duty. During this time, it must review the current status of and compliance with any agreement under which an investigation was suspended.⁸⁷ A review of an antidumping duty order will include new determinations regarding foreign market value and the United States price in the order; this is to facilitate the reassessment of antidumping duties.⁸⁸

In addition, if satisfied that sufficient "changed circumstances" exist, the ITC and the "Authority" may grant a request to review:

- a. an agreement on which a suspension of dumping investigation was based;
- b. an ITC finding that injurious effect had been completely eliminated by an agreement which led to the suspension of a dumping investigation;
- c. a final LTFV finding by the "Authority"; or
- d. a final injury determination by the ITC.⁸⁹

Unless a showing of "good cause" is made, the ITC must wait twenty-four months after publication of a dumping finding before it may review a final affirmative injury determination; similarly, the "Authority" must also wait twenty-four months to review a determination to suspend an investigation subsequent to an agreement, or a final determination of sales at LTFV.⁹⁰ The ITC's regulations set forth this twenty-four-month waiting period⁹¹ but then provide that the Commission has "inherent authority" to issue an "appropriate *modification*, clarification, or correction of a determination within a reasonable time of its issuance."⁹² (Emphasis added.) Although this provision probably will be used to deal with technical questions, it moderates the rigor of an inflexible twenty-four-month rule, a flexibility consistent with the "good cause" exception to the strict rule set forth in the statute itself.

Finally, for any administrative review under the legislation, the "Authority" or the ITC, if requested by an interested party, must hold a hearing on the record, after notice published in the *Federal Register*.⁹³ Such a hearing, and any investigation hearing held by the Commission under section 735 of

⁸⁶HOUSE REPORT at 75. See also STATEMENT OF ADMINISTRATIVE ACTION at 8.

⁸⁷19 U.S.C. § 1675(a).

⁸⁸19 U.S.C. § 1675(a)(2)(A).

⁸⁹19 U.S.C. § 1675(b)(1). The ITC regulation (19 C.F.R. 207.45) governs the conduct of such a leading "changed circumstance" investigation. 44 Fed. Reg. 76475 (Dec. 26, 1979).

⁹⁰19 U.S.C. § 1675(b)(2).

⁹¹19 C.F.R. 207.45, 44 Fed. Reg. 76475 (Dec. 26, 1979).

⁹²19 C.F.R. 207.46, 44 Fed. Reg. 76475 (Dec. 26, 1979).

⁹³19 U.S.C. § 1675(d).

the act, 19 U.S.C. § 1673d, (governing final LTFV and injury determinations)⁹⁴ is explicitly exempted from the provisions of the Administrative Procedure Act.⁹⁵

The new legislation amended the Tariff Act of 1930 by adding specific procedures for judicial review of antidumping proceedings. It authorizes judicial review by the Customs Court of all final, and certain interlocutory, determinations made by either the ITC or the "Authority" during an antidumping proceeding. This provision removes certain ambiguities under the prior law where, for instance, it was not clear whether a domestic manufacturer could challenge the amount of a dumping duty assessment.⁹⁶ The new legislation provides for review of either the amount of the assessment or the total failure to assess such a duty.⁹⁷

The 1979 Act eliminates *de novo* review of determinations or assessments. In general, although the Administrative Procedure Act is not applicable in these cases,⁹⁸ the standard of review for decisions that have generated a record is to be "substantial evidence" on the record.⁹⁹ Those interlocutory determinations that are reviewable, as well as final determinations which were made too early for an adequate record development, will be judged under an "arbitrary and capricious" standard.¹⁰⁰ Both concepts are well known under administrative law, and review proceedings should generate a body of precedent substantially lacking in United States antidumping practice.

To achieve the basic statutory goal of a streamlined process, expedited review procedures are mandated, but whether this can be achieved is at least questionable. Any party with standing can challenge a reviewable order or determination in the Customs Court within thirty days of notice of such determination, and such cases are to be given priority on the court's calendar.¹⁰¹ But once a case is filed in court, there is no practical control over its

⁹⁴19 U.S.C. § 1677c(h).

⁹⁵Section 705 of the act, 19 U.S.C. § 1671d, governing final determinations of subsidies and resulting material injury in countervailing duty cases, incorporates the same hearing procedure and the same exclusion of the APA.

⁹⁶HOUSE REPORT at 180-81.

⁹⁷*Id.*; see 19 U.S.C. § 1516a(a).

⁹⁸See note 95 and accompanying text *supra*.

⁹⁹19 U.S.C. § 1516a(b)(1)(B). Determinations reviewable under a "substantial evidence" standard are any final determinations by the ITC or the "Authority" made under 19 U.S.C. § 1673d; a determination made by the ITC or the "Authority" in connection with their administrative review functions under 19 U.S.C. § 1675; a determination by the "Authority" to suspend its investigation under 19 U.S.C. § 1673c; and an injurious effect determination made by the ITC under 19 U.S.C. § 1673c(h), regarding an agreement to end injury caused by dumping.

¹⁰⁰19 U.S.C. § 1516a(b)(1)(A). Decisions subject to review under an "arbitrary and capricious standard" are a decision by the "Authority" not to initiate an investigation under 19 U.S.C. § 1673a(a); the extension of the time limit for the "Authority's" preliminary determination to 210 days, subsequent to a finding of "extraordinarily complicated" circumstances under 19 U.S.C. § 1673b(c); a decision not to permit administrative review because of a failure to find "changed circumstances" under 19 U.S.C. § 1675(b); a negative preliminary injury finding by the ITC under 19 U.S.C. § 1673b(a); and a negative preliminary determination by the "Authority" under 19 U.S.C. § 1673b(b).

¹⁰¹Under prior law, antidumping duties could be protested by importing interests, and ultimately appealed to the Customs Court, under the same conditions as other protests of Customs

pace. For example, both the statute¹⁰² and the ITC's regulation¹⁰³ provide for judicial review by the Customs Court of a Commission determination not to disclose confidential information on domestic price or production cost. But any such review proceeding very likely would interrupt the schedule described in the statute. Further, it is not difficult to envision circumstances in which a party alleged an unconstitutional deprivation of due process of law if forced to a hearing while its review petition seeking access to confidential price and cost data was pending in the courts. Thus, it would not be surprising if the new review procedure incorporating traditional administrative law standards resulted in longer records, more complex appeals, and, in general, a longer process.

For another example, at a preliminary stage of review of a determination under a "substantial evidence" standard, the court may enjoin the liquidation of duties. The factors it shall consider include, among others, whether:

- (A) the party filing the action is likely to prevail on the merits,
- (B) the party filing the action would be irreparably harmed if liquidation of some or all of the entries is not enjoined,
- (C) the public interest would best be served if liquidation is enjoined, and
- (D) the harm to the party filing the action would be greater if liquidation of some or all of the entries is not enjoined than the harm to other persons if liquidation of some or all of the entries is enjoined.¹⁰⁴

This is the basic standard for preliminary injunctions in United States civil litigation.¹⁰⁵

Under the 1979 Act,¹⁰⁶ the general rule is that information designated as confidential by persons submitting it may not be disclosed without their consent.¹⁰⁷ This rule, however is subject to important exceptions. The ITC or the "Authority" may disclose confidential information, if done so it cannot be used to identify the operations of a particular person.¹⁰⁸ It also may be re-

duties. 19 U.S.C. § 168, 169; 28 U.S.C. § 1582. *See generally* F.W. Myers & Co. v. United States, 376 F. Supp. 860 (Cust. Ct. 1974). But this involved a lengthy delay while antidumping duties were assessed. *See, e.g.,* J.C. Penney Co. v. U.S. Treasury Dept., 439 F.2d 63 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1973). *See generally*, Berger, *Judicial Review of Countervailing Duty Determinations*, 19 HOW. INT'L J. 593 (1978) and Gerhart, *Judicial Review of Customs Service Actions*, 9 LAW & POL'Y IN INT'L BUS. 1101 (1977). Domestic manufacturers, producers or wholesalers could challenge the amount of duties under 19 U.S.C. § 1516a and it had been held that a negative injury finding resulting in freedom from antidumping duties thus could be reviewed. *See* SCM Corp. v. United States, 450 F. Supp. 1178 (Cust. Ct. 1978). But in its report on the 1979 Act, the House Ways and Means Committee referred to the *SCM* case and described the state of the law as "confused." The Committee went on to state that the 1979 Act "would leave no doubt" that a domestic manufacturer could challenge both "the amount of a dumping or countervailing duty assessment . . . [as well as] the total failure to assess such a duty." HOUSE REPORT at 180-81.

¹⁰²19 U.S.C. § 1677f(c)(92).

¹⁰³19 C.F.R. § 207.51, 44 Fed. Reg. 76475 (Dec. 26, 1979).

¹⁰⁴19 U.S.C. § 1516a(c)(2)(A)-(D).

¹⁰⁵*See generally* 7, Pt. 2 MOORE'S FEDERAL PRACTICE ¶ 65.04 (1979 ed.).

¹⁰⁶19 U.S.C. § 1677f.

¹⁰⁷19 U.S.C. § 1677f(b)(1).

¹⁰⁸19 U.S.C. § 1677f(a)(4)(A).

leased pursuant to a request under a "protective order," containing requirements provided the "Authority" or the ITC.¹⁰⁹

This provision has caused substantial uncertainty among those uncomfortable with the "government in the sunshine" theme now generally accepted in Washington.¹¹⁰ In its new regulations, the ITC has provided for limited disclosure of confidential data under a protective order but has limited such disclosure to "an attorney of a party to the investigation, excepting in-house counsel" who can show "substantial need" for the data and who cannot obtain its equivalent by other means "without undue hardship."¹¹¹ The ITC indicated in its summary accompanying the new regulations, that given its "lack of administrative experience with protective orders in antidumping and countervailing duty investigations . . . the Commission is not going to exercise the full range of its authority to release confidential information dealing with data other than domestic prices or cost of production until it has accumulated administrative experience with these protective order requests."¹¹²

The 1979 Act also adds a new provision dealing with ex parte meetings between interested parties or "other persons providing factual information" and a person charged with making a determination or "a final recommendation to that person."¹¹³ This language apparently would exclude contacts from diplomats or other persons not "providing factual information." Records of any ex parte meetings are to be maintained by the Administering Authority and the Commission and are to be part of the record of the proceeding.

Much of the above concerning antidumping applies to the 1979 Act's provisions on countervailing duties.¹¹⁴ It is sufficient to note that similar apparently streamlined procedures and an identical definition of "material injury" now cover countervailing duties; therefore the same ambiguities, uncertainties, and potential for protracted procedures are present. Undoubtedly, one of the most significant changes is the requirement of a finding of "material injury" before any countervailing duties may be imposed.¹¹⁵ Although such a finding had been required under article VI of the GATT, the

¹⁰⁹19 U.S.C. § 1677f(c)(1)(B).

¹¹⁰See also text accompanying note 113 *infra*.

¹¹¹19 C.F.R. § 207.7, 44 Fed. Reg. 76470 (Dec. 26, 1979). In its summary of the new regulations, the ITC explicitly looked to Rule 26 of the Federal Rules of Civil Procedure as its model. 44 Fed. Reg. 76458 (Dec. 26, 1979).

¹¹²ITC Summary, § 207.7, 44 Fed. Reg. at 76462 (Dec. 26, 1979).

¹¹³See 19 U.S.C. § 1677f. The ITC regulation is at 19 C.F.R. § 207.5, 44 Fed. Reg. 76470 (Dec. 26, 1979).

¹¹⁴See 19 U.S.C. § 1671a (Procedures for Initiating Countervailing Duty Investigation), 19 U.S.C. § 1671b (Preliminary Determinations); 19 U.S.C. § 1671c (Termination or Suspension of Investigation); 19 U.S.C. § 1671d (Final Determinations); 19 U.S.C. § 1671e (Assessment of Duty); 19 U.S.C. § 1671f (Difference Between Estimated and Assessed Duty); 19 U.S.C. § 1675 (Administrative Review); and 19 U.S.C. § 1516a (Judicial Review). The ITC's new regulations apply to both antidumping and countervailing duty cases. See 44 Fed. Reg. 76458 (Dec. 26, 1979).

¹¹⁵19 U.S.C. § 1671b(a).

United States has been exempt from this requirement because its countervailing duty law predates the GATT. But because "material injury" is defined the same way as in the new antidumping law, action by the ITC must be awaited in order to assess the real impact of this change.

Another aspect of the countervailing duties law concerns the subsidies themselves. Under the 1979 Act,¹¹⁶ the provision of capital, loans, or loan guarantees "on terms inconsistent with commercial considerations,"¹¹⁷ the provision of goods or services at preferential rates,¹¹⁸ the grant of funds or debt forgiveness to cover operating losses sustained by a specific industry,¹¹⁹ and the assumption of any costs of the manufacture, production, or distribution of an enterprise or industry¹²⁰ may be a countervailable subsidy. But as the House Ways and Means Committee recognized, government subsidies often play a significant role in promoting domestic policy objectives.¹²¹ How such government functions will be reconciled with the new act is now uncertain.

Perhaps the best clue for a legal analysis may be found in the Supreme Court's decision in *Zenith Radio Corp. v. United States*, 437 U.S. 443 (1978). At issue was whether Japan had conferred a countervailable subsidy on certain electronic products by not imposing a commodity tax on the products when exported, despite the fact that the products were taxed when sold domestically. The tax was defined under Japanese law as an "indirect tax," and, in a manner similar to the Value Added Tax (V.A.T.) prevalent in Europe, was computed as a percentage of the manufacturer's sales price and levied on the goods themselves. The Japanese tax was levied either upon shipment from the factory or, in the case of imports, when withdrawn from the customs warehouse. In the case of exports, the tax was either refunded (if previously paid) or the product was simply exempt from such taxation.

American law literally requires that "any bounty or grant" paid "directly or indirectly" must be countervailed.¹²² However, the long-standing practice of the Treasury Department and the policy embodied in article VI(3) of the GATT, is that the remission of nonexcessive indirect taxes, such as a V.A.T., need not be countervailed. In *Zenith*, the Court upheld this practice, citing an "intuitively appealing principle regarding double taxation" as well as substantial reliance interests generated by the Treasury and GATT positions.¹²³ The decision seems to come from a recognition that a literal application of the statute would hurt United States trading interests. Whether or not this is an appropriate judgment for a court to make, this approach probably will be followed in this area.

¹¹⁶19 U.S.C. § 1677(5)(B).

¹¹⁷19 U.S.C. § 1677(5)(B)(i).

¹¹⁸19 U.S.C. § 1677(5)(B)(ii).

¹¹⁹19 U.S.C. § 1677(5)(B)(iii).

¹²⁰19 U.S.C. § 1677(5)(B)(iv).

¹²¹HOUSE REPORT at 43.

¹²²Section 303(a) of the Tariff Act of 1930, 19 U.S.C. § 1303(a).

¹²³437 U.S. at 457.

In conclusion, although procedural changes are significant, except for the "material injury" test, United States substantive law has not changed substantially because of the legislation implementing the MTN antidumping agreements. Many of the major foreign objectives remain unmet. Pricing and injury determinations are still not made simultaneously, although the disparity in timing has been reduced. The market segmentation concept has been retained, at least in some cases. The addition of the "material injury" requirement in the countervailing duty area¹²⁴ benefits foreign exporters, but in both antidumping and countervailing duty issues, it is not yet clear whether any substantive difference will exist between the new definition of materiality, as "not inconsequential, immaterial, or unimportant," and the ITC's former definition of injury (in antidumping cases) as more than *de minimis*.

But the principal changes are procedural, and seem to serve domestic interests in several respects. The definition of "injury" appears to be not inconsistent with prior practice, although the extent to which the ITC will choose to interpret the legislation that way remains to be seen. Provisional remedies will come into effect earlier. In theory, participation in expedited proceedings will be less costly for the domestic producers, and some importers have criticized the expedited proceedings because they may increase the arbitrariness of preliminary decisions, which allegedly might favor domestic producers.¹²⁵

In the outset of the new act's administration, it is not at all clear that such proceedings will be cheaper and more expeditious. Indeed, the conventional wisdom among trade lawyers is that the opposite may well be true.¹²⁶ With a new agency (the Commerce Department) taking up the Treasury Department's former functions, a certain "learning curve" is to be expected as an expanded staff, even with cadres from the Treasury Department and Customs Service, gains experience. These factors, and the provisions for procedural safeguards through proceedings on the record in addition to layers of administrative and judicial review may, in fact, prolong the entire process. There are many questions and no ready answers this early in the new, post-Geneva world.

¹²⁴Duty-free imports could be subject to countervailing duties under section 303(b) of the Trade Act of 1974, and an injury test was applied in those cases. But such injury findings have not been frequent. During 1978, the ITC initiated seven such injury investigations, but in only one was injury found. See OPERATION OF THE TRADE AGREEMENTS PROGRAM, 30TH REPORT, 1978, USITC Pub. 1021 (1979) at 13-16.

¹²⁵CONG. Q., July 7, 1979 at 9.

¹²⁶For a comparison of the lawyer's traditional role in international trade cases with their likely future role, see generally, Herzstein, *The Role of Lawyers in the Operation of the New Multilateral Trade Agreements*, 9 GEORGIA J. OF INT. & COMP. LAW, note 1 *supra* at 177-205. On January 22, 1980 the President nominated Mr. Herzstein to be Undersecretary of Commerce for International Trade.

