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The New Anti-Dumping Procedures of the Trade Agreements Act of 1979: Does It Create a New Non-Tariff Trade Barrier?

The Trade Agreements Act of 1979¹ contains what is likely to be the most extensive modification of U.S. anti-dumping law since the passage of the original Antidumping Act of 1921.² The new law makes five significant changes in anti-dumping investigation procedures which are intended to streamline investigations, to provide prompt and more effective relief for domestic industries threatened by unfair foreign competition, and to provide the agencies with a clearer definition of their responsibilities.³

These worthy intentions, however, have produced a system that is unfairly burdensome to foreign manufacturers and domestic importers:⁴ the shortened time limits may result in inaccurate and prejudicial

¹ Pub. L. No. 96-39, 93 Stat. 144 (1979) (to be codified in scattered sections of 13, 19, 26, 28 U.S.C.). The Act became effective on January 1, 1980. Before it could become effective, the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade (GATT) and the Agreement on Implementation of Article VI of the GATT had to become effective. *Id.* at § 107. This was done when President Carter signed the Memorandum of December 15, 1979. 44 Fed. Reg. 74, 781 (1979).

The Trade Agreements Act of 1979 was designed to implement the liberalized multilateral measures negotiated by the participants in the Tokyo Round of the General Agreement on Tariffs and Trade (GATT). [1979] U.S. CODE CONG. & AD. NEWS 1478 (President Carter's message upon submission of the Trade Agreements Act to Congress for passage); DEP'T STAT BULL., Aug. 1979, at 43.

² 42 Stat. 11 (1921) (current version at 19 U.S.C. §§ 160-171 (1976)). Most of the important procedural amendments to the Antidumping Act of 1921 were made by the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1974) (codified in scattered sections of 5-8, 15, 19, 21-22, 26, 42, 45 U.S.C.).

For ease of drafting, the new law completely revokes all prior legislation and then reenacts some provisions in essentially the same form. Pub. L. No. 96-39, *supra* note 1, at § 106.

³ See *Implementation of the Multilateral Trade Negotiations: Hearings Before the Subcomm. on International Trade of the Senate Finance Comm.*, 96th Cong., 1st Sess. (1979) [hereinafter cited as *Senate MTN Hearings*]; *Multilateral Trade Negotiations: Hearings Before Subcomm. on Trade of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. (1979) [hereinafter cited as *House MTN Hearings*]; *The Trade Agreements Act of 1979: Hearings Before the Subcomm. on International Trade of the Senate Comm. on S. 1376*, 96th Cong., 1st Sess. (1979) [hereinafter cited as *1979 Trade Act Hearings*]; *Administration of the Antidumping Act of 1921: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 95th Cong., 2d Sess. (1978) [hereinafter cited as *Administration Hearings*].

⁴ Some witnesses at the subcommittee hearings on the new Act suggested that in the midst of

findings;⁵ the new price assurance provisions are unnecessarily harsh and limit the opportunities for a quick termination of an anti-dumping investigation;⁶ the new disclosure rules threaten the competitive secrets of foreign producers;⁷ the cash deposit of estimated dumping duties punishes dumpers unnecessarily;⁸ and the new procedure for retroactive duty assessment unjustifiably imposes greater risks upon the dumping defendant.⁹ By unfairly burdening foreign manufacturers and domestic importers, the new law creates a barrier to foreign trade and thus harms both the United States and its trading partners.¹⁰

Because these new procedures are the result of a basic misconception of the purposes of anti-dumping law, this comment first will briefly examine the effects of dumping and anti-dumping legislation in light of a free trade policy. Second, it will outline the procedures utilized prior to the 1979 Act to establish the sequence of an anti-dumping investigation. Next, in order to clearly indicate how the old law has been changed, the five new procedures adopted by the new Act will be described. Finally, this comment will scrutinize these changes in order to demonstrate how they discourage imports and thus erect a barrier to trade.

A BRIEF EXAMINATION OF THE POLICY UNDERLYING ANTI-DUMPING LAW

The benefits of a free trade policy are theoretically based on what economists refer to as comparative advantage. The principle of comparative advantage states that because of natural advantages, such as low labor costs, abundant raw materials, or technical expertise, each country will be better off if it specializes in producing those goods it can make, relatively, the most cheaply, and then trades for the other goods it requires.¹¹ When there are barriers to trade, a country must divert

the debate on the new procedures, some domestic groups took advantage of congressional confusion over the purposes of anti-dumping law to introduce a number of protectionist measures. See *House MTN Hearings*, *supra* note 3, at 745 (statement of Peter Suchman and Gail Cumins).

⁵ See notes 111-137 and accompanying text *infra*.

⁶ See notes 138-157 and accompanying text *infra*.

⁷ See notes 158-168 and accompanying text *infra*.

⁸ See notes 169-189 and accompanying text *infra*.

⁹ See notes 190-198 and accompanying text *infra*.

¹⁰ For a general discussion of past use of antidumping law as a barrier to trade, see Barcelo, *Antidumping Laws as Barriers to Trade*, 57 CORNELL L. REV. 491 (1972); Schwartz, *The Administration by the Department of Treasury of the Laws Authorizing the Imposition of Antidumping Duties*, 14 VA. J. INT'L L. 463 (1974); Weeks, *Introduction to the Antidumping Law: A Form of Protection for the American Manufacturer*, 35 ALB. L. REV. 182 (1971); Note, *U.S. Protectionism in International Trade*, 61 KY. L.J. 935 (1972).

¹¹ For a more detailed discussion of comparative advantage theory and its benefits, see G.

resources to the production of necessary goods that other countries could have produced more cheaply, thereby diminishing the wealth of that country.¹² A barrier to trade consists of any practice that prohibits trade, such as an embargo, or that merely discourages trade, such as tariffs, quality requirements, or more pertinently, legal procedures that impose undue costs and uncertainties upon foreign producers.¹³

Broadly defined, dumping occurs when a foreign manufacturer exports goods to be sold in the United States at a lower price than that to be charged in his own domestic market.¹⁴ The 1979 Act defines dumping as sales of foreign goods at less than their fair value.¹⁵

Because markets consist of many sales at many different prices, the new Act employs a number of theoretical aggregates—United States price, foreign market value, constructed value, and third country price—to determine when sales at less than fair value (LTFV) are being made.¹⁶

Hypothetically, a foreign producer may decide to dump when he sells in two or more markets, and faces a different elasticity of demand in each market.¹⁷ Empirically, although there are a variety of reasons,

HABERLER, A SURVEY OF INTERNATIONAL TRADE THEORY (1961); P. SAMUELSON, ECONOMICS 668-691 (9th ed. 1973); W. WARES, THE THEORY OF DUMPING AND AMERICAN COMMERCIAL POLICY, 65-73 (1977); Barcelo, *supra* note 10, at 498.

¹² See, e.g., Smith, *Restraints on Foreign Imports*, in READINGS IN ECONOMICS 335 (P. Samuelson, R. Bishop & J. Coleman eds. 1952).

¹³ Besides tariffs, barriers to trade "include such traditional obstacles as import quotas and unduly complicated customs procedures which tend to hinder international mobility of merchandise. They also include export subsidies, government procurement policies, and standards set for consumer or user protection." Marks & Malmgren, *Negotiating Nontariff Distortions to Trade*, 7 LAW & POL'Y INT'L BUS. 327, 328 (1975) (emphasis added).

¹⁴ Technically, dumping occurs whenever a manufacturer sells at a different price in a foreign market than in his own, i.e., a manufacturer may "dump" in his own country. W. WARES, *supra* note 11, at 3-7.

¹⁵ Pub. L. No. 96-39, *supra* note 1, at § 731(1).

¹⁶ "United States price" is either the price at which the merchandise is agreed to be sold or the actual sale price in the U.S., each with the appropriate adjustments. Pub. L. No. 96-39, 93 Stat. 144, § 772(a) (1979) (to be codified at 19 U.S.C. § 1677a). "Foreign market value" is the ordinary wholesale price of the goods in the producer country. *Id.* at § 733 (to be codified at 19 U.S.C. § 1673(b)). "Constructed value" is used in place of foreign market value under certain circumstances, and based on cost of production and normal profit rates in the producer country. *Id.* at § 733(e). "Third market value" is also used at times in place of foreign market value and is based on sales in countries other than the United States or the producer country. *Id.* at § 733(a)(1)(B). See generally Note, *Treasury Runs the Maze: Less Than Fair Value Determinations under the Anti-dumping Act of 1921*, 8 GA. J. OF INT'L & COMP. L. 919 (1978) [hereinafter cited as GA. Note].

¹⁷ See W. WARES, *supra* note 11, at 10, 31. Elasticity of demand refers to the slope of the demand curve. An elastic demand means that as the price of a good changes, the number of consumers willing to purchase that good changes greatly; an inelastic demand means that as the price of a good changes, the number of consumers willing to buy that good changes relatively little. *Id.*

dumping often arises when the foreign manufacturer seeks to maintain full production, either because of economies of scale or strong domestic competition, but produces more than his limited, perhaps relatively poorer domestic market can absorb.¹⁸

Dumping can have both beneficial and harmful effects. The foreign manufacturer benefits from increased sales, greater market dominance, and higher profits.¹⁹ Dumping also benefits the American consumer who buys the cheaper, dumped goods,²⁰ although the foreign consumer may be harmed, because he faces a higher price than he would otherwise.²¹ American producers may be harmed by the increased competition from the lower-priced imports. It is this sort of harm to American producers that anti-dumping law seeks to prevent.²²

Three types of dumping may be distinguished—price discrimination per se, injurious dumping, and predatory dumping—and each type is not equally objectionable.²³ Price discrimination²⁴ per se is not illegal under U.S. anti-dumping law; dumping that does not injure domestic industry actually may have beneficial effects: “improved efficiency in the allocation of productive resources through time, innovative vigor in the production process, and distribution of products to the consumer at lowest possible prices.”²⁵ Even injurious dumping is justifiable if it arises from comparative advantage, and harms only inefficient or non-competitive domestic producers whose resources could better be used elsewhere.²⁶ Injurious dumping, however, has long been the overriding concern of domestic unions, manufacturers, and suppliers,²⁷ and, as did the prior law, the 1979 Act prohibits any dumping that causes injury to a domestic industry, regardless of the industry’s efficiency or ability to

¹⁸ *Id.* at 7-12. See also J. VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE 23 (1923).

¹⁹ W. WARES, *supra* note 11, at 7-12.

²⁰ *Id.* at 59-88.

²¹ *Id.* at 27-54.

²² *Id.*

²³ Price discrimination per se “causes only minimal business injury to domestic competitors.” Barcelo, *supra* note 10, at 499. Injurious dumping “causes recognizable and perhaps significant business injury in the form of lost sales and lower profits, but of a type normally associated with ordinary price competition. . . .” *Id.* Predatory dumping “includes dumping practices which by design or in effect cause such pervasive injury to domestic competition as to threaten monopolization.” *Id.*

²⁴ Price discrimination is merely the charging of different prices in different markets. W. WARES, *supra* note 11, at 88-9.

²⁵ Barcelo, *supra* note 10, at 500.

²⁶ *Id.*

²⁷ See, e.g., *Administration Hearings*, *supra* note 3, at 114-15 (statement of Robert Cornog, Chairman, Comm. of Domestic Steel Wire Rope and Specialty Cable Mfrs.).

compete with foreign producers.²⁸ Predatory dumping, as an extreme form of injurious dumping, is also prohibited.²⁹

The remedies for injurious and predatory dumping are "remedial" in nature, that is, essentially prophylactic and not punitive.³⁰ The law is designed merely to force cessation of dumping so that domestic and foreign producers may compete on a fair and equitable basis.³¹ Therefore, any aspect of the law which extends further and prevents non-injurious dumping or punishes the foreign manufacturer for injurious dumping will exceed the intent of anti-dumping law and will unnecessarily discourage imports.

PAST PROCEDURE UNDER THE ANTIDUMPING ACT OF 1921 AND THE TRADE ACT OF 1974

Although a district director of the Customs Service could begin an investigation on his own initiative,³² this rarely happened³³ under the prior statutory scheme.³⁴ Generally, an investigation began when a complaint was submitted by a representative of the domestic industry whose market was allegedly being threatened.³⁵ This complaint had to contain certain information: a description of the goods in question, and sufficient price and injury data to indicate, first, that sales were

²⁸ The injury standard has been raised by the new Act to "material injury." Pub. L. No. 96-39, 93 Stat. 144, § 731 (to be codified at 19 U.S.C. § 1673).

²⁹ See Barcelo, *supra* note 10, at 499.

³⁰ "The intent of Congress was not to impose a penalty, but an amount of duty sufficient to equalize competitive conditions." R. STURM, A MANUAL OF CUSTOMS LAW 134 (1976) (citing *Ellis K. Orlowitz Co. v. United States*, 200 F. Supp. 302 (Cust. Ct. 1961); *C.J. Tower & Sons v. United States*, 71 F.2d 438 (C.C.P.A. 1934); *Kleberg & Co., Inc. v. United States*, 71 F.2d 332 (C.C.P.A. 1933)). See also *Imbert Imports, Inc. v. United States*, 331 F. Supp. 1400 (Cust. Ct. 1971).

³¹ In this respect anti-dumping law resembles the Robinson-Patman Act, 15 U.S.C. §§ 13-13(a), 21(a) (1976). It seems that this purpose could be better effectuated, however, if the law concentrated on predatory dumping alone. See note 23 *supra*.

³² 19 U.S.C. § 160(b) (1976); 19 C.F.R. § 153.25 (1979).

³³ Schwartz, *supra* note 10, at 465. In 1978, a new feature, the trigger price mechanism, was added to Treasury Department procedures in an effort to improve the ability of the Customs Service to detect possible dumping, but it was rarely employed. See generally Kantor, *The Trigger Price Mechanism: Limitation on Administrative Discretion under the Antidumping Laws*, 11 U. MICH. J. L. REF. 443 (1978); Comment, *Effective Enforcement of U.S. Antidumping Laws: The Development and Legal Implications of Trigger Pricing*, 13 J. INT'L L. & ECON. 433 (1979); Note, *Effective Enforcement of U.S. Antidumping Laws: The Development and Legal Implications of Trigger Pricing*, 10 L. & POL'Y INT'L BUS. 969 (1978); Note, *Trigger Prices: A Shot in the Dark?*, 18 VA. J. INT'L L. 771 (1978).

³⁴ For a detailed discussion of past antidumping procedures, see E. ROSSIDES, U.S. CUSTOMS, TARIFF AND TRADE 423-53 (1977); U.S. CUSTOMS DEP'T CUSTOMS ANTIDUMPING HANDBOOK (1978); Schwartz, *supra* note 10, at 464-67.

³⁵ 19 U.S.C. § 160(b) (1976); 19 C.F.R. § 153.26 (1979).

being made at less than fair value (LTFV) and, second, that the industry was being injured by these LTFV sales.³⁶ If the complaint was inadequate in these respects, it was returned to the complainant.³⁷

If the complaint was adequate, the Treasury Department then undertook an initial thirty-day inquiry.³⁸ If the Secretary of the Treasury determined that the complaint could not be substantiated or that further investigation was unwarranted, he would terminate the investigation.³⁹ If the Secretary found that there was "a substantial doubt" that the domestic industry was being injured, he would refer the complaint to the United States International Trade Commission (ITC).⁴⁰ The ITC then would have thirty days to determine either that there was "no reasonable indication" of injury as defined in the Act,⁴¹ in which case it would terminate the investigation; or that a "reasonable indication" did exist, in which case the full-scale Treasury investigation would continue.⁴²

If the investigation continued, the Secretary had a number of duties: he was required to publish an anti-dumping proceedings notice in the Federal Register;⁴³ to request pricing information from foreign manufacturers and domestic importers;⁴⁴ to verify the information by traveling to the exporting country, if necessary;⁴⁵ and to hold a series of disclosure conferences in which "interested parties"—usually the domestic producers—could inspect the non-confidential submissions and suggest further avenues of inquiry.⁴⁶ Commercially sensitive information submitted by foreign producers, such as trade secrets, production and distribution costs or customer lists, could be designated confidential and therefore made available only in summary form to the inter-

³⁶ 19 C.F.R. § 153.27 (1979).

³⁷ *Id.* at § 153.28.

³⁸ *Id.* at § 153.29. See generally McDermid & Foster, *The U.S. International Trade Commission's 30-Day Inquiry Under the Antidumping Act: Section 210(c)(2)*, 27 MERCER L. REV. 657 (1976).

The Treasury Department was originally assigned responsibility for both the LTFV and the injury determinations, but the responsibility for injury determination was transferred to the United States Tariff Commission by the Act of September 1, 1954, 68 Stat. 1138, § 301 (1954). The Tariff Commission was renamed the United States International Trade Commission by the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978, § 321(a)(1) (1974).

³⁹ 19 C.F.R. § 153.29(a) (1979).

⁴⁰ *Id.* at § 153.29(b).

⁴¹ 19 U.S.C. § 160(c)(2) (1976).

⁴² 19 C.F.R. §§ 153.29(b), 207.2-3 (1979).

⁴³ 19 C.F.R. § 153.30 (1979).

⁴⁴ *Id.* at § 153.31(b).

⁴⁵ *Id.* at § 153.31(a).

⁴⁶ *Id.* at §§ 153.31(c)-(d).

ested parties.⁴⁷

Six months after the publication of the anti-dumping proceedings notice, or nine months in complicated cases, the Secretary was required to make a tentative determination.⁴⁸ He had to decide either: (1) to discontinue the investigation on the basis of "price assurances" received from the foreign exporters or because of other reasons;⁴⁹ (2) to make a finding of no sales at LTFV;⁵⁰ or (3) to make a finding of LTFV sales and thus immediately withhold appraisement.⁵¹ Notice of the tentative determination had to be published in the Federal Register.⁵²

Withholding of appraisement meant that the determination of duties on goods arriving from overseas or on goods withdrawn from U.S. Customs warehouses would be postponed until the end of the withholding period and that these goods could not enter the U.S. market unless an appropriate bond was filed.⁵³ Appraisement would be withheld for three months unless a six-month withholding period was requested by one of the parties.⁵⁴ Although appraisement was generally withheld only on goods entered for determination of duties after the date of the tentative determination, the Treasury Department, at its discretion, could retroactively include any imports that had entered the United States up to 120 days before the initiation of the investigation and had not yet been released to the U.S. market.⁵⁵

After the tentative determination was made, an oral hearing on the matter was then conducted, if requested by one of the parties, and an opportunity for written submissions was provided for the manufacturers and importers involved.⁵⁶ Then, within three months of the notice of tentative determination, or six months if the extension on the withholding period had been granted, the Secretary made a final determination. The Secretary could: (1) discontinue the investigation,

⁴⁷ *Id.* at §§ 153.22-23.

⁴⁸ *Id.* at § 153.32.

⁴⁹ *Id.* at § 153.33. Price assurances, also known as price undertakings, are simply agreements between the agency and the foreign exporters to raise the price of the exports so as to eliminate the margin of dumping, *i.e.*, the difference between the sale price in the United States and the fair market value. *Id.*

⁵⁰ *Id.* at § 153.34(a).

⁵¹ *Id.* at §§ 153.35, 153.37.

⁵² *Id.* at §§ 153.33(b), 153.34(a), 153.37(b).

⁵³ E. ROSSIDES, *supra* note 34, at 442. If the final determination is affirmative, then dumping duties will be assessed upon all goods on which appraisement was withheld. *Id.*

⁵⁴ 19 C.F.R. § 153.35 (1979). The six-month period was requested and obtained in about 95% of the cases. This allowed the parties more time to develop arguments and confer. E. ROSSIDES, *supra* note 34, at 442.

⁵⁵ 19 U.S.C. § 160(b)(1)(B) (1976); 19 C.F.R. § 153.35(d) (1979).

⁵⁶ 19 C.F.R. § 153.40 (1979).

accepting the offered price assurances and implementing the appropriate monitoring mechanism;⁵⁷ (2) terminate the investigation with a final finding of no sales at LTFV;⁵⁸ or (3) make an affirmative finding, in which case he would withhold appraisement on the imports, if he had not already done so.⁵⁹ If appraisement was withheld, the Secretary was also required to publish a complete statement of reasons and findings consistent with the confidentiality regulations and to refer the investigation to the ITC.⁶⁰

Upon referral from the Treasury, the ITC published notice of its investigation.⁶¹ The ITC then sought written submissions from the parties, and if the ITC deemed it worthwhile, it held a public hearing.⁶² Within three months a determination was made either that the domestic industry was not being injured by the dumping and the proceeding was terminated, or that the industry was indeed being injured.⁶³ If injury was discovered, this finding was communicated to the Treasury Department.⁶⁴

Upon an affirmative finding from the ITC, the Secretary would publish a dumping finding in the Federal Register and request the Customs Service to begin assessing dumping duties.⁶⁵ Release of the goods to the domestic market would still be conditioned upon the filing of an adequate bond.⁶⁶ The Customs Service would then prepare master lists of the different makes and models of the dumped goods and proceed to assess duties on a case-by-case basis.⁶⁷

PROCEDURAL CHANGES ENACTED BY THE TRADE AGREEMENTS ACT OF 1979

Five of the most important changes in anti-dumping procedure contained in the new Act are: (1) shortened time limits for dumping determinations; (2) complex and extensive new provisions governing

⁵⁷ *Id.* at §§ 153.33(c), (f). If the foreign exporter chose to raise prices, then a statement of the agreement had to be received at the Treasury and periodic reports were required. *Id.* at § 153.33(c). If the exporter chose to leave the U.S. market instead, he could not re-enter for five years. *Id.* at § 153.33(i).

⁵⁸ *Id.* at § 153.34(c).

⁵⁹ *Id.* at § 153.38.

⁶⁰ *Id.* at § 153.41.

⁶¹ *Id.* at § 207.4(b).

⁶² *Id.* at §§ 207.4(c)-(d).

⁶³ *Id.* at § 207.4(e).

⁶⁴ *Id.*

⁶⁵ *Id.* at § 153.43.

⁶⁶ *Id.* at §§ 153.50-.51.

⁶⁷ *Id.* at § 153.57.

the use of price undertakings or assurances; (3) liberalized rules for disclosure of confidential information; (4) the new availability of cash deposits of estimated dumping duties as a provisional remedy; and (5) the retroactive application of dumping duties under "critical circumstances."

Shortened Time Limits for Dumping Determinations

There are three stages in an anti-dumping investigation: the initial inquiry, the preliminary determination, and the final determination. The 1979 Act allocates less time for each of these phases than did prior legislation.

In the initial inquiry, the Department of Commerce⁶⁸ now has only twenty days after the initiation of an investigation to test the sufficiency of the allegations of the dumping complaint instead of the thirty days that the Treasury Department had under the old scheme.⁶⁹ Furthermore, the ITC has only forty-five days after the initiation of an investigation to decide whether there is a "reasonable indication" of injury, while previously the ITC had another thirty days after the matter was referred from the Treasury.⁷⁰

The preliminary determination stage has been abridged from seven months to 160 days.⁷¹ As before, more time may be sought to investigate complicated cases; the time limit may be extended to 210 days if the Commerce Department finds that "novel issues" or numerous transactions are involved.⁷² Regardless of the complexity of the

⁶⁸ The 1979 Act made one change that is incidental to the main discussion of this paper, and is yet very important. Because of wide dissatisfaction with inadequate enforcement, arbitrary decisions, and long delays in investigation and assessment of duties, Congress removed the responsibility for LTFV investigation from the Treasury Department and vested that responsibility with an unspecified "administering authority," leaving the assignment of functions to the President. Many critics felt that the Treasury's enforcement and diplomatic responsibilities conflicted. 1979 *Trade Act Hearings*, *supra* note 3, at 40, 73; Kantor, *supra* note 33, at 448.

In his Reorganization Plan No. 3, President Carter transferred the responsibility for enforcement and LTFV determination to the Commerce Department, and placed the responsibility for all overarching policy decisions with the Office of the Special Representative for Trade Negotiations. 15 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 1476, *reprinted in* 44 Fed. Reg. 69,273 (1979). After the time for congressional objection passed, the plan became effective. 44 Fed. Reg. 74,781 (1979).

⁶⁹ The complaint must make the same allegations and supply the same information as under the prior legislation. Pub. L. No. 96-39, 93 Stat. 144, § 732(c)(1) (1979) (to be codified at 19 U.S.C. § 1673a). *See also* note 42 and accompanying text *supra*.

⁷⁰ In the peculiar bureaucratic double negative, the ITC does not determine that there is no reasonable likelihood of material injury. Pub. L. No. 93-39, 93 Stat. 144, § 733(a) (1979) (to be codified at 19 U.S.C. § 1673b). *See also* Acrylic Sheet from Japan, 40 Fed. Reg. 30,509 (1975).

⁷¹ Pub. L. No. 96-39, 93 Stat. 144, § 733(b)(1) (1979) (to be codified at 19 U.S.C. § 1673b).

⁷² *Id.* at § 733(c)(1)(B) (to be codified at 19 U.S.C. § 1673b).

case, however, the time limit may be extended if the petitioner makes a timely request.⁷³

A new feature of the law allows a drastic contraction of the preliminary determination stage. Seventy-five days after the initiation of the investigation, the petitioner and all other interested parties are offered an opportunity to waive the verification process, and to proceed to a determination on the evidence submitted by the foreign manufacturers prior to that time.⁷⁴

The final determination phase has been shortened from the original nine months to seventy-five days.⁷⁵ An extension of up to 135 days may be sought by the foreign manufacturer if the preliminary determination is affirmative or by the petitioner if the preliminary determination is negative.⁷⁶ This contrasts with the six-month extension available under the prior legislation. The ITC now has only 120 days after the preliminary determination by the Commerce Department in which to make its final determination, although if the LTFV investigation is extended, the ITC has until the forty-fifth day after the final determination by the Commerce Department to complete its investigation.⁷⁷

New Codified Procedures on Acceptance of Price Assurances

Previously, the Treasury Department had broad discretion to negotiate, accept, and monitor undertakings or agreements.⁷⁸ In contrast, the new Act creates a complex mechanism to regulate the use of agreements and undertakings.

An investigation may be terminated at any time if the petitioner simply withdraws his petition.⁷⁹ An investigation also may be suspended if those foreign exporters who account for "substantially all" of the imports in question agree to stop dumping.⁸⁰ The exporters may agree to cease all exports within six months, or they may agree to a price assurance or undertaking under which they will adjust their prices so as to eliminate the dumping margins.⁸¹ If a price undertaking is agreed upon, the amount of future imports by the foreign parties may

⁷³ *Id.* at § 733(c)(1)(A).

⁷⁴ *Id.* at § 733(b)(2).

⁷⁵ *Id.* at § 735(a)(1) (to be codified at 19 U.S.C. § 1673d).

⁷⁶ *Id.* at § 735(a)(2).

⁷⁷ *Id.* at § 735(b).

⁷⁸ See notes 141-143 and accompanying text *infra*.

⁷⁹ Pub. L. No. 96-39, 93 Stat. 144, § 734(a) (1979) (to be codified at 19 U.S.C. § 1673c).

⁸⁰ *Id.* at § 734(b).

⁸¹ *Id.*

not exceed the amount imported over the "most recent representative period."⁸²

If the Commerce Department determines that "extraordinary circumstances" are present, however, then the agreement must demonstrate that it will eliminate all injurious effects resulting from LTFV sales before it can be accepted.⁸³ Under extraordinary circumstances, import entries will be examined on an entry-by-entry basis by the Customs Service to assure that the agreement is being observed.⁸⁴ Circumstances are considered extraordinary if "novel issues" or numerous transactions or parties are involved.⁸⁵

There are five prerequisites to the acceptance of a price undertaking. First, the agreement must be "in the public interest."⁸⁶ Second, those producers who account for "substantially all" of the imports at issue must all agree to the undertaking.⁸⁷ Third, the Customs Service must implement an effective monitoring system for the agreement.⁸⁸ Fourth, the Commerce Department must give notice of the agreement and provide interested parties with a chance to comment on and, if necessary, to seek judicial review of the terms of the undertaking.⁸⁹ Finally, the suspension of the investigation must be accompanied by an affirmative preliminary determination of dumping.⁹⁰ This determination does not result in the application of provisional remedies, such as withholding of appraisement, or, as it is termed in the new Act, suspension of liquidation,⁹¹ unless the agreement is breached. In the case of a breach, liquidation is immediately suspended, that is, appraisement is withheld and the investigation is resumed at the point of interruption.⁹² Intentional violations of a price undertaking, although they are difficult to prove, may be subject to further civil sanctions.⁹³

If any interested party⁹⁴ desires a determination as to whether

⁸² *Id.* at § 734(d)(2).

⁸³ *Id.* at § 734(c).

⁸⁴ *Id.*

⁸⁵ *Id.* at § 734(c)(2).

⁸⁶ *Id.* at § 734(d)(1)(A).

⁸⁷ *Id.* at § 734(b).

⁸⁸ *Id.* at § 734(d)(1)(B).

⁸⁹ *Id.* at § 734(e).

⁹⁰ *Id.* at § 734(f)(1)(A).

⁹¹ *Id.* at § 733(d)(1) (to be codified at 19 U.S.C. § 1673b).

⁹² *Id.* at § 734(i)(1)(A) (to be codified at 19 U.S.C. § 1673c).

⁹³ *Id.* at § 734(i)(2).

⁹⁴ An "interested party" is defined by the 1979 Act to be either a foreign exporter, the government of that exporter, a domestic manufacturer, a trade association representing manufacturers, or a union whose members are employed in the industry. *Id.* at § 771(9) (to be codified at 19 U.S.C. § 1677).

dumping indeed has occurred, however, it may request that the investigation continue, despite the agreement.⁹⁵ Then, if the final determination is negative, the undertaking or agreement is no longer binding; if affirmative, the determination will not be given effect unless there has been a violation of the agreement.⁹⁶ If there is a breach after such an affirmative final determination of dumping, duties are assessed immediately.⁹⁷

New Liberalized Rules for Disclosure of Confidential Information

Prior to the Trade Agreements Act of 1979, all disclosure rules were promulgated by the agencies, rather than enacted by Congress.⁹⁸ The new Act incorporates those rules to a large extent. Nonconfidential information from foreign manufacturers and summaries of confidential information remain available to interested parties,⁹⁹ and disclosure meetings are still *ex parte*, although a record of each meeting must now be kept by the investigating agency.¹⁰⁰

Unlike the prior regulations, however, the new Act additionally allows the release of confidential information under a protective order to representatives of interested parties.¹⁰¹ If a request for such a release is denied by the agency, the party may appeal the decision to the Customs Court.¹⁰² To prevent possible competitive injury to foreign manufacturers, however, either the agency or the court may enforce the order through contempt citations.¹⁰³

Cash Deposit of Estimated Dumping Duties as a Provisional Remedy

Under the previous statutory scheme, an affirmative preliminary or final determination would cause the appraisal of foreign imports to be withheld. These goods would be released to the U.S. market, however, if the importer secured the amount of possible duties with a bond.¹⁰⁴ Under the new Act, upon an affirmative determination, liquidation is suspended, and either a bond or a cash deposit for the full amount of the estimated dumping duties, as the Customs Service deems

⁹⁵ *Id.* at § 734(g) (to be codified at 19 U.S.C. § 1673c).

⁹⁶ *Id.* at § 734(f)(3).

⁹⁷ *Id.*

⁹⁸ See 19 C.F.R. at §§ 153.22-23 (1979).

⁹⁹ Pub. L. No. 96-39, 93 Stat. 144, § 777(a)(4) (1979) (to be codified at 19 U.S.C. § 1677f).

¹⁰⁰ *Id.* at § 777(a)(3).

¹⁰¹ *Id.* at § 777(a).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ See notes 53 and accompanying text *supra*.

appropriate, must secure each import entry.¹⁰⁵

Retroactive Application of Dumping Duties Under "Critical Circumstances"

Prior legislation conferred upon the Treasury Department the discretion to assess dumping duties retroactively for a period up to 120 days prior to the initiation of the anti-dumping investigation.¹⁰⁶ Under the new law, a petitioner may seek retroactive application by making a timely allegation of "critical circumstances."¹⁰⁷ Circumstances are critical if there has been a history of dumping in the industry or if there has been intentional dumping, and if, in either case, there has been massive dumping over a brief period of time.¹⁰⁸ If such an allegation has been made, the Commerce Department and the ITC must decide at the time of the final determination whether critical circumstances exist.¹⁰⁹ If so, then all goods entered for appraisement in the ninety days prior to the date of the suspension of liquidation, in addition to goods entered after that date, will be withheld for assessment of dumping duties.¹¹⁰

CRITICISM OF THE NEW ANTI-DUMPING PROCEDURES CONTAINED IN
THE TRADE AGREEMENTS ACT OF 1979

A foreign manufacturer who faces a dumping complaint must decide whether to defend against the complaint or to discontinue exporting; a foreign manufacturer who confronts the possibility of a dumping complaint must decide whether he will risk a proceeding or, instead, change his pricing policy, perhaps choosing not to export at all. In a variety of ways, the five major procedural changes introduced by the new Act add to the cost and the uncertainty of an anti-dumping investigation and, thus, will have a discouraging effect on some foreign exporters.

Shortened Time Limits for Dumping Determinations

In prescribing any time limits for anti-dumping investigations,

¹⁰⁵ Pub. L. No. 96-39, 93 Stat. 144, § 733(d)(3) (1979) (to be codified at 19 U.S.C. § 1673b).

¹⁰⁶ 19 U.S.C. § 160(b)(1)(B) (1976); 19 C.F.R. § 153.35(d) (1979).

¹⁰⁷ Pub. L. No. 96-39, 93 Stat. 144, § 733(e) (1979) (to be codified at 19 U.S.C. § 1673b). The allegation may be made at any time up to 20 days before the final determination by the Commerce Department. *Id.*

¹⁰⁸ *Id.* at § 733(e)(1)(A). "Hit-and-run" or "sporadic" dumping usually involves only a few shipments within a short time. Barcelo, *supra* note 10, at 508.

¹⁰⁹ Pub. L. No. 96-39, 93 Stat. 144, §§ 735(a)(3), (b)(4) (to be codified at 19 U.S.C. § 1673d).

¹¹⁰ *Id.* at § 733(e)(2) (to be codified at 19 U.S.C. § 1673b).

there is a trade-off between the interest in granting early relief to domestic producers and the interest in making an accurate and fair finding.¹¹¹ The Antidumping Act of 1921 placed no time limits on investigations, with the result that substantial delays were common.¹¹² This occasionally worked hardship on domestic industries beleaguered by predatory pricing. One extreme example is the case of *Television Receivers from Japan*,¹¹³ in which several years passed between the initiation of the investigation and the effective enforcement of the dumping determination.¹¹⁴ As a result of the delay, several domestic television manufacturers went out of business.¹¹⁵ In response to this case, Congress, in the Trade Act of 1974,¹¹⁶ set time limits for the various determinations.¹¹⁷

The further contraction of time limits in the 1979 Act is the result of a continuing, but now unnecessary congressional reaction to past lax enforcement by the Treasury Department.¹¹⁸ Backlogs in dumping duty assessment will be effectively eliminated by the new time limits on assessment;¹¹⁹ the time limits enacted by the 1974 Act have been adequate to prevent the sort of delays that occurred in *Television Receivers from Japan*.¹²⁰ The new provisions only marginally hasten relief—by a month and a half, at most—while they make it much more difficult to collect useful data necessary to an accurate determination of dumping.¹²¹

¹¹¹ See 1979 Trade Act Hearings, *supra* note 3, at 708 (statement of Noel Hemmendinger).

¹¹² See Senate MTN Hearings, *supra* note 3, at 208-09 (statement of John Nevin, Chairman, Zenith Radio Corporation).

¹¹³ 36 Fed. Reg. 4597 (1971) (imposing antidumping duties).

¹¹⁴ The history of Television Receivers from Japan, *id.*, began with the filing of the complaint in March, 1968. In December, 1970, the Treasury Department notified the ITC of a determination of LTFV sales. In March 1971, the ITC found that over half of the 15 or 16 domestic television producers then in business had suffered losses. A dumping finding was entered and the Customs Department assessed about one million dollars in duties between March 1971 and March 1972. Assessment was then discontinued without explanation. In 1976, the ITC sought to reinvestigate, but was denied access to the files. In March 1978, the Justice Department received evidence of kickbacks and double pricing in the Japanese TV import business. The Customs Department then discovered that its figures were totally inaccurate and attempted to assess 400 million dollars in past duties. Treasury subsequently sought to settle for about 50 million dollars, and the deadline for the settlement was extended at least three times over a four-month period. Senate MTN Hearings, *supra* note 3, at 207-09 (statement of John Nevin, Chairman, Zenith Radio Corporation).

¹¹⁵ *Id.*

¹¹⁶ Pub. L. No. 93-618, 88 Stat. 1978 (1974) (codified in scattered sections of 5-8, 15, 19, 21-22, 26, 42, 45 U.S.C.).

¹¹⁷ *Id.* at § 321(a) (codified at 19 U.S.C. § 160 (1976)).

¹¹⁸ See House MTN Hearings, *supra* note 3, at 102 (statement of Richard Cunningham).

¹¹⁹ Pub. L. No. 96-39, 93 Stat. 144, § 736(c)(1) (1979) (to be codified at 19 U.S.C. § 1673e).

¹²⁰ 19 C.F.R. §§ 153.32, .33(c), .33(f), .41, 207.4(e).

¹²¹ See House MTN Hearings, *supra* note 3, at 102 (statement of Richard Cunningham).

The shorter time limits impede effective data collection in a number of ways. First, some initial investigatory decisions, such as the use of constructed value¹²² in place of foreign market value in the LTFV determination, are based upon the character of the initial submissions.¹²³ These decisions determine the subsequent thrust of the investigation, and a hasty, erroneous decision would be difficult to correct later. The use of an inappropriate valuation, for instance, would inaccurately reflect the fair values of the goods at issue and may lead to an improper determination of dumping; a change to the correct valuation would require collection and verification of completely new data within the remaining statutory period.¹²⁴

Second, the briefer time periods affect data collection during the course of the investigation. Generally, the investigating agency first drafts a questionnaire seeking the information it believes will be important.¹²⁵ To verify the evidence obtained in response to those questionnaires, representatives of the agency may need to travel to the exporter's country.¹²⁶ In subsequent disclosure conferences, domestic producers will indicate what additional information will be needed.¹²⁷ The consequence of shortened time limits is that there will be less time to draft adequate questionnaires, less time for thorough verification, and less time for a helpful series of disclosure conferences.¹²⁸ In this connection, it is interesting to note that an examination of anti-dumping cases prosecuted under the previous schedule revealed that in almost every case the agencies utilized the entire statutory period for each determination.¹²⁹

¹²² See note 16 *supra*.

¹²³ Pub. L. No. 96-39, 93 Stat. 144, § 773 (1979) (to be codified at 19 U.S.C. § 1677b). The decision to use constructed value or third country value depends on the amount of product sales made in the producer country, and the similarity of the goods in the producer country with the exported goods. See GA. Note, note 16 *supra*.

¹²⁴ *House MTN Hearings*, *supra* note 3, at 746-47 (statement of Peter Suchman and Gail Cumins).

¹²⁵ E. ROSSIDES, *supra* note 34, at 448.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *1979 Trade Act Hearings*, *supra* note 3, at 708 (statement of Noel Hemmendinger).

¹²⁹ In a study of 33 cases initiated and completed between January 1, 1975 and January 1, 1978, the initial inquiry was completed within 21 days in only four cases: Capacitors from Japan, 40 Fed. Reg. 48,702 (1975); Digital Automatic Scales from Japan, 41 Fed. Reg. 43,746 (1976); Pressure Sensitive Plastic Tape from West Germany, 41 Fed. Reg. 36,521-22 (1976); and Ice Hockey Sticks from Finland, 42 Fed. Reg. 65,345 (1977). In only one case was the preliminary investigation completed in as little as five months, and in that case the determination was negative. Tires from Canada, 40 Fed. Reg. 58,869 (1975). On the other hand, in fourteen cases the times for the preliminary determination was extended, in all but two cases for the statutory maximum of nine months. See, e.g., Metal Walled Swimming Pools from Japan, 42 Fed. Reg. 17,558 (1976); Ski

In two ways, then, the agencies may be unable to collect useful or sufficient information on which to base a decision. As a result, the agency will prefer to err on the side of domestic protection and provisional remedies. The Commerce Department and the ITC may make a greater number of affirmative preliminary determinations that will be reversed by the final determinations;¹³⁰ the agencies may even make affirmative final determinations in cases where there actually has been no dumping.¹³¹ Unwarranted assessments of dumping duties would have a serious impact upon the pricing decisions of foreign exporters, for even a temporary suspension of liquidation may be harmful because it could drive marginally successful companies out of business.¹³²

One rationale for the shorter time limits is that they would make it more difficult for an exporter who is aware of a dumping investigation to quickly finish his dumping before the suspension of liquidation.¹³³ There is empirical evidence, however, that foreign exporters take such action only in the most exceptional cases.¹³⁴ Certainly such action would tend to make the dumping more obvious, to the detriment of the exporter.

Although the problem of shortened time limits may be ameliorated by more substantial budgets of anti-dumping enforcement, the agencies have not been guaranteed larger future appropriations.¹³⁵ Furthermore, the speed of an anti-dumping investigation depends to some extent on factors beyond the agency's control: the foreign manufacturer must cope with questions in a foreign language; he must supply data of a kind often not retained or compiled in the requested format; and the goods themselves may be produced in numerous models or with unique characteristics, each of which must be distinguished.¹³⁶ Even a huge increase in funding, facilities, and staff will do little to hasten completion of these aspects of the investigation.¹³⁷

Bindings from Austria, Switzerland, West Germany, 40 Fed. Reg. 30,847-48 (1975); Automobiles from Belgium, Japan, Sweden, United Kingdom, Canada, France, Italy, West Germany, 40 Fed. Reg. 33,755-58 (1975).

¹³⁰ *Senate MTN Hearings*, *supra* note 3, at 40 (statement of Lee Greenbaum, President, Kemp & Beatly Corp.).

¹³¹ *Id.*

¹³² *House MTN hearings*, *supra* note 3, at 17 (statement of William Eberly, Representative, American Chamber of Commerce).

¹³³ *Id.*

¹³⁴ *Administration Hearings*, *supra* note 3, at 271 (report of the Comptroller of the United States).

¹³⁵ *Senate MTN Hearings*, *supra* note 3, at 301 (statement of Ferroalloys Assoc.).

¹³⁶ *Id.* at 40-41 (statement of Lee Greenbaum, President, Kemp & Beatly Corp.); *1979 Trade Act Hearings*, *supra* note 3, at 708 (statement of Noel Hemmendinger).

¹³⁷ *Senate MTN Hearings*, *supra* note 3, at 40-41 (statement of Lee Greenbaum, President,

New Codified Procedures on Acceptance of Price Assurances

Price assurances are an appropriate remedy for dumping because the anti-dumping law is essentially a remedial statute and its purpose is served by voluntary elimination of dumping margins.¹³⁸ For domestic producers, price assurances generally provide relief more quickly than the provisional remedies which accompany an affirmative preliminary or final determination of dumping.¹³⁹ For the foreign manufacturers, price assurances provide greater certainty in commercial transactions and obviate the need for a costly defense and submissions of confidential information.¹⁴⁰

Despite the fact that the Antidumping Act of 1921 contained no provision for price assurances, such agreements evidently were liberally used until the mid-1970's.¹⁴¹ At that time, domestic producers, through their congressmen, greatly criticized the Treasury Department for accepting agreements that were considered too advantageous to foreign producers and for insufficiently monitoring subsequent compliance.¹⁴² In response, the Treasury Department adopted a very restrictive policy; assurances were no longer accepted unless the margin of dumping was less than one percent of a weighted average of all imports.¹⁴³

The new Act contains no such mathematical restrictions. Nevertheless, the same sort of criticisms as those previously directed to the Treasury Department seem to have guided the drafting of the section of price assurances.¹⁴⁴ The complicated new provisions are likely to restrict the usefulness of price assurances in several ways.

First, investigations can be continued merely upon the request of an interested party, such as a domestic manufacturer or a union whose members are employed in the industry.¹⁴⁵ Thus, a foreign competitor may be harassed by an expensive investigation even after the reason for

Kemp & Beatly Corp.); *1979 Trade Act Hearings*, *supra* note 3, at 708 (statement of Noel Hemmendinger).

¹³⁸ *House MTN Hearings*, *supra* note 3, at 33-4 (statement of Charles Carlisle, Representative, Ad Hoc American Subsidies Coalition); *Senate MTN Hearings*, *supra* note 3, at 159-160 (statement of John Rehm, Special Counsel, Senate Finance Committee).

¹³⁹ See Schwartz, *supra* note 10, at 482.

¹⁴⁰ *Id.*

¹⁴¹ See Johnson, *Retroactive Application of the Antidumping Act of 1921*, 1 NW. J. INT'L L. & BUS. 262, 264-65 n.10 (1979). Since 1975, there have been only two discontinuances of investigation although 16% of all past complaints were disposed of through price assurances. *Id.*

¹⁴² See Barcelo, *supra* note 10, at 543; Schwartz, *supra* note 10, at 481.

¹⁴³ T.D. 70-127, 4 CUSTOMS BULL. 293 (1970). See also Barcelo, *supra* note 10, at 543; Schwartz, *supra* note 10, at 481.

¹⁴⁴ *1979 Trade Act Hearings*, *supra* note 3, at 707 (statement of Noel Hemmendinger).

¹⁴⁵ See note 94 *supra*.

the proceeding has ceased to exist.¹⁴⁶ The opportunity to continue the investigation greatly reduces the incentive to agree to a price undertaking.

Second, the penalty for violators of price assurances seems unduly punitive.¹⁴⁷ Upon acceptance of a price assurance, an affirmative preliminary determination is automatically made. If the undertaking is subsequently violated, liquidation is immediately suspended.¹⁴⁸ Foreign exporters often agree to a price assurance simply because they find it easier to raise prices than to defend against a dumping complaint.¹⁴⁹ If that agreement is violated, however, the foreign exporters face a three-month suspension of liquidation even though the original investigation might have led to a negative determination. Moreover, the violation may be inadvertent or circumstances may have changed to the point where the breach is harmless.¹⁵⁰ The civil sanctions imposed on intentional violators are also contrary to the remedial nature of the Act, although these provisions may be unenforceable in practice.¹⁵¹

Third, the wording of the 1979 statute requires all of those producers, who account for "substantially all" of the imports at issue, to agree to the undertaking before it may become effective.¹⁵² In the case of a large number of producers, each possessing a small share of the import market, disagreement and dissension could make an agreement impossible to reach.¹⁵³ In the case of a small number of producers, each controlling a large share of the market, the provisions may require unanimity.¹⁵⁴ It is unlikely, however, that an exporter's counsel will recommend participation in the undertaking if there is a good chance that a negative determination will be made concerning his client.¹⁵⁵

Fourth, suspension of the investigation must be "in the public interest."¹⁵⁶ This provision might be interpreted to require periodic re-evaluations of the undertaking so that as costs and prices inflate, the provisions of the undertaking are altered. This re-evaluation would be

¹⁴⁶ 1979 Trade Act Hearings, *supra* note 3, at 707 (statement of Noel Hemmendinger).

¹⁴⁷ *Id.*

¹⁴⁸ See notes 91-92 and accompanying text *supra*.

¹⁴⁹ Administration Hearings, *supra* note 3, at 232 (statement of William Barringer).

¹⁵⁰ *Id.*

¹⁵¹ See 1979 Trade Act Hearings, *supra* note 3, at 707 (statement of Noel Hemmendinger).

¹⁵² See note 88 and accompanying text *supra*. "Substantially all" is likely to mean no less than 85% of the imports in question. 1979 Trade Act Hearings, *supra* note 3, at 708 (statement of Noel Hemmendinger).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ See note 86 and accompanying text *supra*.

equivalent to administering prices on those imports.¹⁵⁷

New Disclosure Provisions for Confidential Submissions

The new disclosure provisions are designed to improve the ability of agency personnel to acquire and verify information.¹⁵⁸ Disclosure conferences with representatives of domestic industry provide an important and independent check of the accuracy and relevance of submissions from foreign manufacturers.¹⁵⁹ Under the prior rules, however, it was difficult to verify confidential information because domestic parties could not examine it in its original form, and summaries of such information were often meaningless.¹⁶⁰ Thus, under the new rules, even confidential information is subject to critical examination.

These new provisions, however, will also have a discouraging effect on foreign trade. First, the new rules will impose "psychic costs" on the foreign producers.¹⁶¹ Disclosure of highly sensitive confidential information to domestic rivals would adversely affect the competitiveness of foreign manufacturers.¹⁶² Thus, confidential information will not be disclosed to shareholders or employees of the domestic producers, but only to counsel and then only for the purposes of the investigation.¹⁶³ The availability of civil and criminal contempt penalties may be insufficient to prevent minor or inadvertent disclosures due to the difficulty of detection.¹⁶⁴ Those foreign manufacturers who feel their confidential information is sufficiently important may choose to discontinue imports altogether rather than risk disclosure. Other manufacturers may attempt to delay or avoid disclosing sensitive matters or try to submit the bare minimum requested.¹⁶⁵ For lack of certain information, the agencies will be forced to make more arbitrary determinations.

Second, it seems that a meaningful review of the facts both prior to the decisions to issue a protective order and on appeal will increase the

¹⁵⁷ *House MTN Hearings*, *supra* note 3, at 103 (statement of Richard Cunningham).

¹⁵⁸ *Id.* at 110-11 (statement of Charles Verrill, President, AMF, Inc.).

¹⁵⁹ *See* Schwartz, *supra* note 10, at 470.

¹⁶⁰ *House MTN Hearings*, *supra* note 3, at 110-11 (statement of Charles Verrill, President, AMF, Inc.).

¹⁶¹ *Id.* at 746.

¹⁶² *Id.*

¹⁶³ The Trade Agreements Act of 1979 makes confidential information available under a protective order. Pub. L. No. 96-39, 93 Stat. 144, § 777(c)(1)(B) (1979) (to be codified at 19 U.S.C. § 1677f). The protective order shall contain those requirements that the administering agencies shall deem appropriate. *Id.* The ITC has made confidential information available only to independent attorneys representing the domestic parties. 44 Fed. Reg. 76,458, 76,470 (1979).

¹⁶⁴ *House MTN Hearings*, *supra* note 3, at 746 (statement of Peter Suchman and Gail Cumins).

¹⁶⁵ *1979 Trade Act Hearings*, *supra* note 3, at 706 (statement of Noel Hemmendinger).

cost of anti-dumping investigation for the foreign producers.¹⁶⁶ Before information is disclosed it is likely that some minimum showing of need will be required.¹⁶⁷ This will precipitate more litigation and greater costs as the foreign parties attempt to defend the confidentiality of their submissions.¹⁶⁸

Cash Deposit of Estimated Dumping Duties as a Provisional Remedy

Upon the suspension of liquidation, the Commerce Department has the option of compelling the cash deposit of estimated duties as security for those duties that might later be assessed.¹⁶⁹ The intent of Congress was to provide better protection for domestic industry over the period before final duty assessment.¹⁷⁰ The new provisions may be another legacy of *Television Receivers from Japan* and the inadequate prior administration of the anti-dumping law.¹⁷¹ As will be demonstrated below, the new measure is an improper solution to past problems for it is contrary to the remedial nature of anti-dumping law. Furthermore, it is not clear that the previous use of bonding to secure future duties failed to provide the needed protection.

Deposit of estimated dumping duties is a punitive measure for a number of reasons. First, after a dumping finding has been made, the importer generally will raise his prices to eliminate the dumping margins.¹⁷² In this way, the importer retains the extra income on each sale, rather than losing it to the U.S. government as a dumping duty.¹⁷³ This does not subvert the Act; instead, the dumping margin is eliminated and the remedial purpose of the law is fulfilled.¹⁷⁴ An example of such a result is *Elemental Sulphur from Mexico*,¹⁷⁵ in which the dumping margin was found to be seventy-three percent, but the actual assessment on the goods amounted to only about three percent.¹⁷⁶ Although any excess assessment would eventually be refunded to the import-

¹⁶⁶ *House MTN Hearings*, *supra* note 3, at 110 (statement of Charles Verrill).

¹⁶⁷ See, e.g., 44 Fed. Reg. 76,458 (1979) (new ITC regulations).

¹⁶⁸ *House MTN Hearings*, *supra* note 3, at 746 (statement of Peter Suchman and Gail Cumins).

¹⁶⁹ See note 106 and accompanying text *supra*.

¹⁷⁰ *Administration Hearings*, *supra* note 3, at 57-58 (statement of William Anderson, Dep'y Director, Gen'l Gov't Position, GAO).

¹⁷¹ *House MTN Hearings*, *supra* note 3, at 747 (statement of Peter Suchman and Gail Cumins); *Senate MTN Hearings*, *supra* note 3, at 239.

¹⁷² 1979 *Trade Act Hearings*, *supra* note 3, at 492 (statement of Lee Greenbaum, President, Kemp & Beatly Corp.).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ 37 Fed. Reg. 2793 (1972).

¹⁷⁶ 1979 *Trade Act Hearings*, *supra* note 3, at 492 (statement of Lee Greenbaum, President, Kemp & Beatly Corp.).

ers,¹⁷⁷ the new provision requires the importer to carry a dual burden: during the period before final assessment, he must pay for past dumping while simultaneously raising his present prices.¹⁷⁸ This dual burden is not only punitive, but it may also force many marginal businesses into insolvency.¹⁷⁹

Second, the provisional duties are estimated on the basis of the LTFV margins elicited in the investigation, and these LTFV margins are a poor basis for estimating duties. The LTFV determination is based on a historical period and does not reflect subsequent changes in the prices of foreign and domestic goods.¹⁸⁰ Furthermore, the LTFV margin is an aggregate value, derived from sampling the entire batch of goods at issue, and it is arbitrary to apply this valuation to goods upon which a duty eventually will be assessed on a case-by-case basis.¹⁸¹ It is also true that the LTFV determinations are less exacting and rigorous than the margin determinations made at the assessment stage.¹⁸² In fact, errors, in LTFV determinations of five and ten percent are common.¹⁸³

Third, it has not been conclusively shown that bonding fails to adequately protect domestic industry. While it is true that, in the past, bonds usually covered only a fraction of the duties owing, the Customs Service has reported that few, if any, duties have been lost as a result of inadequate bonding.¹⁸⁴ In any event, most importers immediately raise their prices after a dumping finding, thus providing all the protection that anti-dumping law seeks.¹⁸⁵

Bonding has also been criticized because it allows the foreign manufacturer the use of the duties owing during the period of assessment,¹⁸⁶ and it further allows him to pay the duties in inflated

¹⁷⁷ Pub. L. No. 96-39, 93 Stat. 144, § 778 (1979) (to be codified at 19 U.S.C. § 1677g).

¹⁷⁸ 1979 *Trade Act Hearings*, *supra* note 3, at 492 (statement of Lee Greenbaum, President, Kemp & Beatly Corp.).

¹⁷⁹ *Senate MTN Hearings*, *supra* note 3, at 40 (statement of Lee Greenbaum, President, Kemp & Beatly Corp.).

¹⁸⁰ *Administration Hearings*, *supra* note 3, at 189 (statement of American Importers Association).

¹⁸¹ *House MTN Hearings*, *supra* note 3, at 218 (statement of Richard Maxwell, Vice President, American Importers Association).

¹⁸² *Senate MTN Hearings*, *supra* note 3, at 63 (statement of Noel Hemmendinger).

¹⁸³ *Id.*

¹⁸⁴ *Senate MTN Hearings*, *supra* note 3, at 239 (statement of Peter Suchman and Gail Cumins). The Treasury policy stated that bonding was not intended to cover the total liability, but only the risk factor. *Administration Hearings*, *supra* note 3, at 49 (statement of John O'Loughlin, Duty Assessment Div., Customs Service).

¹⁸⁵ See notes 172-76 and accompanying text *supra*.

¹⁸⁶ See McDermid & Foster, *supra* note 38, at 658-9.

dollars.¹⁸⁷ These two points are irrelevant, however, if the primary purpose of the Act—the cessation of dumping—is achieved. Furthermore, considering the costs of investigation and the costs of bonding, it is difficult to see how bonding is of much investment value.

Finally, the critics of bonding often observe that other countries require the deposit of estimated dumping duties.¹⁸⁸ Other countries assess dumping duties in far fewer cases than does the United States,¹⁸⁹ however, and the gravity of those cases may demand a level of protection that the majority of U.S. cases do not.

Retroactive Application of Dumping Duties Under "Critical Circumstances"

Although prior legislation provided for retroactive assessment of dumping duties, the measure was discretionary and rarely invoked.¹⁹⁰ Retroactive assessment under the 1979 Act is less discretionary: if "critical circumstances" are proven, retroactive duties must be assessed.¹⁹¹ Moreover, at least theoretically, a negative determination of critical circumstances is reviewable.¹⁹²

From the standpoint of free trade, the primary concern is the greater uncertainty that the new provision creates for the foreign manufacturer.¹⁹³ The limits of potential liability are less clear and foreign manufacturers may hesitate to export after the initiation of investigation.¹⁹⁴ Even if the ultimate determination is negative, the added risk of retroactive assessment may discourage imports, particularly if the industry is one with a history of dumping.¹⁹⁵

The new provision was intended to prevent "hit-and-run" dump-

¹⁸⁷ *Senate MTN Hearings*, *supra* note 3, at 210 (statement of John Nevin, President, Zenith Radio Corporation).

¹⁸⁸ *Administration Hearings*, *supra* note 3, at 49, 60 (statement of John O'Loughlin, Duty Assessment Div., Customs Service).

¹⁸⁹ *Senate MTN Hearings*, *supra* note 3, at 138 (statement of AFL-CIO).

¹⁹⁰ See *1979 Trade Act Hearings*, *supra* note 3, at 491 (statement of Lee Greenbaum, President, Kemp & Beatly Corp.); Schwartz, *supra* note 10, at 482 n.38. Generally, retroactive duties were assessed only when appraisement of the goods had been delayed for fortuitous reasons or when the foreign exporter and the domestic importer were "related." Anthony, *The American Response to Dumping from Capitalist and Socialist Economies*, 54 CORNELL L. REV. 159, 193 n.127 (1968).

¹⁹¹ See notes 107-110 and accompanying text *supra*.

¹⁹² Pub. L. No. 96-39, 93 Stat. 144, § 1001 (1979) (to be codified in scattered sections of 19 U.S.C.).

¹⁹³ *1979 Trade Act Hearings*, *supra* note 3, at 491 (statement of Lee Greenbaum, President, Kemp & Beatly Corp.).

¹⁹⁴ *Id.*

¹⁹⁵ *Administration Hearings*, *supra* note 3, at 271-2 (report of the Comptroller of the United States).

ing¹⁹⁶ and to discourage importers from attempting to quickly complete their dumping before the suspension of liquidation. It is far from clear, however, that "hit-and-run" dumping is harmful,¹⁹⁷ and there is evidence that importers do not try to take advantage of the lag between the filing of a complaint and the application of provisional remedies.¹⁹⁸ Thus, the extra protection provided to domestic producers by retroactive assessment is superfluous.

CONCLUSION

Basing its perception on a few anomalous cases, Congress was dissatisfied with prior anti-dumping procedure because it believed that a sluggish investigatory timetable and an apathetic, perhaps even complicit, exercise of discretion by the Treasury Department allowed dumpers to evade effective censure. The new procedures were intended to create a more potent enforcement mechanism: shortened time limits were to provide relief to domestic industry more quickly; price assurance provisions were to prevent easy agreement between agency and foreign producer on assurances that were, nonetheless, detrimental to domestic industry; new disclosure measures were to facilitate more intensive investigation; cash deposit of estimated duties was to protect domestic industry better over the period between detection of dumping and remedy; and the critical circumstances provision was to provide an easily ascertainable standard for application of harsher remedies.

Not only is greater domestic protection unnecessary, but by making inappropriate changes, the Trade Agreements Act of 1979 unfairly burdens foreign manufacturers and domestic importers in a variety of ways: the shortened time limits may lead to arbitrary and prejudicial determinations; the price assurance provisions are punitive and greatly discourage any quick and economical resolution of a complaint; the new disclosure rules threaten the competitive secrets of foreign producers; the cash deposit of estimated duties punishes dumpers unnecessarily; and the new critical circumstances determination engenders undue uncertainty. By creating a more oppressive process for foreign producers, the new law may interfere with import and pricing decisions that would normally be made under free trade conditions. This harms

¹⁹⁶ See note 108 *supra* (definition of sporadic dumping).

¹⁹⁷ "Hit-and-run" or "sporadic" dumping is "simply too brief and or haphazard to be seriously injurious." Barcelo, *supra* note 10, at 508 (citing J. VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE 30 (reprint ed. 1966)).

¹⁹⁸ *Administration Hearings*, *supra* note 3, at 271 (report of the Comptroller of the United States).

American consumers and contributes to an unjustified protection of inefficient domestic industry.

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