AN EXAMINATION OF THE ANTIDUMPING PROVISIONS OF THE TRADE AGREEMENTS ACT OF 1979: UNITED STATES IMPLEMENTATION OF THE ANTIDUMPING CODE FORMULATED IN THE TOKYO ROUND

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I. INTRODUCTION

Following the conclusion of the seventh series of multilateral trade negotiations (MTN) held under the auspices of the General Agreement on Tariffs and Trade (GATT),[1] the Tokyo Round was concluded in April, 1979.[2] The U.S. Congress approved the negotiated agreements and passed implementing legislation in the Trade Agreements Act of 1979.[3] On January 1, 1980, Title I of the Act, which contains the revisions to the antidumping and countervailing duty provisions and expressly repeals the Antidumping Act of 1921,[4] became law.

A unique, if constitutionally unforeseen, sequence was followed to enact the Trade Agreements Act of 1979. In the Kennedy Round of the MTN a decade ago, the administration formulated a code elaborating upon the sparse GATT language concerning antidumping measures. Congress, however, was not receptive to the code. It had not been consulted prior to or during the negotiations and saw nothing useful in the final product. The result was Hill hostility toward the notion of a code and legislation that provided, in essence, that U.S. adherence to the code was acceptable only if no provisions of U.S. law were adversely affected by the document or by the work of the GATT Antidumping Committee.

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1. General Agreement on Tariffs and Trade, *done* October 30, 1947, 61 Stat. (effective Jan. 1, 1948) A3, T.I.A.S. No. 1700, 55 U.N.T.S. 194. For detailed discussion and analysis of GATT, *see* J. JACKSON, WORLD TRADE AND THE LAW OF GATT 35-57 (1969).

2. For background on the Tokyo Round, *see* Wolff, *The U.S. Mandate for Trade Negotiations*, 16 VA. J. INT'L L. 505 (1976). The text of the agreements was published in Message from the President of the United States, AGREEMENTS REACHED IN THE TOKYO ROUND OF THE MULTILATERAL TRADE NEGOTIATIONS, H.R. DOC. NO. 153, 96th Cong., 1st Sess., pt. 1 (1979) [hereinafter cited as MTA].

3. Pub. L. No. 96-39, 93 Stat. 144 (1979) (codified in scattered sections of 19 U.S.C.) [hereinafter cited as Trade Agreements Act].

4. *Id.*, Title I, § 106 (repealing 19 U.S.C. §§ 160-173 (1976)).

In enacting the Trade Reform Act of 1974,[5] Congress sought to avoid a repetition of this conflict. The Act specifically provided for continuous congressional consultation throughout the negotiations of the Tokyo Round and, to avoid the debacle that followed the Kennedy Round,[6] further provided for a novel legislative procedure under which the entire package negotiated in the MTN was either to be accepted *in toto* or rejected within a ninety-day period. No amendments could be offered in committee or on the floor.[7]

Congress did participate in the negotiations of the Tokyo Round. It was consulted in closed "mark-up" sessions of the relevant congressional committees which engaged in the preparation of "statements of administrative action" designed to indicate the way in which the law would be implemented.[8] The accompanying committee reports were negotiated and drafted together with administration representatives.

This article will examine the antidumping provisions of the Trade Agreements Act of 1979 as they reflect the MTN Antidumping Code concluded in the Tokyo Round and will consider the potential impact of the new U.S. antidumping statute upon the trade of multinational corporations (MNCs) and less-developed-countries (LDCs).

II. ANTIDUMPING MEASURES— UNDERLYING PRINCIPLES

The economic theory of antidumping laws has been the subject of prior scholarly discussion.[9] The classic definition of dump-

5. Pub. L. No. 93-618, 88 Stat. 1978 (1975) (codified in scattered sections of 5, 19 U.S.C.). For a comprehensive, section by section analysis of the Act, *see* Campbell, *The Foreign Trade Aspects of the Trade Act of 1974 (Part I)*, 33 WASH. & LEE L. REV. 325 (1976); Campbell, *The Foreign Trade Aspects of the Trade Act of 1974 (Part II)*, 33 WASH & LEE L. REV. 639 (1976).

6. The Tokyo Declaration, as a result, made indirect reference to the need, based on past experience, for assurances that the United States would implement its international commitments. Declaration of Ministers approved at Tokyo on 14 September 1973, paras. 1, 4 GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS (20th Supp.) 19, 21 (1974).

7. 19 U.S.C. §§ 2112, 2191-94 (1976).

8. TRADE AGREEMENTS ACT OF 1979 STATEMENTS OF ADMINISTRATIVE ACTION, H.R. DOC. NO. 96-153, 96th Cong., 1st Sess., pt. 2 (1979) [hereinafter cited as STATEMENTS OF ADMINISTRATIVE ACTION].

9. *See* Note, Dumping by State-Controlled-Economy Countries: *The Polish Golf Cart Case* and the New Treasury Regulations, 128 U. PA. L. REV. 217, 221 (1979). *See generally*, MICH. Y.B. INT'L LEGAL STUD., ANTIDUMPING LAW: POLICY AND IMPLEMENTATION

ing is "price discrimination between national markets."[10] Dumping is perceived to occur when a foreign producer sells his goods in an export target market at prices lower than those of the same goods sold in the home market.[11] From a theoretical, economic viewpoint, dumping is not evil per se. If a continuous flow of less expensive goods were guaranteed, no harm would result because injury to the target market's domestic industry would be offset by the benefit of a constant supply of inexpensive goods.[12] However, if the foreign producer raises the prices of his goods to artificially high and noncompetitive levels once the target market's domestic competition has been eliminated or substantially curtailed, the long range injury to competition in the target market outweighs the temporary benefit of lower prices.

According to the theoretical proponents of international free trade policy, unfettered international competition will maximize efficiency and result in lower prices as each nation comes to specialize in producing those products for which it is best suited.[13] On the other hand, "predatory" dumping to capture a share of a target market by undercutting domestic competitors is viewed as inimicable to "free trade" and as constituting an unfair trade practice against which nations espousing free trade principles may legitimately defend their domestic industry. In keeping with the policy of international free trade, all imports that undersell domestic goods are not held to be subject to dumping sanctions. Only those imports that undersell domestic goods by exploiting an artificial or anticompetitive advantage are subject to sanctions.[14]

(1979); Ehrenhaft, *Protection Against International Price Discrimination*, 58 Colum. L. Rev. 44 (1958).

10. J. Viner, Dumping: A Problem in International Trade 3 (1923).

11. *See* Barcelo, *Antidumping Laws as Barriers to Trade—The United States and the International Dumping Code*, 57 Cornell L. Rev. 491, 494 (1972).

12. *Id.*; *see* Anthony, *The American Response to Dumping from Capitalist and Socialist Economics—Substantive Premises, and Restructured Procedures After the 1967 GATT Code*, 54 Cornell L. Rev. 159, 163-77 (1969).

13. *Id. See also* P. Samuelson, Economics 668-91 (10th ed. 1976); Coudert, *The Application of the United States Antidumping Law in the Light of a Liberal Trade Policy*, 65 Colum. L. Rev. 189 (1965).

14. In theory, a foreign manufacturer could dump his goods in the United States even though he sold them at prices equal to or higher than his domestic competitors. Dumping that does not undersell prices charged by domestic competitors is labeled "technical dumping" and does not result in a finding of injury. *See* Vinyl Clad Fence Fabric from Canada, 40 Fed. Reg. 51, 243, 244-45 (1975) (concurring statement of reasons of Comm'rs Moore and Ablondi).

However, price discriminatory exports are presumed exploitative on the assumption that lower export prices are subsidized by higher prices elsewhere and thus do not reflect the "fair value" of the goods.[15]

This presumption underlies the Trade Agreements Act. The premise of the antidumping law is that if a foreign producer sells goods at a given price in his home market, he ought not to sell for less in the United States if the effect of such sales is to injure U.S. producers of like merchandise.[16] At the root of the implementation of the Act is the notion that U.S. producers of goods that are competitive with imports are entitled to government-imposed protection against "unfair" foreign competition and predatory pricing practices.[17] In keeping with the traditional concept of price discrimination, the Trade Agreements Act focuses entirely on the difference in prices charged by the individual foreign producer in its domestic and foreign markets.[18] The element of predation which was absent in the Antidumping Act of 1921 is lacking in the Trade Agreements Act as well.[19]

It is noteworthy that dumping does not exist merely because a foreign producer undersells domestic competition. On the other hand, dumping is not avoided where the foreign producer meets the price charged in his target market. The U.S. antidumping law limits examination to the difference in prices charged by the producer in his home market and in the U.S. market. The fact that the producer lacks competition in his home market and may, because of this or for other reasons, be able to command higher prices

15. The fair value of goods is normally understood as cost plus profit. *See* Feller, *The Antidumping Act and the Future of East-West Trade*, 66 MICH. L. REV. 115, 118 (1967).

16. *See* H.R. REP. NO. 317, 96th Cong., 1st Sess. 44 (1979) [hereinafter cited as H.R. REP. NO. 317].

17. *Id.* at 43, 44.

18. *Id.* at 44-45.

19. The Antidumping Act of 1916, 15 U.S.C. §§ 71-77 (1976), does require "intent to injure" as an element of both its criminal and civil offenses, but the problem of proving such intent has rendered that statute a virtual dead letter, and it has never been successfully invoked. Hiscocks, *International Price Discrimination: The Discovery of the Predatory Dumping Act of 1916*, 11 INT'L LAW. 227, 232 (1977). Moreover, potential complainants are loathe to initiate such proceedings because antitrust counterclaims that are burdensome to defend and may result in liability are common. *See* Outboard Marine Corp. v. Pezetel, 474 F. Supp. 168, 179 (D. Del. 1979) (held that the Polish golf cart manufacturer and its domestic distributor's counterclaim alleging a conspiracy to submit knowingly false information to the Treasury Department and the U.S. Customs Service, resulting in assessment of dumping duties, was sufficient to state a claim under section 1 of the Sherman Act against former domestic manufacturer).

there than in the United States, is irrelevant and provides no defense to a charge of price discrimination.[20] Rather, it can be argued that the higher priced home market sales which enable the foreign producer to offer the lower priced goods that injure competitors in the United States are thus precisely the "evil" against which the law is aimed. If the foreign producer were to lower his home market price to the same level as that charged in the U.S., it could not afford to "dump."[21] It is similarly irrelevant that foreign producers, like their American counterparts, occasionally sell at a loss to preserve investments or meet fixed costs or because their product is affected by natural forces such as the maturation cycle of agricultural produce.

III. THE ANTIDUMPING CODE FORMULATED IN THE TOKYO ROUND

The code on antidumping negotiated during the Tokyo Round[22] requires that antidumping proceedings be brought "by or on behalf" of a domestic industry. The code recognizes that antidumping practices should "not constitute an unjustifiable impediment to international trade" and that antidumping duties "may be applied only . . . [where] dumping causes or threatens material injury to an established industry or materially retards the establishment of an industry" and furthermore calls for "equitable and open procedures in the examination of dumping cases" and for the "speedy, effective and equitable resolution" of dumping disputes.[23]

The MTN Antidumping Agreement, in its provisions concerning the determination of injury, provides that the determination of an injurious impact on a domestic industry should include evaluation of "all relevant economic factors and indices that have a bear-

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20. Ehrenhaft, *What the Antidumping and Countervailing Duty Provisions of the Trade Agreements Act [Can] [Will] [Should] Mean for U.S. Trade Policy*, 11 LAW & POL'Y INT'L BUS. 1361, 1363 (1979) [hereinafter cited as *Antidumping and Trade Policy*].

21. *See* Ehrenhaft, *Protection Against International Price Discrimination: United States Countervailing and Antidumping Duties*," 58 COLUM. L. REV. 44, 49 (1958).

22. International Antidumping Code, *done* June 30, 1967, 19 U.S.T. 4348, T.I.A.S. No. 6431 (effective July 1, 1968); MTN, Antidumping: Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade MTN/NTM/W/232, *done* April 9, 1979, [hereinafter cited as Antidumping Agreement], *reprinted in* MTA, *supra* note 2, at 311-37.

23. *Id.*, *reprinted in* MTA, *supra* note 2, at 312. The antidumping code also calls for contracting parties to take into account "the particular trade development and financial needs of developing countries" and recommends the establishment of alternative, constructive remedies where LDC's are involved in dumping cases. *Id.*

ing on the state of the industry," including actual and potential decline in output, sales, market share, profits, productivity, return on investments or utilization of capacity as well as factors affecting domestic prices such as actual and potential negative effects on cash flow, inventories, employment, wages, growth, and ability to raise capital or investments.[24] The Agreement calls for a determination that injury to domestic industry is caused by the dumped imports and not by other factors which are not attributable to imported merchandise.[25] Thus, the Agreement calls for a finding that (a) dumping has occurred; (b) material injury or retardation has occurred; and (c) a direct causal link between the dumped imports and the alleged injury can be established.

One participant in the recent MTN has observed that, on the national level, the ultimate success of the Tokyo Round will depend upon "the willingness of governments to resist domestic protectionist pressures and [the reestablishment of] a basis for responding to worldwide economic problems with negotiation rather than 'beggar your neighbor' mercantilism."[26] An analysis of the U.S. Trade Agreements Act reveals the extent to which protectionist sentiment continues to outweigh the principles of free trade.

IV. ANALYSIS OF KEY SECTIONS OF THE ANTIDUMPING PROVISIONS OF THE TRADE AGREEMENTS ACT OF 1979

The Trade Agreements Act abolished the Antidumping Act of 1921[27] and replaced it with a new antidumping statute which was enacted in the form of amendments to the Tariff Act of 1930.[28]

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24. Antidumping Agreement, *supra* note 22, pt. I, art. 3, para. 3, *reprinted in* MTA, *supra* note 2, at 315.

25. *Id.* pt. I, art. 3, para. 4, *reprinted in* MTA, *supra* note 2, at 315.

26. Graham, *Reforming the International Trading System: The Tokyo Round Trade Negotiations in the Final State*, 12 CORNELL INT'L L.J. 1, 3 (1979). *See also* Graham, *Results of the Tokyo Round*, 9 GA. J. INT'L & COMP. L. 153 (1979).

27. 19 U.S.C. § 160-171. The Antidumping Act of 1921 was originally directed toward the elimination of international price discrimination practiced at the time by large European cartels. Its purpose was to protect U.S. industry from the dumping of goods at less than cost or home value. It provided for the imposition of dumping duties on imports sold in the U.S. market at "less than fair value," if, as a result of such imports, a U.S. industry was "being or likely to be injured, or [was] prevented from being established." *See* Victor, *United States Antidumping Rules*, 10 ST. MARY'S L. J. 217 (1978).

28. Tariff Act of 1930, as amended, 19 U.S.C. §§ 1202-1654 (1976) [hereinafter cited as Tariff Act of 1930].

The new statute encompasses the transfer of authority to regulate antidumping duties from the Treasury Department and the U.S. Customs Service to the International Trade Administration of the Department of Commerce[29] and provides both substantive and procedural changes to U.S. antidumping law. These changes will likely have a significant impact on trade involving the United States and other countries, LDC's and multinational corporations. It may be criticized as providing too many concessions to domestic industries which may seek the imposition of protectionist trade barriers.

Under the Trade Agreements Act of 1979, dumping occurs when a foreign producer exports and sells goods in the United States at less than fair value.[30] If such sales are taking place and are causing or threatening to cause material injury[31] to an industry in the United States, or if the sales are materially retarding the establishment of a domestic industry, then an antidumping duty is added with the aim of bringing the United States sales price of the foreign goods into line with the fair value of the merchandise.[32]

Under the terms of the new legislation, an antidumping duty will be imposed whenever the administering authority determines "that a class or kind of foreign merchandise is being sold or is likely to be sold in the U.S. at less than its fair value" and the International Trade Commission determines that an industry in the United States is "materially injured, or is threatened with material injury, or the establishment of an industry in the U.S. is materially retarded."[33] Ordinarily, the amount of the duty to be imposed is "an amount equal to the amount by which the foreign market value exceeds the United States price[34] for the merchandise."[35]

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29. The International Trade Administration published its regulations concerning antidumping duties in 45 Fed. Reg. 8,182-8,208 (February 6, 1980) (codified in 19 C.F.R. § 353 *et seq.*).

30. Trade Agreements Act, *supra* note 3, § 731 (codified at 19 U.S.C. § 1673).

31. *Id.* The requirement that the injury be "material" is a major innovation of the 1979 Act. *See* H.R. Rep. No. 317, *supra* note 16, at 45-49.

32. *See* Trade Agreements Act, *supra* note 3, at § 731 (codified at 19 U.S.C. § 1673).

33. *Id.*

34. The Trade Agreements Act adopts a new term "United States Price" which incorporates the previous concepts of "purchase price" and "exporter's sales price" under the Antidumping Act of 1921 but does not change their meaning. *Id.* at § 772 (codified at 19 U.S.C. § 1677a).

35. *Id.* at § 731 (codified at 19 U.S.C. § 1673).

The principal substantive change in the Act is the substitution of "material injury" for "injury" as the standard by which the International Trade Commission determines whether less than fair value imports have injured domestic industry. Under the prior law the requisite showing of injury did not require materiality.[36] This new standard may require a slightly higher level of injury to be shown than was the case under the Antidumping Act of 1921.[37]

Notably, the Trade Agreements Act, in its definition of "injury," fails to assess domestic conditions of competition or levels of prices, technology, adaptation to changing demand or other factors which may injure domestic industry[38] and rests upon the concept of "overall" injury. It does not require that dumping be the principal or even major cause of injury but permits a finding of injury upon the barest causal link. The Act does not require that the complainant or its industry as a whole be operated efficiently and does not expose the complainant to counterclaims for its own possible violation of trade regulation laws.[39] It further fails to require "clean hands" in determining whether relief should be withheld because the domestic industry is also dumping in foreign countries.[40] Finally, under the Act domestic producers may occa-

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36. "Material injury" is defined as "harm which is not inconsequential, immaterial or unimportant." *Id.* at § 771(7) (codified at 19 U.S.C. § 1677(7)).

37. *But see* the SENATE FINANCE COMMITTEE REPORT ON THE TRADE AGREEMENTS ACT, S. REP. NO. 249, 96th Cong., 1st Sess. 87-89 (1979) [hereinafter cited as S. REP NO. 249], indicating that Congress does not expect the inclusion of the term "material" to significantly alter the decisions of the International Trade Commission from previous practice: "[T]he ITC determinations with respect to the injury criterion under existing law . . . have been, on the whole, consistent with the material injury criterion of this bill." *Id.* at 87.

38. The MTN code on antidumping provides that administrators of antidumping laws consider "other factors" that may cause injury. Antidumping Agreement, *supra* note 22, pt. I, at 3, para. 3, *reprinted in* MTA, *supra* note 2, at 315. However, the House Report does recommend consideration of other factors. H.R. REP. NO. 317, *supra* note 16, at 47. The original draft of the ITC's proposed regulations under the Trade Agreements Act did not mention other factors, 44 Fed. Reg. 59392, 59404 (1979) (proposed regulation 19 C.F.R. § 207.26). However, after intense criticism, the ITC's final rules on injury did include a reference to "other factors" that the Commission "will also take into account." 44 Fed. Reg. 76,458, 76,473 (1979) (codified at 19 C.F.R. § 207.27).

39. The Act provides no immunity against antitrust claims. Under the *Noerr-Pennington* doctrine, however, the mere invocation of legal procedures against competitors may be protected by the First Amendment, Eastern R.R. President Conf. v. Noerr Motor Freight, Inc., 365 U.S. 127, 136-40 (1961); United Mine Workers of America v. Pennington, 381 U.S. 657, 669-70 (1965), unless the proceedings constitute a "sham" used to harass competition, California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 515-16 (1972).

40. Ehrenhaft, *Antidumping and Trade Policy*, *supra* note 20, at 1378 (footnotes omitted).

sionally sell portions of their output below cost while, at the same time, claiming that similar selling techniques by foreign exporters constitute dumping. Thus, a domestic industry may be suffering injury from a variety of factors, but so long as dumped imports is one of them, the ITC can make an affirmative injury determination.

Additionally, the Trade Agreements Act now permits, in the absence of sales in the home market, the use of constructed value (based on costs of production) in the determination of home market value,[41] even where third-country export price information is available. Under the old law the Treasury Department, in the absence of sales in the home market, could not use constructed value unless it first determined that there was insufficient information to determine a third-country export price.[42]

The principal procedural changes in the antidumping law embodied in the Trade Agreements Act relate to shortened time periods during the investigative phase of proceedings,[43] detailed provisions concerning the suspension of investigations,[44] the imposition of time limits on the liquidation of entries subject to the assessment of antidumping duties,[45] yearly administrative review of outstanding suspension agreements and antidumping duty orders,[46] and judicial review of interlocutory and final decisions.[47] While the accelerated time periods contained in the Act may be praised as providing for the "prompt administration of justice," serious questions may be proffered as to precisely how just such provisions are. It has been posited that the accelerated time frame within which antidumping investigations are to be completed and the expansion of judicial review of both interlocutory and final decisions provided in the Act were prompted by protectionist sentiment,[48] for Congress adopted these reforms without any

41. Trade Agreements Act § 773(e) (codified at 19 U.S.C. § 1677b(e)).

42. Although the Trade Agreements Act provides the administering authority with the discretion to use constructed value as it deems appropriate it is not likely to alter the existing preference for third-country export value over constructed value. Remarks of Noel Hemmendinger, District of Columbia Bar, Continuing Legal Education Program on the Trade Agreements Act of 1979, Feb. 5, 1980.

43. Trade Agreements Act, *supra* note 3, at §§ 732-733 (codified at 19 U.S.C. §§ 1673a-1673b).

44. *Id.*, at § 734 (codified at 19 U.S.C. § 1671c).

45. *Id.*, at §§ 735-40 (codified at 19 U.S.C. § 1673d-1673i).

46. *Id.*, at § 751 (codified at 19 U.S.C. § 1675).

47. *Id.*, at §§ 1001, 516A (codified at 19 U.S.C. § 1516a).

48. Ehrenhaft, *Antidumping and Trade Policy*, *supra* note 20, at 1381.

study of the impact of the existing antidumping laws and administrative procedures or of whether accelerated (and perhaps more arbitrary) decision-making would provide any meaningful improvement.[49]

The Act provides that the Commerce Department may initiate an investigation whenever it determines that an investigation is warranted, or that an investigation must be initiated within 20 days[50] after an "interested party"[51] files a petition on behalf of a domestic industry.[52] While the Trade Agreements Act reflects the MTN antidumping code requirement that antidumping proceedings be brought "by or on behalf of the industry,"[53] the Act arguably goes further in defining the classes of potential complainants by giving standing to labor unions to file complaints and participate in proceedings.[54] This furtherance may result in significantly increased filings.

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49. However, a report published by the General Accounting Office in 1979 found seven cases in the 17 cases it studied where exporters accelerated shipments when an antidumping proceeding was initiated in order to "beat" the subsequent withholding of appraisement notice. U.S. GENERAL ACCOUNTING OFFICE, U.S. ADMINISTRATION OF THE ANTIDUMPING ACT OF 1921: REPORT TO THE CONGRESS BY THE COMPTROLLER GENERAL 9-10 (1979) [hereinafter cited as GAO Report]. To address the problem of increased shipments pending withholding of appraisement, the Trade Agreements Act now contains provisions for the retroactive application of dumping duties when such "critical circumstances" are demonstrated. Trade Agreements Act, *supra* note 3, at § 703(e) (codified at 19 U.S.C. § 1671b(e)).

50. This represents a reduction of 10 days from the old initiation period.

51. "Interested party" includes domestic manufacturers, producers or wholesalers of a like product, labor unions or other groups of workers representative of an industry engaged in the manufacture, production or wholesale sale of a like product and trade or business associations, the majority of whose members manufacture, produce or wholesale a like product in the United States. Trade Agreements Act, *supra* note 3, § 771(9) (codified at 19 U.S.C. § 1677(9)). The Act also encourages governmental assistance to potential complainants in the filing of petitions. The administering authority has the responsibility "to advise and to assist private parties, as appropriate, before they file the petition." S. REP. No. 249, *supra* note 37, at 63.

52. Trade Agreements Act, *supra* note 3, at § 732(b)(1) (codified at 19 U.S.C. § 1673a(b)(1)).

53. Antidumping Agreement, pt. I, art. 5, para. 1, *reprinted in* MTA, *supra* note 22, at 317. The Trade Agreements Act provides: "An antidumping proceeding shall be commenced whenever an interested party . . . files a petition with the administering authority, on behalf of an industry, which alleges the elements necessary for the imposition of the duty . . ." *Id.* at § 732(b)(1) (codified at 19 U.S.C. § 1673a(b)(1)).

54. Under the Trade Agreements Act, "producers" includes labor and "interested parties" includes unions, a majority of whose members manufacture, produce or wholesale a product "like" the ones imported. *Id.* at §§ 702(b), 771(9)(D) (codified at 19 U.S.C. §§ 1671a(b), 1677(9)(D)). *See also* H.R. REP. No. 317, *supra* note 16, at 50.

Within 45 days of the filing of any petition or of initiation, the ITC must reach a determination as to whether there is a "reasonable indication" that a U.S. industry is threatened with or is being materially injured or has been materially retarded by reason of imported merchandise.[55] Thus, unlike prior law, the ITC will now make a determination in every case. Since the standard for a preliminary affirmative decision is low, it is likely that few cases will be terminated on the basis of the ITC's initial review.

The Act contains shortened time periods to insure that investigations are completed as quickly as possible.[56] Antidumping proceedings are generally to be concluded within 300 days, approximately 100 days more quickly than under the Antidumping Act of 1921. Moreover, the 3-to 3½-year delay between the entry of goods subject to a finding and an assessment of dumping duties was harshly criticized by the congressional committees which directed that all assessments be concluded within a period preferably as short as six months but in no event longer than two years after entry.[57] The charts contained in the Appendix contrast the time periods under the Antidumping Act of 1921 and the Trade Agreements Act of 1979.

The new, shortened time limits concerning antidumping investigations impose substantial burdens on submission by importers and foreign manufacturers. If such submissions are not made in a timely manner, a decision will be made on the basis of the best information available, including the information supplied by the domestic complainant. Thus, while a domestic industry or interested party may file an antidumping action at any time which it determines is propitious, the importer or foreign producer has a short time in which to respond and will likely be adversely affected if it does not respond within the allotted time.

As under the Antidumping Act of 1921, whenever the administering authority makes a affirmative determination of less-than-fair-value (LTFV) sales, liquidation must be suspended for all

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55. Trade Agreements Act, *supra* note 3, at § 703(a) (codified at 19 U.S.C. § 1671b(a)). This provision differs from 19 U.S.C. § 160(c)(2) of the Antidumping Act of 1921 where the ITC made a preliminary determination only where the Treasury Department referred the matter in cases where a "substantial doubt" of injury existed.

56. *Id.* at §§ 732-733 (codified at 19 U.S.C. § 1673a-1673b).

57. *Id.* at § 736(a) (codified at 19 U.S.C. § 1673(a)). *See* H.R. Rep. No. 317, *supra* note 16, at 69; S. Rep. No. 249, *supra* note 37, at 66.

entries of merchandise subject to the determination.[58] Under the new provisions, however, a cash deposit may be required in lieu of a bond.[59] The statute also provides for retroactive withholding of appraisement in "critical circumstances" where the Commerce Department determines that there is a history of dumping in the U.S. or the importer knew or should have known that the exporter was selling at LTFV and, in addition, massive imports of merchandise subject to the investigation had taken place over a relatively short period of time.[60]

Once a preliminary determination is made by the Commerce Department, and absent the suspension or termination of an investigation,[61] it is forwarded to the International Trade Commission for a material injury determination.[62] Upon an affirmative ITC finding of material injury and the issuance of a dumping order, dumping duties may be imposed.[63] Under previous practice entries were to be liquidated within one year subject to administrative extensions,[64] however, final assessments were frequently not imposed until years after a final dumping order. The Trade Agreements Act provides formal time limits for assessments[65] and requires the payment of the entire amount of the estimated dump-

58. Trade Agreements Act, *supra* note 3, §§ 736-738 (codified at 19 U.S.C. §§ 1673e-1673g). If the preliminary determination is negative, security is not required to be posted until and unless there is a final determination of LTFV sales.

59. *Id.* Under the Antidumping Act of 1921, when liquidation was suspended the importer was required to post a bond in an amount determined by the Secretary of Treasury.

60. *Id.* at § 733(e) (codified at 19 U.S.C. § 1673b(e)).

61. The Commerce Department may suspend an investigation on the acceptance of an agreement by exporters accounting for "substantially all" of the goods under consideration whereby they agree to eliminate all LTFV sales or cease exports to the U.S. entirely or to eliminate completely the injurious effects of the imports upon the relevant U.S. industry. Trade Agreements Act, *supra* note 3, at § 734 (codified at 19 U.S.C. § 1673c). The term "substantially all," according to the Congressional Committee Reports, refers to exporters responsible for no less than 85 percent of the total volume of merchandise subject to the investigation in the most recent representative period. H.R. No. 317, *supra* note 16, at 64; S. Rep. No. 249, *supra* note 32, at 71; *see also* Statement of Administrative Action, *supra* note 8, at 31.

62. Trade Agreements Act, *supra* note 3, at § 732(d) (codified at 19 U.S.C. § 1673a(d)).

63. *Id.* at §§ 736-738 (codified at 19 U.S.C. §§ 1673e-1673g).

64. Tariff Act of 1930, *supra* note 28, at § 504 (codified at 19 U.S.C. § 1504).

65. Duties must be assessed with 6 months after "satisfactory" information upon which an assessment may be based has been received, but in no event later than 12 months after the manufacturer's accounting period within which the merchandise entered or no later than 12 months after the manufacturer's or exporter's accounting period within which merchandise is sold to someone other than the exporter. Trade Agreements Act, *supra* note 3, at § 736 (codified at 19 U.S.C. § 1673e).

ing duty on entry based upon the LTFV margin found in the final dumping order.[66] These provisions will likely shorten the time frame and significantly increase the amount of money required to be paid as duties.

The Act significantly expands the requirements for administrative and judicial review of determinations by the Commerce Department and the International Trade Commission.[67] In terms of administrative review, the new law provides for a yearly review of the suspension of investigation agreements as well as of the amount of a dumping duty which thereby causes a redetermination of the foreign market value and the United States price of each entry subject to an order and the amount by which the foreign market value exceeds the price.[68] These periodic reviews are designed to insure that the amount of dumping duties imposed will reflect current dumping margins. Further, upon the assertion of "changed circumstances," an interested party may request Commerce Department review of an affirmative final determination of LTFV sales, a determination to suspend an investigation pursuant to an exporter's agreement, an ITC determination of material injury or retardation, or an ITC determination that a suspension agreement eliminated the injurious effects of imports upon domestic industry.[69]

The judicial review provisons contained in the Trade Agree-

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66. *Id.* at §§ 736-738 (codified at 19 U.S.C. §§ 1673e-1673g). This provision permits the temporary posting of a bond for up to 90 days after publication of the final order during which time the importer must provide information on which to determine the duty. At the end of the 90-day period, or as soon as a basis for the duty has been determined, estimated duties must be paid in full. It is interesting to note that the E.E.C. antidumping rules provide that an antidumping duty may be less than the LTFV margin if such lesser duty would be adequate to remedy the injury. O.J. EUR. COMM. (No. L 93) (1968); O.J. EUR. COMM. (Spec. Ed.) (1968), *as amended by* O.J. EUR. COMM. (No. L 160) (1977), However the U.S. law requires a duty equivalent to the margin irrespective of its adequacy to remedy the injury.

67. Trade Agreements Act, *supra* note 3, at §§ 751, 516A (codified at 19 U.S.C. §§ 1675, 1516a).

68. The extent of both the margins involved and of compliance are subject to review. The Commerce Department may order reinstitution of an investigation if it is dissatisfied with the extent of compliance. *Id.* at § 751(a) (codified at 19 U.S.C. § 1675(a)).

69. *Id.* at § 751(b) (codified at 19 U.S.C. § 1675(b)). However, a Commerce Department review of an affirmative final determination of LTFV sales or suspension of an investigation pursuant to an agreement, or ITC review of its material injury determination or of a suspension agreement, may not occur until 24 months have elapsed since the publication of the determination of suspension, absent "good cause" for an early review. H.R. REP. NO. 317, *supra* note 16, at 72.

ments Act provide increased rights of review of both final and interlocutory determinations made in the course of an antidumping investigation.[70] Most of the rights of review are, however, accorded exclusively to the domestic industry, and exporters are accorded more limited rights to appeal decisions which affect them adversely. The Act permits an interested party to go to the U.S. Customs Court for interlocutory review of legal conclusions or underlying factual findings concerning a Commerce Department determination that a case is extraordinarily complicated and that the time limits for the investigation must be extended, a preliminary determination that no LTFV margins exist, a determination by either the ITC or Commerce Department not to review a prior determination or suspension agreement upon an assertion of "changed circumstances," or an ITC determination that an industry is not being material injured, threatened with material injury or materially retarded.[71] Review of final determinations by the ITC on material injury or by the Commerce Department on LTFV are judicially reviewable[72] as under the Antidumping Act of 1921.[73]

The review process embodied in the Trade Agreements Act may be criticized as unfair to importers and foreign producers. The Act provides that if an initial decision is reached by the Commerce Department adverse to an importer or foreign producer, it cannot be appealed until the end of the proceeding. However, if a preliminary determination is made that no dumping has occurred, the domestic complainant can immediately appeal to the Customs Court. It may be argued that there is no incentive for an exporter to appeal since there is no reason to appeal a decision *not* to initiate an investigation. Further, an appeal prior to a final determination would be costly and would provide serious time delays. Notwithstanding these concerns, the review provisions do operate to the advantage of domestic industry complainants who seek the imposition of dumping duties.

70. The applicable standard of review is whether such determinations were "unsupported by substantial evidence on the record, or otherwise not in accordance with law." Trade Agreements Act, *supra* note 3, §§ 516A(a)(1), (2), (b)(1)(B) (codified at 19 U.S.C. § 1516a(a)(1), (2), (b)(1)(B)).

71. *Id.* at § 771(a) (codified at 19 U.S.C. 1677 (a)). "Interested party" includes unions, trade or business associations and the government of the exporting country.

72. *Id.* at 1001a(a)(1), (2), (b)(1)(B) (codified at 19 U.S.C. 1516a(a)(1), (b)(1)(B)).

73. *Id.* The periodic review by the Commerce Department of LTFV sales or of suspension agreements may be judicially reviewed as well.

V. POTENTIAL IMPACT ON THE OPERATIONS OF MULTINATIONAL CORPORATIONS

Numerous corporations which were formerly considered "American" have established international strategic approaches to ascertain the least expensive inputs and best markets for their products. As a result of increased global integration, occasions have arisen where separate operations of a single multinational corporate entity were positioned on opposite sides of an antidumping controversy.[74] For examples, potash from Canada was produced by the same MNC's that owned facilities in the U.S. which were allegedly injured by the dumping of the Canadian product,[75] and Ford automobiles manufactured in Europe have been the subject of a U.S. antidumping investigation.[76]

The Trade Agreements Act has significantly altered the treatment of dumping controversies where multinational corporations are involved. The Antidumping Act of 1921 assumed the existence of separate "home" or "third" country and domestic markets in which price levels could be independently determined.[77] While the assumption was valid in many cases where necessary isolation of markets and freedom to set prices occurred, this assumption failed in its application to the operation of MNC's[78] where independent markets are blurred and may be regarded as part of a worldwide market.[79] The Antidumping Act of

74. Ehrenhaft, *Multinational Enterprises and the Antidumping Law*, 20 HARV. INT'L L. J. 277 (1979) [hereinafter cited as Ehrenhaft, *Multinational Enterprises*].

75. Potassium Chloride from Canada, 34 Fed. Reg. 19,003 (1969) (Determination of Sales at Less Than Fair Value); 34 Fed. Reg. 13,670 (1969) (Tariff Commission Determination of Injury and Likelihood of Injury).

76. Automobiles from West Germany, 41 Fed. Reg. 34,989 (1976) (Discontinuance of Antidumping Investigation).

77. The price in the domestic United States market of imported merchandise was called the "purchase price" and was defined as "the price at which such merchandise has been purchased or agreed to be purchased, prior to the time of exportation, by the person by whom or for whose account the merchandise is imported." 19 U.S.C. § 162(a) (1976). The price in foreign markets was called the "foreign market value" and was defined as

> the price, at the time of exportation of such merchandise to the United States, at which such or similar merchandise is sold or, in the absence of sales, offered for sale in the principal markets of the country from which exported, ... or, ... the price at which so sold or offered for sale for exportation to countries other than the United States.

19 U.S.C. § 164(a) (1976).

78. Ehrenhaft, *Multinational Enterprises*, *supra* note 74, at 280-81.

79. In the course of an antidumping proceeding, the Treasury was required to determine whether merchandise was being, or was likely to be, sold in the United States at less

1921 presumed that a foreign producer did not have an affiliated U.S. reseller[80] and failed to address intracorporate transfer pricing at less than arm's length.[81] The law required that investigation and computation be based on the price charged in the first sale by the MNC's U.S. seller to an unrelated party. From that price all of the company's costs, extending backward to include the producer's presumed "foreign export price," were deducted prior to comparison with the home-market price of the foreign producer.[82] The Trade Reform Act of 1974 did consider the application of the antidumping law to MNC's, particularly where MNC's use overall company profits as "subsidies" to offset unfairly low prices in the United States.[83] However, its attempt to address the issue was never invoked.[84] As a result, in subtracting the U.S. related

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than its fair value. 19 U.S.C. § 160(a) (1976). This less than fair value determination increasingly took the form of a mathematical price comparison test: the United States selling price compared to an approximation of foreign market value of the merchandise under investigation. Note, *Treasury Runs the Maze: Less Than Fair Value Determinations Under the Antidumping Act of 1921*, 8 GA. J. INT'L & COMP. L. 919, 922 (1978); *see* 19 U.S.C. § 161(a) (1976).

80. This is a particularly acute problem. A report of the United Nations Centre on Transnational Corporations notes that 46% of total U.S. imports and 45% of total U.S. exports have been "intra-firm." Transnational Corporations in World Development: a Reexamination, 4 U.N. DOC. E./C. 10/38, 43 (1978).

81. In determining the United States selling price of the merchandise under investigation, the Treasury used either the purchase price or the exporter's sales price of the merchandise. When a foreign producer had an affiliated United States reseller, the relevant price for comparison purposes was the exporter's sales price, defined as "the price at which such merchandise is sold or agreed to be sold in the United States, before or after the time of importation, *by or for the account of the exporter*," with certain adjustments. 19 U.S.C. § 163 (1976) (emphasis added).

82. *Id.*

83. *See* SENATE COMM. ON FINANCE, TRADE REFORM ACT OF 1974, S. REP. NO. 1298, 93rd Cong., 2d Sess. 174-77 (1974).

84. The Trade Reform Act of 1974 added a new section 205(d) which provided that if an MNC had production and sale facilities in two or more foreign countries, only one of which supplied the U.S. market, then the home market price of the entity actually supplying the U.S. was to be disregarded if another related entity supplied non-U.S. markets with the same goods at higher prices than those at which such merchandise was sold to the United States. 19 U.S.C. § 164(d) (1976); *see* Ehrenhaft, *Multinational Enterprises, supra* note 74, at 281. However, this section is triggered only if MNC sales in the home exporting country are non-existent or too few to provide an adequate basis for price comparison with U.S. sales and ignores the possibility that a MNC could subsidize both sales to the U.S. and home market, thereby allowing sufficient home market sales to force the use of the normal foreign market procedure. Thus, the subsidized price of the home market sales would be low, so that if the foreign market value were compared to the United States sales price, no dumping determination would result, enabling the MNC to succeed at underselling American competition while avoiding the assessment of a dumping duty. *See* Note, *Treasury Runs The Maze: Less Than Fair Value Determinations Under the Antidumping Act of 1921, supra* note 79, at 937.

party's selling expenses from its resale prices in order to reach the figure to be compared with the foreign market value of the goods, no allowance was made for the reseller's profits.[85] The related party thus held an advantage over unrelated sales agencies which must earn a profit to survive.

The Trade Agreements Act does address, though imperfectly, the operations of MNC's. Section 773(d) of the Act provides that where merchandise exported to the U.S. is produced by a multinational corporation and where sales of such or similar goods do not exist or are inadequate as a basis for comparison of U.S. sales with those in the country of exportation, and where, in addition, the foreign market value outside the country of exportation is greater than the value within the exporting country, the applied value shall be the foreign market value at the time of exportation of such goods sold in substantial quantities in other countries. Such calculation will involve adjustments for differences in the costs of production, including taxes, labor, materials and overhead, where such differences are satisfactorily demonstrated as well as the costs of packaging and shipping.[86] Although this provision is an improvement over prior law, it still fails to encompass situations involving "intra-firm" sales and may well fail in practice.

The Act fails to address the situation where MNC's with diversified production and distribution facilities acquire components of products from another country at less than fair value prices which are then assembled for sale to the U.S. The products might later be sold at uniformly low prices in both the home market of their assembly and the United States. Further, U.S. multinational corporations will likely be unwilling to invoke the antidumping provisions of the Trade Agreements Act either because they do not feel that the pressure of import competition can be meaningfully addressed through the antidumping proceedings or because they fear retaliation against their export sales.[87] Thus, in

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85. A deduction was required to be made in computing exporter's sales price only for
> the amount of the *commissions*, if any, for selling in the United States the particular merchandise under consideration, by an amount equal to the expenses, if any, generally incurred by or for the account of the exporter in the United States in selling identical or substantially identical merchandise.

19 U.S.C. § 163 (1976) (emphasis added).

86. Trade Agreements Act, *supra* note 3, at § 773(d) (codified at 19 U.S.C. § 1677b(d)).

87. Ehrenhaft, *Antidumping and Trade Policy, supra* note 20, at 1376. However, as the author notes, steel and chemical companies are exceptions.

substance and in terms of enforceability, the new provision may inadequately address abuses or price-discriminatory strategies practiced by multinational corporations.

VI. POSSIBLE CONSEQUENCES FOR LESS DEVELOPED COUNTRIES

The "Tokyo Declaration," which gave the Tokyo Round its name and established its terms of reference, called for "improvements in the international framework for the conduct of world trade"[88] and recognized the need to adopt "differential measures" in order to give developing countries "special and more favorable treatment . . . in areas of the negotiation where this is feasible and appropriate."[89] This principle encompasses a rule of "graduation" to permit LDC's to take on increased responsibilities under GATT as their levels of development advance. It also reflects the qualified success of LDC's in convincing the international community to permit some forms of special treatment for their exports.[90] However, these calls by LDC's for easier access to developed country markets have largely gone unheeded.[91]

The bargaining power of developing countries was weakened in the recently completed Tokyo Round by their strong, continuous opposition to the principle of reciprocity[92] and their later demand for a departure from the most-favored-nation (MFN) clause,[93] which are the cornerstones of GATT, to make possible the introduction of a one-way preferential system for LDC's.[94] The MTN Antidumping Agreement did recognize, however, that

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88. Declaration of Ministers, *supra* note 6, at 22.

89. *Id.* at 21. Graham, *Reforming the International Trading System: The Tokyo Round Trade Negotiations in The Final Stage*, 12 CORNELL INT'L L.J. 1, 27-28 (1979).

90. One result of this effort was the adoption of the Generalized System of Preferences, which allows selected exports from LDC's to enter the markets of developed countries at lower duty rates than those applied to the same products from developed countries. *See* Graham, *The U.S. Generalized System of Preferences for Developing Countries: International Innovation and the Art of the Possible*, 72 AM. J. INT'L L. 513 (1978).

91. *See* YEATS, TRADE BARRIERS FACING DEVELOPING COUNTRIES (1979); Nowzad, *Differential Trade Treatment for LDC's*, FINANCE AND DEVELOPMENT (1978) at 16.

92. Reciprocity is essentially the principle of "give and take" which implies mutuality of gains and the granting of equivalent concessions.

93. The MFN clause contained in Article II of the GATT is a principle of nondiscrimination and calls for the automatic and unconditional extension of concessions to all other contracting parties. *See* BISD, *supra* note 6, at 2.

94. A thorough discussion of this debate is contained in Ibrahim, *Developing Countries and the Tokyo Round*, 12 J. WORLD TRADE L. 1, 3 (1978).

special attention must be given by developed countries to the situation of developing countries when considering the application of antidumping measures. That Agreement called for the exploration of possible "constructive" remedies before applying antidumping duties where the duties would effect the essential interests of LDC's.[95] Despite this MTN recommendation, however, the Trade Agreements Act contains no such flexibility in the provision of "constructive" remedies and treats dumping by LDC's in a manner similar to dumping by developed countries. Thus, the development goals of LDC's are extraneous to U.S. antidumping decisions inasmuch as LDC's would be subject to automatic remedies if a dumping determination were made.

Developing countries have long recognized the importance of market access for their exports to developed countries. LDC's concern for their future development has grown with the increased incidence of protection in developed market economies and with the realization that trade barriers often impact disproportionately on products exported by developing countries.[96] LDC's have expressed particular concern over protection, such as antidumping measures, granted in response to claims that their exports are disrupting domestic markets. Two important concerns have been raised by the developing countries. First, while they view safeguard action as both necessary and appropriate in many circumstances, they seek some guarantee that such action will be temporary in nature and will take into consideration the disruption in their own economies and markets that follows the imposition of dumping duties or other protectionist measures. Second, LDC's want it to be clearly and factually established that developing country imports are responsible for the "material injury" suffered by a domestic industry prior to the imposition of any protectionist response.[97]

LDC's are justifiably concerned about antidumping measures such as those contained in the Trade Agreements Act. If they are unable to sell their products in the United States, alternative

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95. Antidumping Agreement, *supra* note 22, at pt. I, art. 13, *reprinted in* MTA, *supra* note 2, at 325. *See generally*, MTN, Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries, MTN/FR/W/20/Rev. 2 (1979), *reprinted in* MTA at 622-61.

96. Sampson, *Contemporary Protectionism and Exports of Developing Countries*, 8 WORLD DEVELOPMENT 113 (1980).

97. *Id.* at 116-17.

outlets must be sought. This is frequently an arduous undertaking. LDC's have argued that their exports are frequently used as scapegoats to mask internal structural problems in the country of importation. One commentator has observed that import growth has not significantly affected the growth of output or employment in the United States.[98] In the field of textiles, an industry frequently the subject of dumping investigations or voluntary restraint agreements, recent studies have revealed that imports of textiles from developing countries accounted for less than 2.5% of U.S. consumption and less than 10% of the consumption of clothing in 1975. Moreover, developing countries are net importers of the intermediate goods and raw materials for the manufacture of clothing and other textile goods.[99]

LDC's have posited that protectionist measures, such as the imposition of dumping duties, employed against developing countries are ill-chosen because the exports of manufactured goods from developed countries to developing nations have increased substantially more than their imports from LDC's. Moreover, LDC's argue that the loss of jobs in import-competing industries is not due to increased imports but is the result of the failure of developed countries to keep pace with technological innovation and the diffusion of production technology and ability.[100] It is argued that protectionism will reduce pressures for productivity and cost-efficiency improvements in import-competing industries. National incomes will subsequently decline because resources will not be used to the best advantage and potential economies of scale will not be realized.[101]

The increasing employment of state trading by developing countries to improve their bargaining power, expand exports, provide central planning, raise revenue for the government, diversify the geographical and commodity structure of exports, and lower costs may increase exposure to the risk of a dumping find-

98. Krueger, *Effects of Exports from New Industrial Countries on U.S. Industries*, in GROWTH, TRADE AND STRUCTURAL CHANGE IN AN OPEN AUSTRALIAN ECONOMY 15 (W. Kasper & T. Perry, eds. 1978).

99. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, HANDBOOK OF INTERNATIONAL TRADE AND DEVELOPMENT STATISTICS (1979).

100. *See* Franko, *Multinationals: The End of U.S. Dominance*, 56 HARV. BUS. REV. 95 (1978).

101. Balassa, *World Trade and the International Economy: Trends, Prospects and Policies*, WORLD BANK STAFF WORKING PAPER NO. 282 at 33-35 (1978) [hereinafter cited as Balassa].

ing.[102] As a result, such risk may induce LDC producers to limit exports to the United States for fear of financial loss in the form of payments of additional duties or bonds which may strain the LDC's treasury.[103] Thus, LDC sales of products at less than fair value to capture market share will likely be curtailed. It may be argued that LDC's will be acutely disadvantaged because market forces as well as the benefits obtained by shifts to lower-cost sources will be foregone, thereby freezing existing patterns, discriminating against new producers, and obstructing potential changes in comparative trade advantage.[104]

VII. CONCLUSION

The principle objectives of the General Agreement on Tariffs and Trade (GATT) are the progressive reduction of barriers to trade and the diversion of trade flows according to the free trade principle. Its goal is to increase the economic welfare of its contracting parties.[105] The Trade Agreements Act is an attempt to codify such principles. While imperfect, its failings cannot be attributed to American protectionism alone but must be viewed as a reflection of worldwide protectionist sentiment.[106]

The purposes of the antidumping provisions of the Trade Agreements Act are to discourage price discrimination practices and the sale of unfairly priced import goods in the United States, and to offer remedies for the injury suffered by domestic industry when such practices occur. It is, in essence, intended to be preventive and not punitive. Nevertheless the Act, which in both design and application will present undue hardships to foreign producers and developing countries, fails to adequately address the global operations of multinational corporations and is susceptible to protectionist designs.

The Act places greater restrictions on the practices of foreign producers selling in the U.S. market than are applied to domestic

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102. *See* Kostecki, *State Trading in Industrialized and Developing Countries*, 12 J. World Trade L. 187, 188 (1978).

103. *See* Balassa, *supra* note 101, at 15; Balassa, *The 'New Protectionism' and the International Economy*, 12 J. World Trade L. 409, 418 (1978).

104. *Id* at 425.

105. *See generally*, K. Dam, The GATT—Law and International Economic Organization (1970).

106. *See* Jackson, *The Crumbling Institutions of the Liberal Trading System*, 12 J. World Trade L. 93 (1978), for an insightful analysis of the causes of crisis in the international liberal trade system and in the effectiveness of GATT.

producers. U.S. producers are not likely to suffer governmentally imposed financial burdens if they sell at less than full cost as long as they do not sell below average variable cost.[107] Further, the Act fails to adequately distinguish between dumping by inadvertence or as the result of rational business decisions to introduce new products, test new markets, or reduce surplus or outdated inventories, and intentional, predatory dumping to eliminate competition in order to gain market control. Moreover, it ignores the particular needs of LDC's whereby sales practices are fostered by government policies aimed at maintaining employment levels, obtaining foreign exchange needed to finance internal development, or to help alleviate chronic balance-of-payment deficits.

Finally, due to the difficulty of ascertaining a foreign market price for imported goods, the danger exists that the new antidumping provisions will be undermined by protectionist ends. One result may be that domestic industries which are overly concentrated and inefficient or sell at inflated prices will be shielded from the healthy competition provided by lower priced imports. The Code promulgated in the Tokyo Round and the Trade Agreements Act are steps in the right direction. Further steps are required, however, if the ideal of free trade is ever to be achieved.

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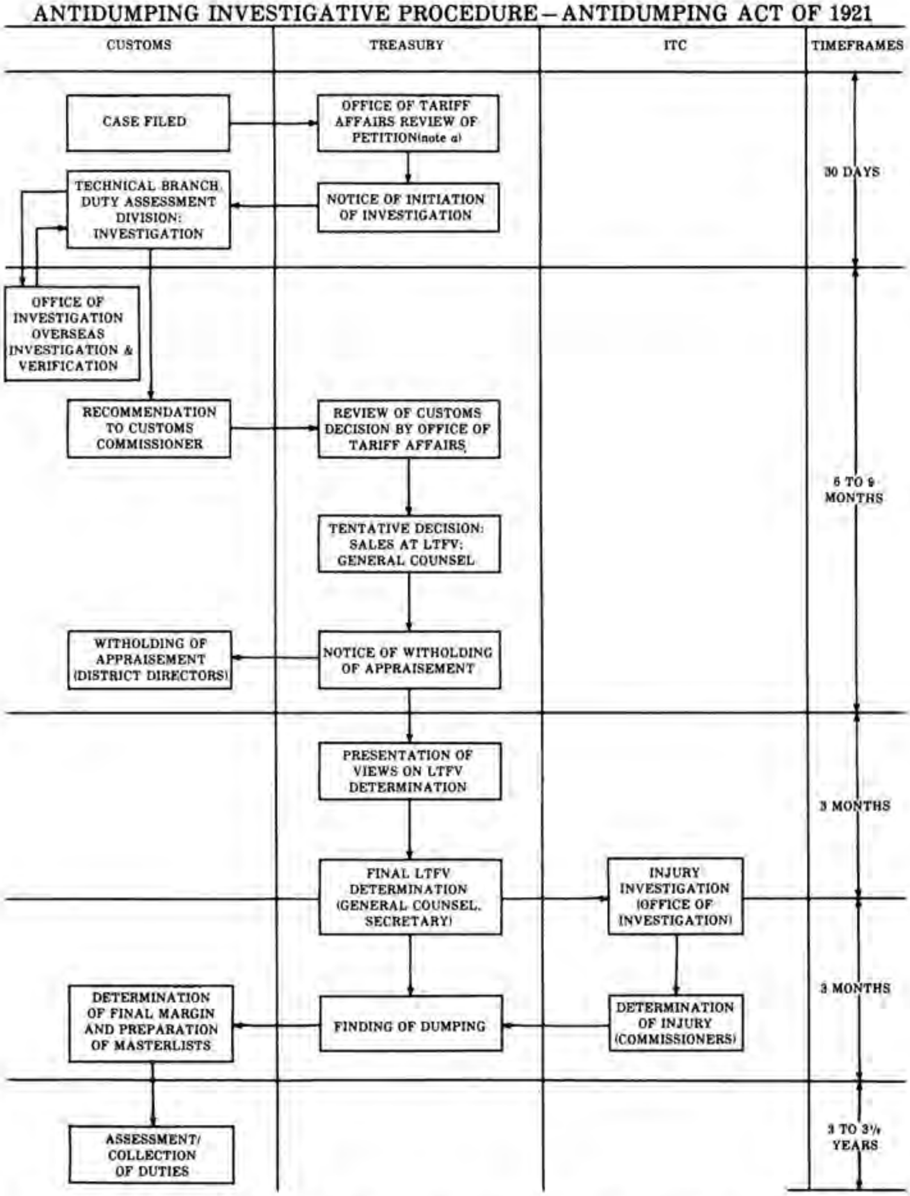
107. *See* Chillicothe Sand & Gravel Co. v. Martin Marietta Corp., 615 F.2d 427 (7th Cir. 1980) (no predatory pricing or Sherman Act violation where defendant's prices were above average variable cost).

VIII. APPENDIX

CHART 1

ANTIDUMPING INVESTIGATIVE PROCEDURE – ANTIDUMPING ACT OF 1921



a BY AMENDMENT IN THE TRADE ACT OF 1974, TREASURY AT THIS STAGE COULD REQUEST A PRELIMINARY INDICATION OF INJURY DECISION FROM THE ITC.

SOURCE: COMPTROLLER GENERAL, U.S. ADMINISTRATION OF THE ANTIDUMPING ACT OF 1921, REPORT TO CONGRESS 3 (G.A.O. 1979).

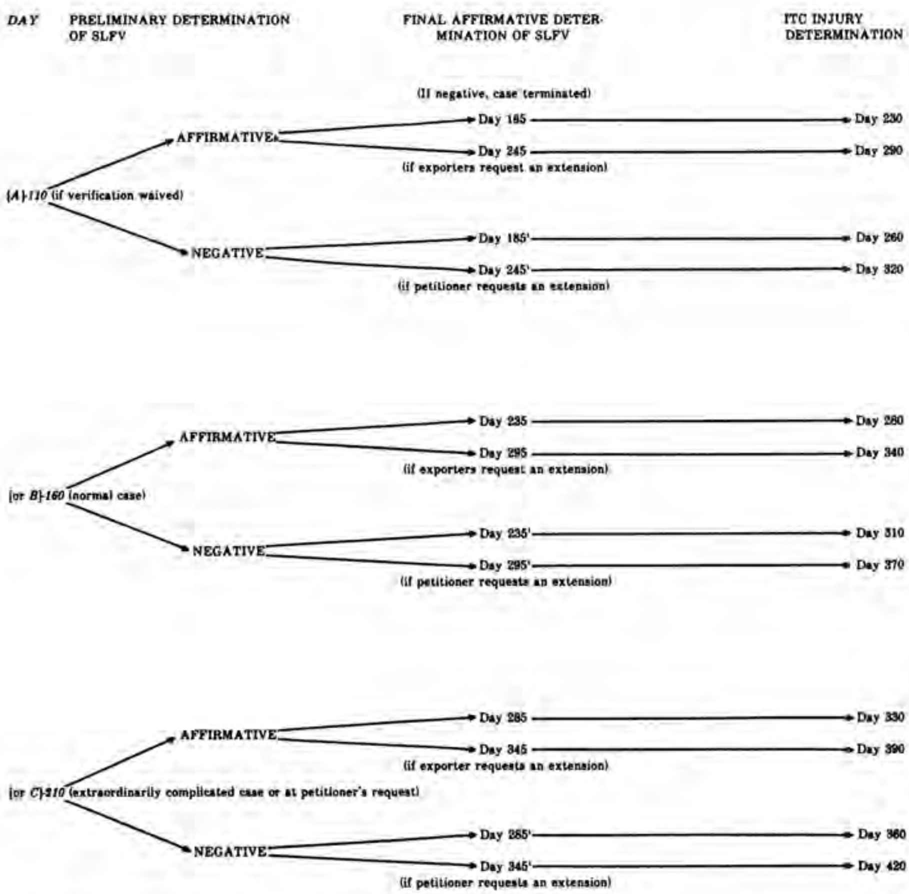
CHART 2

ANTIDUMPTING CASES
(Statutory Deadlines)—TRADE AGREEMENTS ACT OF 1979

DAY 1—PETITION FILED WITH THE ADMINISTERING AUTHORITY AND THE ITC
(If self-initiated by Administering Authority no action required on day 20)

DAY 20—INITIATION DECISION BY THE ADMINISTERING AUTHORITY
(The ITC is informed. If the decision is negative, the case is terminated.)

DAY 45—REASONABLE INDICATION OF INJURY DETERMINATION BY THE ITC
(If the decision is negative the case is terminated)



b. LIQUIDATION SUSPENDED.

Source: Ehrenhaft, ***What the Antidumping and Countervailing Duty Provisions of the Trade Agreements Act [Can] [Will] [Should] Mean for U.S. Trade Policy***, 11 LAW & POL'Y INT'L BUS. 1361, 1370-71 (1979)