# THE MULTINATIONAL CORPORATION, INTEGRATED INTERNATIONAL PRODUCTION, AND THE UNITED STATES ANTIDUMPING LAWS

HILARY K. JOSEPHS*



## PRÉCIS OF THE ANALYSIS

The U.S. antidumping laws[1] have been the subject of unrelenting attacks by legal scholars and practitioners, Americans and foreigners alike, as a vestige of protectionism in what should be an era of "free" (or

* Professor of Law and Director of the Center for Global Law and Practice, Syracuse University College of Law. The author is grateful for financial support provided by the College of Law and for research assistance from Josh McKniff and David Marcus. The author is solely responsible for opinions expressed and any errors made.

1. The antidumping laws are part of Title VII of the Tariff Act of 1930, 46 Stat. 590 (codified as amended in scattered sections of 19 U.S.C.). The major provisions of the antidumping and countervailing duty laws are codified in 19 U.S.C. §§ 1671-1677n (1994).

at least "freer") trade. The Uruguay Round Final Act (Final Act),[2] and its implementing legislation in the United States, the Uruguay Round Agreements Act (URAA),[3] responded constructively to many of the specific criticisms previously made against the antidumping laws, though the Final Act left the basic framework of the laws intact.

However, the laws and the institutions which administer them have been given insufficient credit for their efforts to take account of complex international social, political, and economic conditions. This Article advances the premise that the U.S. antidumping laws have done at least as well as, if not better than, other areas of U.S. law in addressing this complexity and in dealing equitably over the long term with various interest groups. Because of their lack of exclusive preoccupation with economic efficiency considerations, the antidumping laws have been more successful than other laws in integrating economic with social and political values. For example, the antidumping laws instruct the administering agencies to take numerous factors into account and the agencies have faithfully adhered to this legislative directive.[4] This Article will illustrate this thesis by examining the Smith Corona/Brother Industries litigation concerning the dumping of electric typewriters.[5]

## I. INTRODUCTION

Since World War II there have been two significant and interrelated developments affecting the international law of corporations and, by extension, the law of international trade. The first is the proliferation of multinational corporate groups (MNCs). MNCs are affiliated corporations conducting a common enterprise and under common control although incorporated in different jurisdictions.[6] The second is the internationalization of the production process, whereby a MNC shifts the production site to a location that ultimately allows the MNC to be more profitable. As such, each operation in the production

---

2. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125 (1994) [hereinafter Final Act].

3. Pub. L. No. 103-465, 108 Stat. 4809, 4842-4901 (1994) (codified in scattered sections of 19 U.S.C.).

4. *See infra* note 103.

5. *See* discussion *infra* Part IX.

6. *See generally* PHILLIP I. BLUMBERG, THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY (1993); U.N. Conference on Trade and Development, Programme on Transnational Corporations, *World Investment Report 1993: Transnational Corporations and Integrated International Production*, at 183-91, U.N. Doc. ST/CTC/156, U.N. Sales No. E.93.II.A.14 (1993) [hereinafter *WIR 1993*].

process is judged according to its contribution to the entire value chain, and any affiliate may perform functions for the firm as a whole.[7]

International trade historically consisted of an exchange of products among countries, whereby a product was manufactured within a single exporting country by a national corporation within that country.[8] Today, international trade consists increasingly of intra-firm trade where firms have production facilities in a number of countries.[9] One consequence of these developments is the decline of the national corporation as a vehicle for national development policy, at least in the United States.[10] Another consequence is the decreasing ability of national governments to regulate the activities of multinational firms (whether for revenue-raising purposes or policing of unfair business practices).[11] Additionally, international organizations, such as the United Nations (UN), the General Agreement on Tariffs and Trade (GATT) / World Trade Organization (WTO), the International Monetary Fund (IMF), and the Organization for Economic Cooperation and Development (OECD), are still largely state-based, rely on consensus building and promulgation of guidelines, and lack direct enforcement capability. Therefore, the decline in state control has not been offset by a corresponding increase in international control.[12] As in the case of arms control, human rights enforcement, environmental pollution, and other public international law concerns, growing global interdependence has

---

7. *See WIR 1993*, *supra* note 6, at 115; *see also* Walter Adams & James W. Brock, *The "New Learning" and the Euthanasia of Antitrust*, 74 CAL. L. REV. 1515, 1532-37 (1986) (discussing the web of joint ventures in the automobile industry).

8. *See* Stephen J. Powell & John D. McInerney, *Globalization of the Production Process and the Unfair Trade Laws*, *in* THE COMMERCE DEPARTMENT SPEAKS: THE LEGAL ASPECTS OF INTERNATIONAL TRADE 11, 11 (1990).

9. *See* BLUMBERG, *supra* note 6, at 139-40; *WIR 1993*, *supra* note 6, at 164-65; ROBERT B. REICH, THE WORK OF NATIONS: PREPARING OURSELVES FOR 21ST CENTURY CAPITALISM 134 (1992) [hereinafter THE WORK OF NATIONS]; LAURA D'ANDREA TYSON, WHO'S BASHING WHOM?: TRADE CONFLICT IN HIGH TECHNOLOGY INDUSTRIES 128 (1992) [hereinafter WHO'S BASHING WHOM?].

10. *See* THE WORK OF NATIONS, *supra* note 9, at 119-35. However, the phenomenon has begun to make its appearance even in Japan, where companies have traditionally been more wedded to the home country than American or European multinationals. *See* Andrew Pollack, *Breaking Out of Japanese Orbit: Shift Offshore Rattles The Economic Constellation*, N.Y. TIMES, Jan. 30, 1996, at D1.

11. *See WIR 1993*, *supra* note 6, at 161.

12. *See* BLUMBERG, *supra* note 6; 1 RESTATEMENT (THIRD) OF THE LAW OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 213, cmt. f & reporters' note 7 (1987) [hereinafter RESTATEMENT].

not yet been matched by a commensurately effective international legal regime.[13]

One might argue that neither national nor international regulation should impede the growth of MNCs and the globalization of the production process. Firms are better situated than governments to maximize efficiencies by seeking out optimal production conditions wherever they occur.[14] In practice the production process is not so fragmented as it might appear because most trade and investment occurs among a limited number of developed countries, most significantly the United States, Canada, the Member States of the European Union, and Japan.[15] Therefore, assuming no radical change in the status quo, a high degree of cooperation among the legal authorities of this limited group would provide most of the necessary legal coordination. Numerous examples of interstate cooperation may be found among taxing authorities, agencies which regulate securities markets, and agencies which regulate antitrust enforcement. In addition, legal coordination is already being provided through the institutions of regional economic integration, such as the European Union and the three parties to the North American Free Trade Agreement (NAFTA).[16]

This Article focuses on the activities of multinational corporate groups and their effect on U.S. laws regulating unfair trade practices. Specifically, it concentrates on the impact to the antidumping laws, which proscribe sales of imported goods in the United States at less than fair value if the effect of such sales is to harm a U.S. industry. For purposes of the antidumping laws, a U.S. industry is defined essentially as one with domestic production facilities.[17]

The regulatory framework of the U.S. antidumping laws was designed at a time when U.S. producers were U.S. companies under any definition (place of incorporation, location of corporate headquarters,

---

13. *See* BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 705-706 (excerpt of J. STARKE, INTRODUCTION TO INTERNATIONAL LAW 193-200, 224-26 (9th ed. 1984) (quoting DEP'T ST. BULL., Oct. 1970, at 429)); *id.* at 47-50 (excerpt of R. FALK, THE END OF WORLD ORDER 26-30, 227, 280-89 (1983)).

14. *See* THE WORK OF NATIONS, *supra* note 9, at 119-34.

15. *See WIR 1993*, *supra* note 6, at 166.

16. The three NAFTA signatories are the United States, Mexico, and Canada.

17. *See generally* Harvey M. Applebaum & Paul G. Gaston, *What Is a "Domestic Industry" for Purposes of Application of the United States Trade Laws?*, *in* INTERNATIONAL TRADE POLICY: THE LAWYER'S PERSPECTIVE § 13.01, at 13-1 (John H. Jackson et al. eds., 1985); *see also* Powell & McInerney, *supra* note 8, at 34. The standard for determining a domestic industry for purposes of initiating an antidumping investigation is discussed extensively in Part VIII, which addresses standing, and Part IX, which deals with the Smith Corona/Brother Industries litigation.

location of production facilities, beneficial ownership by U.S. citizens) and U.S. products were made locally of domestic inputs. With the growing internationalization of corporate groups and the concomitant internationalization of the production process, the nature of the target group to be protected by the antidumping laws is less clear. As a result, the question of which party has standing to invoke the antidumping laws has become more controversial. An extreme example of this controversy is the antidumping case involving the Smith Corona Corp. (Smith Corona) and Brother Industries (USA), Inc. (BIUSA). At the present time, BIUSA, which is a subsidiary of a Japanese company, is one of only two companies still producing electric typewriters in the United States.[18]

Among the questions that this Article addresses is whether increased ownership of domestic production facilities by affiliates of foreign companies, as well as increased reliance of U.S. companies on foreign production facilities, may make the regulatory framework obsolete. At least with respect to some industries, it is quite conceivable that there will be no domestic producer with standing to initiate antidumping proceedings because of the shift of production facilities overseas. Another possible outcome is that domestic producers will be disinclined to initiate antidumping proceedings because of relationships with foreign exporters, whether through equity holdings or contractual dealings.[19]

The antidumping laws have been periodically amended to take account of changing circumstances; there have been five major revisions in the last two decades (1974, 1979, 1984, 1988, 1994).[20] With each revision the language of the statute has become more precise and specific,

---

18. *Cf.* Keith Bradsher, *Smith Corona Plant Mexico Bound*, N.Y. TIMES, July 22, 1992, at D11. The other company is Lexmark International, a subsidiary of IBM. *Cf. Shares of Former IBM Unit Rise 8% on First Day*, N.Y. TIMES, Nov. 16, 1995, at D4.

19. *See* Stephen Engelberg & Martin Tolchin, *Foreigners Find New Ally In U.S. Industry*, N.Y. TIMES, Nov. 2, 1993, at A1; *see also* 2 THE GATT URUGUAY ROUND: A NEGOTIATING HISTORY (1986-1992) at 1582 (Terence P. Stewart ed., 1993) [hereinafter NEGOTIATING HISTORY]. "Because of the many industries that are characterized by significant foreign ownership, it is quite common in the U.S. for trade associations to be unable to muster authorization for the filing of antidumping petitions." *Id.*

20. *Cf.* Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1974) (amending the Antidumping Act of 1921); Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979); Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2984 (1984); Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988); Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809, 4842-4901 (1994).

limiting the discretion of the administering agencies.[21] No doubt the antidumping laws will need further adjustments to keep them current with changing business practices.

In the periods between major legislative revisions, the only practicable approach is to repose confidence in the administrative agencies which enforce the laws, the International Trade Administration of the United States Department of Commerce (ITA) and the United States International Trade Commission (ITC).[22] Their direct experience with implementation provides the foundation for statutory revision.[23]

## II. DEVELOPMENT OF MNCS AND HISTORY OF FOREIGN INVESTMENT IN THE UNITED STATES

The current controversy over identifying an "American" company is only the latest stage in the historical ambivalence of the United States towards trade relations with other countries—welcoming foreign investment on the one hand and fearing foreign domination of the economy on the other. As a colony of Great Britain, the United States was largely founded and operated by state-owned multinationals, and in turn, became an exporter of multinational business from early in its history.[24] Ambivalence towards inward foreign investment has been a constant since the beginning of U.S. history[25] and has not diminished with the transition from a developing country to an economic superpower. We retain statutes, some dating back to the early days of the republic, which restrict foreign investment in certain "strategic" industries such as exploitation of natural resources, transportation and communications.[26]

---

21. *Cf.* Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 379-85 (1989) (discussing the difference between "transitive" statutes which allow little discretion in implementation versus "intransitive" statutes which allow a great deal of discretion).

22. *See* 19 U.S.C. §§ 1673 and 1677(1) & (2) (1994).

23. *See* discussion *infra* Part VII.

24. *See* Jonathan Turley, *Transnational Discrimination and the Economics of Extraterritorial Regulation*, 70 B.U. L. REV. 339, 343 (1990). In Federalist Paper No. 11, Alexander Hamilton made the following observation:

> There are appearances to authorize a supposition that the adventurous spirit, which distinguishes the commercial character of America, has already excited uneasy sensations in several of the maritime powers of Europe. . . . If we continue united . . . we may oblige foreign countries to bid against each other for the privileges of our markets.

The Federalist No.11 (Alexander Hamilton) (J.R. Pole ed., 1987).

25. *See* The Federalist, *supra* note 24.

26. *See generally* MIRA WILKINS, THE HISTORY OF FOREIGN INVESTMENT IN THE UNITED STATES TO 1914 (1989).

On the other hand, the United States has resisted the temptation to impose greater restrictions on foreign investment because it has promoted liberal treatment of U.S. corporations doing business abroad. How the United States treats foreign corporations is therefore very often related to the treatment desired for U.S. companies overseas.[27] At the same time, the United States has become even more preoccupied with defining the "American" corporation as a reaction to investment barriers faced by U.S. companies in Japan and Germany, its chief economic rivals.[28]

Certainly, anxiety over foreign investment has become acute in recent years due to continuing trade imbalances with a number of trading partners. Budget deficits have reduced the ability of the United States to finance industrial development. An increased emphasis on economic rather than military power, as a measure of international political importance, has also contributed to U.S. anxiety over foreign investment. These problems have been difficult to resolve, despite efforts such as currency devaluation and the application of trade surpluses towards the acquisition of U.S. assets (whether U.S. government securities, real estate, or corporations).[29]

Under the Clinton administration, the question of what constitutes an "American" company has been under heightened scrutiny because the administration initially advocated a proactive stance towards management of the economy, in contrast to the laissez-faire attitude of the Reagan and Bush administrations.[30] The chief economic strategists in the early years of the Clinton administration believed in an active role for government, hence their concern with separating out those companies which should benefit from government grants, technological assistance, or export advice.[31] However, there were two distinct approaches to this question; one espoused by Laura Tyson, the former chair of the Council of

---

27. *See generally* Audio tape of Edwin D. Williamson and Ivan Schleger, National Treatment and Multinational Enterprises: Does U.S. Ownership Matter? Panel Discussion at the American Bar Association, Section of International Law & Practice, (Aug. 6-10, 1993) (audio tape available for purchase from the ABA) [hereinafter ABA-ILP session].

28. *See generally id*.

29. *See* EDWARD M. GRAHAM & PAUL R. KRUGMAN, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES 7-33 (3d ed. 1995).

30. At this juncture, the beginning of President Clinton's second term in office, it is difficult to ascertain how much of this activist spirit remains in the executive branch. Both Tyson and Reich have left their positions for private life. *See* Louis Uchitelle, *An Appointment that Draws No Fire*, N.Y. TIMES, Jan. 7, 1997, at D3; Julie Flaherty, *On Campus: Reich Takes Brandeis Post Over a Return to Harvard*, N.Y. TIMES, Jan. 22, 1997, at B7.

31. *See* ABA-ILP session, *supra* note 27.

Economic Advisers, and the other by Robert Reich, the Secretary of Labor.

Tyson took the position that the government should support American-owned companies rather than U.S. subsidiaries of foreign corporations.[32] She saw no reason to depart from the tradition of identifying national interests with domestically owned companies, a tradition dating to the time when corporations served the monarchs who gave them special charters.[33] If the economic competitiveness of companies is a direct function of their investment in research and development, then multinational companies should engage in that activity in their home countries, even if they produce goods and services abroad.[34] According to Tyson's argument, the U.S. government should favor U.S. owned companies which center their research and development activities at home.[35]

Reich, on the other hand, rejected the idea that the U.S.-owned corporation headquartered in the United States is necessarily the vehicle for U.S. economic growth.[36] To the contrary, U.S. affiliates of foreign companies which invest in production facilities and worker training in the United States may make a greater contribution to growth in the U.S. economy.[37] For a time, it appeared that Reich's point of view was shaping government policy, as higher priority was given to "helping foreign-owned companies expand production in the United States than to assisting domestic companies with output from their factories overseas."[38] Though not expressly identified as such, Reich's point of view was the one which was ultimately adopted in the Smith Corona/Brother Industries case.[39]

---

32. *See generally* Laura D'Andrea Tyson, *They Are Not Us: Why American Ownership Still Matters*, 4 THE AMERICAN PROSPECT 37 (1991).

33. *See id.*

34. *See id*. at 40.

35. *See id*. at 44-45.

36. *See generally* Robert B. Reich, *Who is Us?*, HARV. BUS. REV. Jan.-Feb. 1990, at 53 [hereinafter *Who Is Us?*]; *see also* Robert B. Reich, *Rejoinder: Who Do We Think They Are?*, 4 AMERICAN PROSPECT 49 (1991) (rejoinder to Tyson article, *supra* note 32); THE WORK OF NATIONS, *supra* note 9.

37. *See Who is Us?*, *supra* note 36, at 59-60.

38. Keith Bradsher, *In Shift, White House Will Stress Aiding Foreign Concerns in U.S.*, N.Y. TIMES, June 2, 1993, at A1.

39. *See* discussion *infra* Part IX.

## III. DEFINITION OF CORPORATE NATIONALITY AND INTERNATIONAL EFFORTS TO REGULATE MNCS

Because special benefits accrue to the "American" corporation and not to foreign corporations (including the ability to invoke the protection of U.S. laws), the tests for identifying corporate nationality are crucial. United States corporation law has not kept pace with changes in the economic reality. As Professor Blumberg argues:

> [t]he concept of the corporation as a separate legal entity, a concept which originally had satisfactorily defined the economic entity as well as the legal entity, has failed to correspond to the modern realities of American and world business. . . . Accordingly, it is appealing to consider whether it is feasible to fashion a new legal unit, consisting of the affiliated corporations of a corporate group, as an "enterprise" to serve either generally, or in appropriate cases, as the conceptual basis for attributing the liabilities (and perhaps certain rights as well) of the component companies of a group to each other.[40]

Such reconceptualization is not to be found in the foreign relations law of the United States. The Restatement Third of the Foreign Relations Law of the United States (Restatement) illustrates the traditional approach to the definition of corporate nationality and essentially views each member in a corporate family as a stand-alone unit.[41] The Restatement provides: "For purposes of international law, a corporation has the nationality of the state under the laws of which the corporation is organized."[42] Comment c of the Restatement observes that "[t]he traditional rule, . . . *adopted for certainty and convenience*, treats every corporation as a national of the state under the laws of which it was created."[43] Furthermore, in Comment f, the Restatement acknowledges the existence of the multinational corporation or enterprise but states that such entity "has not yet achieved special status in international law or in national legal systems."[44] Thus, the drafters of the Restatement failed to take up the challenge posed by Professor Blumberg.

---

40. BLUMBERG, *supra* note 6, at 232-33.
41. *See* RESTATEMENT, *supra* note 12, § 213.
42. *See id.*
43. *See id.* cmt. c (emphasis added).
44. *See id.* cmt. f.

Notwithstanding the fact that the United States has retained for general purposes a traditional definition of corporate nationality, the United States has resorted to entity "look-through" principles in limited situations, such as "trading with the enemy" statutes and diplomatic protection of the economic interests of U.S. nationals.[45] In fact, the United States has been more aggressive than other countries in applying its domestic laws extraterritorially to the activities of MNCs.[46] Moreover, extraterritoriality has sometimes been based on the U.S. nationality of the parent corporation and its presumed control of a foreign affiliate, the MNC's nexus with U.S. commerce, or even the U.S. origin of goods or technology regardless of nationality or control.[47] The U.S. legal system has long been willing to espouse claims of Americans abroad, even when they were doing business through the medium of a foreign company, or to look through the form of a foreign corporation for beneficial ownership by Americans.[48]

Because the corporation is a creature of municipal law and at the same time a creature of statute, it is perhaps not surprising that the International Court of Justice (ICJ), in the *Barcelona Traction* case, passed on the opportunity to shape a working definition of the multinational corporation.[49] In this case, "the ICJ held that Belgium could not bring proceedings against Spain for injury to a corporation incorporated and having its headquarters in Canada, even though most of the shareholders were Belgian."[50] The ICJ refused to look beyond the external formalities of incorporation to beneficial ownership.[51] Instead,

---

45. *See id.* reporters' notes 5, 8.

46. *See* BLUMBERG, *supra* note 6, at 172, 179, 199.

47. *See generally* Stanley J. Marcuss, *Commentaries on the Restatement (Third) of the Foreign Relations Law of the United States: Jurisdiction with Respect to Foreign Branches and Subsidiaries: Judicial Power in the Foreign Affairs Context Under Section 414 of the Foreign Relations Restatement*, 26 Int'l Law. 1 (1992). Compare the flexibility and pragmatism of U.S. courts with respect to resolving international maritime conflicts of law. *See* William Tetley, *The Law of the Flag, "Flag Shopping," and Choice of Law*, 17 TUL. MAR. L.J. 139, 142, 156-57 (1993).

48. *See* Lucius Caflisch, *LA PROTECTION DES SOCIÉTÉS COMMERCIALES ET DES INTÉRÊTS INDIRECTS EN DROIT INTERNATIONAL PUBLIC* (THE PROTECTION OF COMMERCIAL COMPANIES AND INDIRECT INTERESTS IN PUBLIC INTERNATIONAL LAW) 101-04, 108-11 (1969) (discussion of the *I'm Alone* case). For purposes of the U.S.-Japan Semiconductor Agreement, which required Japan to increase its imports of semiconductors, production by foreign subsidiaries of U.S. companies was counted as U.S. production for purposes of counting imports. *See* WHO'S BASHING WHOM?, *supra* note 9, at 109 n.35, 130, 131 (Table 4.8).

49. *See* Barcelona Traction, Light & Power Co. (Belgium v. Spain), 1970 I.C.J. 3, 43-45.

50. RESTATEMENT, *supra* note 12, § 213, reporters' note 2 (citing *Barcelona Traction*, 1970 I.C.J. at 43-45).

51. *See Barcelona Traction*, 1970 I.C.J. at 43-45.

the ICJ relied on the traditional view that a corporation is a national of the state in which it was formed.[52]

One significant effort to devise legal concepts for the new economic reality was the Draft Code of Conduct on Transnational Corporations (Draft Code), prepared by the UN Commission on Transnational Corporations.[53] The idea of an international corporation law as the necessary counterpart to international economic integration has been discussed for some time. The Draft Code was an attempt to fill the gap in international regulation.[54] Opponents of such a statute argued, among other things, that it would be too difficult a task.[55] Why it would be more difficult to harmonize the corporation laws of the various states than to achieve harmonization in the area of sales contracts, for example, is unclear.[56] A more likely explanation is that MNCs preferred to operate in a legal vacuum.[57]

The Draft Code definition of "transnational corporation" is so diffuse and all-encompassing as to be virtually useless as a legal standard. The Draft Code applies to:

> enterprises, irrespective of their country of origin and their ownership, including private, public or mixed, comprising entities in two or more countries, regardless of the legal form and fields of activity of these entities, which operate under a system of decision-making, permitting coherent policies and a common strategy through one or more decision-making centers, in which the entities are so linked, by ownership or otherwise, that one or more of them may be able to exercise a significant influence over the activities of others and, in particular, to share

52. *See id.*

53. *See U.N. ECOSOC Proposed Text of the Draft Code of Conduct on Transnational Corporations*, U.N. Doc. E/1990/94, Annex (1990), *available in* LEXIS, Intlaw Library, BDIEL File [hereinafter U.N. Draft Code]. Apparently this drafting project has been abandoned. *See* John F. Murphy, *The International Law on Foreign Investment*, 89 AM. J. INT'L L. 666 (1995) (Book Review).

54. *See WIR 1993*, *supra* note 6, at 189.

55. *See id*.

56. The Vienna Convention on Sales was drafted to bridge the gap between common law and civil law approaches to contract formation. *See generally* Final Act of the United Nations Conference for the International Sale of Goods, Apr. 10, 1980, U.N. Doc. A/CONF. 97/18 (1980), *reprinted in* 19 I.L.M. 668.

57. *See WIR 1993*, *supra* note 6, at 189.

> knowledge, resources and responsibilities with the others.[58]

The definition takes integrated production into account, but it does not set forth any specific, relatively objective tests for measuring control or affiliation.[59]

## IV. OVERVIEW OF UNITED STATES TRADE LAWS

The antidumping laws are only a part of a complex scheme regulating imports into the United States; therefore, they exhibit only one situation where the issue of corporate nationality has arisen. In addition to the antidumping laws, corporate nationality is also an important issue in three other contexts: countervailing duty laws, which impose penalties on a nation of origin where the prices of goods have been artificially lowered due to subsidized production;[60] "Section 337 of the Tariff Act of 1930, an 'unfair competition' statute most often invoked by a domestic producer when imports are alleged to infringe patents or trademarks; [and] Section 201 of the Trade Act of 1974, the 'escape clause' invoked by domestic industries to seek a period of temporary relief from increased imports."[61]

With the exception of "escape clause" proceedings, all of the remedies mentioned above involve practices deemed unfair in international trade. The GATT/WTO codifies the rights of importing countries to impose dumping and/or countervailing duties on unfairly priced goods.[62] However, the issue of corporate nationality is particularly relevant with regard to the antidumping laws because international trade lawyers perceive these laws as providing the "weapon of choice" for domestic companies seeking relief from import competition.[63] A survey of U.S. trade actions over the period from 1980 to 1988 revealed that dumping cases and countervailing duty cases were brought with about the

---

58. U.N. Draft Code, *supra* note 53, para. 1(a).

59. However, the Code draftsmen may not have been overly concerned with ascertaining the precise relationship among the various members of the corporate group since the Code provides elsewhere that each host country gains jurisdiction over the entire affiliated group by virtue of its local operations. *See id.*, paras. 22, 23, 33, 34, 44, 53, 56, 58.

60. *See generally* 19 U.S.C. § 1671 (1994).

61. Applebaum & Gaston, *supra* note 17, § 13.01, at 13-2 (citing 19 U.S.C. §§ 1337 & 2251, respectively).

62. Uruguay Round Agreement Establishing the World Trade Organization, Apr. 15, 1994, 33 I.L.M. 1143 (1994).

63. *See* Gary N. Horlick, *The United States Antidumping System*, *in* ANTIDUMPING LAW AND PRACTICE 99, 102 n.4 (John H. Jackson & Edwin A. Vermulst eds., 1989).

same frequency.[64] On the other hand, "escape clause" actions were quite uncommon, mainly for procedural reasons.[65]

## V. INCREASED RELIANCE ON TRADE LAW REMEDIES, 1979 TO THE PRESENT

The increase in antidumping and other unfair trade cases in the 1980s was a predictable outcome of the successive lowering of tariff barriers since World War II and the consequent exposure of the U.S. economy to import competition. This trend will likely be accentuated by the further reduction in tariffs achieved at the recent Uruguay Round.[66]

The antidumping laws appear to serve as protection particularly for certain domestic companies. These include sole producers of certain products, or producers that are one of few remaining domestic producers of certain products;[67] relatively small businesses;[68] or those companies which do not have equity or contractual relationships with foreign partners. Thus, the antidumping laws may perpetuate a deeply ingrained cultural bias towards preserving the existence of the small, family-owned, domestically-based business, just as various laws protecting agricultural interests are justified as preserving the family farm.[69]

On the other hand, there are strong economic arguments to be made in favor of preserving a market with numerous small players, even

---

64. *See* J. Michael Finger & Tracy Murray, *Antidumping and Countervailing Duty Enforcement in the United States*, *in* ANTIDUMPING: HOW IT WORKS AND WHO GETS HURT 241, 245 (J. Michael Finger ed., 1993).

65. *See id.* at 250. Escape clause actions require a higher threshold of injury than do antidumping or countervailing duty actions. *See id.* In addition, even if the injury threshold is met, the President is given the discretion not to grant relief or to modify the form of relief recommended by the ITC. *See id.* These remedies are not mutually exclusive. It is possible to bring simultaneously antidumping, countervailing duty, and escape clause proceedings with respect to the same imported goods. *See id*.

66. *See Uruguay Round Ends in Geneva; Major Provision of Deal Outlined*, BNA INT'L TRADE DAILY, Dec. 17, 1993, *available in* LEXIS, BNA Library, BNAITD File (discussing Ambassador Kantor's statements on antidumping issues).

67. *See, e.g.*, NTN Bearing Corp. of America v. United States, 757 F. Supp. 1425 (Ct. Int'l Trade 1991); Gilmore Steel Corporation v. United States, 585 F. Supp. 670 (Ct. Int'l Trade 1984); Brother Industries (USA), Inc. v. United States, 801 F. Supp. 751 (Ct. Int'l Trade 1992).

68. *See* Engelberg & Tolchin, *supra* note 19, at A1; Barnaby J. Feder, *Tiny Industry Fears NAFTA's Reach*, N.Y. TIMES, Sept. 24, 1993, at D1 (broom manufacturer in Illinois); Michael Janofsky, *A Curb on Imported Tobacco Aids Farms and Philip Morris*, N.Y. TIMES, Sept. 29, 1993, at A1; Carlos Primo Braga & Simao Davi Silber, *Brazilian Frozen Concentrated Orange Juice: The Folly of Unfair Trade Cases*, *in* ANTIDUMPING: HOW IT WORKS AND WHO GETS HURT 83, 83-84 (J. Michael Finger ed., 1993).

69. *See* Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 911 (1987); Turley, *supra* note 24, at 370-71 n.186.

at the expense of some inefficiency. The market system progresses through a system of trial and error. Concentrated markets enable a few competitors to engage in collusive activities.[70] Moreover, markets which are not concentrated benefit consumers, a large but fragmented group unable to effectively resist concentrated economic power.

The United States, as a member of GATT, is required to reduce tariffs.[71] Therefore, it is now politically and legally impossible for the United States to revert to tariff barriers in order to protect its consumer interests. Yet an underlying political pressure to raise tariffs against foreign competition lurks in the background. The availability of unfair trade remedies acts as a kind of safety valve to reduce this pressure.[72] As a domestic institutional matter, the pressure is most likely to be felt in Congress, which is generally most responsive to domestic political pressures. By contrast, the executive branch is less responsive to domestic interests because it uses access to the U.S. market as a trade-off with other countries for their political and military cooperation.[73]

Since antidumping and other unfair trade cases are usually initiated by private parties, the onus of protectionism is shifted away from the legislative branches of the federal government, including Congress and the executive branch, toward administrative agencies and the courts.[74] Trade problems are thereby depoliticized.

At first blush, the antidumping laws are non-discriminatory in that they protect domestic production regardless of the nationality or affiliation of the producer. Thus the protection of the antidumping laws (or relief from the application of the antidumping laws) may be viewed as a "reward" for foreign direct investment in the United States.[75] For developed countries, the antidumping laws and other unfair trade laws are

---

70. *Cf.* Adams & Brock, *supra* note 7, at 1532.

71. Statement as to How the Uruguay Round Agreements Achieve Congressional Negotiating Objectives (Sept. 27, 1994) (Office of the U.S. Trade Rep.), 1994 WL 761805, *available in* WESTLAW, GATT Database.

72. *See* J. Michael Finger, *The Origins and Evolution of Antidumping Regulation*, *in* ANTIDUMPING: HOW IT WORKS AND WHO GETS HURT 13, 26 (J. Michael Finger ed., 1993).

73. *See generally* Alfred E. Eckes, *Trading American Interests*, FOREIGN AFFAIRS, Sept. 1992, at 135-54, *available in* LEXIS, ITRADE Library, FORAFR File.

74. *Cf.* Taeho Bark, *The Korean Consumer Electronics Industry: Reaction to Antidumping Actions*, *in* ANTIDUMPING: HOW IT WORKS AND WHO GETS HURT 121, 129 (J. Michael Finger ed., 1993) (describing surprised reaction by Korean industry to antidumping duties).

75. *See* Gunnar Fors, *Stainless Steel in Sweden: Antidumping Attacks Responsible International Citizenship*, *in* ANTIDUMPING: HOW IT WORKS AND WHO GETS HURT 137, 155 n.15 (J. Michael Finger ed., 1993); *WIR 1993*, *supra* note 6, at 103 (discussing the recent increase in Japanese outward investment).

a disguised and indirect form of a local content requirement—to sell in the local market, one must produce in the local market. Yet the United States has steadily, and successfully, opposed local content requirements in its international trade negotiations.[76] For example, under NAFTA, a country is prohibited from requiring that investors achieve a certain level of domestic content or give preferences for domestic sourcing.[77]

Increased reliance on the unfair trade laws has accompanied a decline in the use of the antitrust laws as a weapon against unfair business practices.[78] For more than a decade there has been a sharp decline in antitrust enforcement both by the government and through private civil litigation.[79] Compared to the antitrust laws, the unfair trade laws, particularly after the 1979 amendments, have offered petitioners a number of distinct advantages.

Although antidumping and countervailing duty proceedings are usually initiated by private U.S. companies, they are not, strictly speaking, adversarial in nature.[80] The U.S. government, through the ITA and the ITC, not only judges the merits of each case and administers any relief, but also performs the investigation.[81] While petitioners are invariably represented by counsel, they do not have to shoulder the entire burden of investigation, as in civil discovery.[82] Furthermore, the ITA and the ITC

---

76. *See* Daniel M. Price, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, 27 INT'L LAW. 727, 729 (1993).

77. *See id.*

78. *See generally* Robert Pitofsky, Comment, *Antitrust in the Next 100 Years*, 75 CAL. L. REV. 817 (1987); *see also* Adams & Brock, *supra* note 7, at 1516-18.

79. *See generally* Pitofsky, *supra* note 78; *see also* Adams & Brock, *supra* note 7, at 1516-18. With respect to international trade, the antitrust laws in their present form suffer from conceptual limitations. *See* Christopher M. Barbuto, Note, *Toward Convergence of Antitrust and Trade Law: An International Trade Analogue to Robinson-Patman*, 62 FORDHAM L. REV. 2047, 2051-52 (1994). For example, the Robinson-Patman Act only applies to price discrimination between markets within the United States and not to the kind of price discrimination addressed by the antidumping laws. *See id.* Under the Sherman Act as interpreted by the United States Supreme Court, a parent and subsidiary, even if incorporated in different jurisdictions, cannot conspire for purposes for Section 1. *See* Kojo Yelpaala, *Strategy and Planning in Global Product Distribution—Beyond the Distribution Contract*, 25 LAW & POL'Y INT'L BUS. 839, 880 & n.136 (1994) (citing Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 759-77 (1984)).

Furthermore, the decline in antitrust enforcement by government and private parties means an irrevocable loss of institutional expertise. To resurrect antitrust enforcement would necessitate rebuilding the public and private antitrust bar. By way of comparison, the reinstitution of capital punishment in various states after a long hiatus has required the local bar to train in the prosecution and defense of capital cases.

80. *See* Theodore W. Kassinger, *Antidumping Duty Investigations*, *in* LAW & PRACTICE OF UNITED STATES REGULATION OF INTERNATIONAL TRADE 1, 2 (Charles R. Johnston, Jr. ed., 1989).

81. *See id.*

82. *See id*.

work with petitioners before a case is initiated to ensure that the petition is legally sufficient, a service unavailable to the ordinary plaintiff in civil litigation.[83] In addition, the ITA and the ITC are subject to strict time limits in issuing their determinations, so that a petitioner can expect the entire proceedings to last no longer than about a year.[84] While the legal costs of pursuing (or defending against) an antidumping claim are not inconsiderable, a petitioner has a greater certainty of achieving a successful outcome: seventy percent of antidumping cases in the period 1980-88 ended with a restrictive outcome.[85] Because the doctrines of res judicata and collateral estoppel do not apply in antidumping proceedings,[86] unsuccessful petitioners may bring repeated actions until success is finally achieved.[87] Repeated mass filing of antidumping petitions, and/or simultaneous pursuit of other trade remedies, often provide the momentum for a political solution negotiated through the executive branch, such as "voluntary export restraints" imposed by exporting countries.[88]

By contrast, the antitrust laws have become an expensive and uncertain tool against unfair competition. In the antitrust case *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*,[89] the United States Supreme Court ruled that U.S. firms could not recover for harm resulting from the behavior of foreign firms in foreign markets unless a direct effect on U.S. commerce can be proved—an extraordinarily difficult task.[90] In a recent predatory pricing case, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*,[91] the Supreme Court ruled that pricing

---

83. *See id*. at 16.

84. *See id*. at 16-20.

85. *See* Finger & Murray, *supra* note 64, at 244.

86. *See, e.g.*, 19 U.S.C. §§ 1671a(a) & 1673a(a). "A countervailing duty investigation shall be initiated whenever the administering authority determines, from information available to it, that a formal investigation is warranted into the question of whether the elements necessary for the imposition of a duty under section 701(a) [19 U.S.C. § 1671(a)] exist." *Id.* § 1671a(a).

87. This strategy was used, for example, in the steel cases. *See* Fors, *supra* note 75, at 154-55. It was also used in the cut flower cases. *See* José A. Mendez, *The Development of the Colombian Cut Flower Industry: A Textbook Example of How a Market Economy Works*, *in* ANTIDUMPING: HOW IT WORKS AND WHO GETS HURT, 103 116 (J. Michael Finger ed., 1993).

88. *See* J. Michael Finger, *Reform*, *in* ANTIDUMPING: HOW IT WORKS AND WHO GETS HURT 57, 66 (J. Michael Finger ed., 1993) [hereinafter Finger, *Reform*].

89. 475 U.S. 574 (1986).

90. *See id*. at 582 & n.6 (*discussed in* WHO'S BASHING WHOM?, *supra* note 9, at 267). For discussion of the difficulties of conducting discovery or enforcing judgments abroad see Barbuto, *supra* note 79, at 2071; *see also* Thomas J. Schoenbaum, *The International Trade Laws and the New Protectionism: The Need for a Synthesis with Antitrust*, 19 N.C.J. INT'L LAW & COM. REG. 393, 404-05 (1994) (discussing Section 337 of the Tariff Act of 1930).

91. 509 U.S. 209 (1993).

products below cost with the intention to hurt competitors is not enough to show predatory pricing; there must be adequate proof that the company had a reasonable prospect of achieving its goals.[92] However, the problem with these standards is that such proof may only be forthcoming after irreparable damage has been done. Furthermore, a number of countries affronted by what they consider an illegitimate exercise of U.S. extraterritorial jurisdiction, have enacted blocking or "claw-back" statutes to relieve companies of liability from U.S. antitrust law or to prevent enforcement of U.S. damage awards.[93] Arguments to eliminate the unfair trade laws, and handle antidumping complaints under the antitrust laws, have not taken realistic account of these problems in contemporary antitrust enforcement.[94]

## VI. OVERVIEW OF THE ANTIDUMPING LAWS AND THEIR ENFORCEMENT

Two agencies are primarily involved in the administration of the antidumping duties laws: the ITA and ITC.[95] The ITA determines whether or not goods imported into the United States are being sold, or are likely to be sold, at less than their fair market value so as to require the imposition of antidumping duties to offset the dumping margin.[96] The ITC determines whether the dumping found by the ITA harms or threatens to harm an existing U.S. industry.[97] Both agencies must make affirmative determinations in order for antidumping duties or fines to be imposed.[98] Thus, if the ITA finds dumping but the ITC does not find injury, then the proceedings are terminated without imposition of antidumping duties.[99]

---

92. *See id*. at 222.

93. *See* CARTER & TRIMBLE, *supra* note 13, at 732-33.

94. *See* Finger, *Reform*, *supra* note 88, at 60; Barbuto, *supra* note 79; Schoenbaum, *supra* note 90.

95. *See* 19 U.S.C. §§ 1673 and 1677(1) & (2) (1994). For a concise summary on the administration of U.S. antidumping laws see The Economic Effects of Antidumping and Countervailing Duty Orders and Suspension Agreements, USITC Pub. 2900, Inv. No. 332-344, at 2-1 to 2-7 (June 1995) [hereinafter Pub. 2900].

96. *See* 19 U.S.C. § 1673(1).

97. *See* § 1673(2)(A). The statute also provides for an injury determination if the establishment of an industry in the United States is materially retarded by reason of imports of the subject merchandise, but such cases are few. *See* Pub. 2900, *supra* note 95, at 2-7 & n.35; *see also* § 1673(2)(B).

98. *See* § 1673.

99. *Cf. id*.

A petition seeking the imposition of antidumping duties must be filed with the ITA and ITC by an "interested party," "on behalf of an industry."[100] After such a filing, the ITA must determine whether the petition reasonably supports allegations of dumping;[101] and if so, commence an investigation of the alleged dumping.[102] Then the ITC must preliminarily determine whether there is reasonable indication that a U.S. industry is materially injured or threatened with material injury.[103] Only after an affirmative preliminary determination by the ITC does the ITA make a preliminary determination with respect to dumping.[104] If the ITA's preliminary determination is affirmative, the Customs Service will suspend the sale of the imported merchandise and require the posting of a bond in the amount of the estimated dumping duties.[105] After a final determination of dumping by the ITA, the ITC makes a final determination of injury.[106] However, if either of the final determinations is negative, the investigation must be terminated.[107] On the other hand, if the ITC's final determination is affirmative, the ITA will issue an antidumping order which is enforced by the Customs Service.[108] An antidumping order is subject to annual review by the Department of Commerce and may be revoked or modified.[109] Pursuant to recent amendments, the ITA and the ITC are required to conduct "sunset reviews" no later than five years after the issuance of an order and in certain other circumstances.[110]

Judicial review of ITA and ITC decisions is entrusted to the Court of International Trade (CIT),[111] with further appeals to the Court of

---

100. *See* § 1673a(b)(1) & (2). What constitutes an "interested party" is defined in 19 U.S.C. § 1677(a)(1994); *see also* Pub. 2900, *supra* note 95, at 2-4. For discussion of "interested party" status, see *infra* Part VIII.

101. *See* § 1673a(c)(1)(A).

102. *See* § 1673a(c)(2).

103. *See* § 1673b(a). The statute requires the ITC to consider a detailed list of relevant factors in making a material injury determination, including the volume of imports, price underselling by imports, and impact on the affected industry. *See* 19 U.S.C. § 1677(7)(C) (1994). In determining impact on the affected industry, the ITC is to consider, among other factors, actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment. *See* § 1677(7)(C)(iii). Similarly, the ITC is required to consider a detailed list of factors in making a "threat of material injury" determination. *See* § 1677(7)(F).

104. *See* § 1673b(b).

105. *See* § 1673b(d).

106. *See* § 1673d(b); *see also* Pub. 2900, *supra* note 95, at 2-5 to 2-8.

107. *See* § 1673d(c)(2).

108. *See* § 1673e(a).

109. *See* Horlick, *supra* note 63, at 128-29; *see also* 19 U.S.C. § 1675(a) (1994).

110. *See* Pub. 2900, *supra* note 95, at 2-14 (citing 19 U.S.C. § 1675(c)).

111. *See* 19 U.S.C. § 1516a (1994).

Appeals for the Federal Circuit (CAFC) and the United States Supreme Court.[112] The CIT may review all decisions by the ITA and the ITC which are in some sense final.[113] For example, a petitioner may challenge a decision to dismiss a petition, since that decision terminates the proceeding, but a respondent cannot challenge a determination to initiate an investigation.[114] Some agency decisions are reviewed under the "arbitrary and capricious" standard, including an ITA determination not to initiate an investigation.[115] On the other hand, final determinations of dumping or injury are reviewed under the "unsupported by substantial evidence in the record" standard.[116] As a general rule, the CIT shows less deference to agency determinations than does the CAFC.[117]

## VII. PERCEIVED INADEQUACIES OF THE ANTIDUMPING LAWS AS A MEANS OF ADDRESSING UNFAIR TRADE PRACTICES

Antidumping laws, whether of the United States or other jurisdictions, have been criticized as encouraging anticompetitive and protectionist behavior, rather than furthering the international free flow of goods. Some critics have argued that the antidumping laws should be entirely eliminated, and unfair trade practices prosecuted solely under the antitrust laws.[118]

Among the criticisms leveled at the antidumping laws is that they are frequently invoked where the petitioner is a U.S. producer which has

---

112. *See* 28 U.S.C. § 2645 (1994) & 19 U.S.C. § 1516a(a)(4). In antidumping investigations involving imports from Canada or Mexico, an aggrieved interested party who was a party to the investigation may forgo judicial review for binational panel review under NAFTA. *See* Pub. 2900, *supra* note 95, at 2-15. Binational panel review has the same effect in U.S. law as judicial review. Under the 1994 Uruguay Round Agreements, including the Antidumping Agreement, conflicts between signatory countries are subject to dispute resolution by the WTO. *See* Pub. 2900, *supra* note 95, at 2-15 to 2-16. However, private parties do not have standing before the WTO, and the outcome of WTO dispute resolution is not directly enforceable under U.S. domestic law. *See* Philip A. Akakwan, *The Standard of Review in the 1994 Antidumping Code: Circumventing the Rule of GATT Panels in Reviewing National Antidumping Determinations*, 5 MINN. J. GLOBAL TRADE 277, 292-93 (1996).

113. *See* § 1516a(a)(2)(B); *see also* Horlick, *supra* note 63, at 130.

114. *See* Horlick, *supra* note 63, at 129-30.

115. *See* § 1516a(b)(1)(A).

116. *See* § 1516a(b)(1)(B).

117. *See* Horlick, *supra* note 63, at 130.

118. *See* Finger, *Reform*, *supra* note 88, at 60; Barbuto, *supra* note 79, at 2051-52; *see generally* Schoenbaum, *supra* note 90. The harmonization of antitrust and unfair trade laws has been studied and recommended ever since the founding of GATT, with little practical effect. *See, e.g.*, *International Antitrust Code Will Be Studied by GATT Members, Antitrust & Trade Reg. Rep. (BNA)*, Aug. 19, 1993, *available in* LEXIS, BNA Library, BNAITD File.

failed to adapt to international competition.[119] As a practical matter, standing to invoke the antidumping laws is limited to the "affected industry" and the public interest is not considered.[120] On balance, the benefits of imports to society may far outweigh the harm to the "affected industry" through the creation of new businesses,[121] the availability of superior inputs to downstream producers of other products,[122] and the increased availability of superior products at lower prices to consumers.[123] United States law differs from that of the European Union and Canada in that it does not expressly allow for consideration of the public interest as part of an antidumping proceeding.[124]

Paradoxically, compliance with the antidumping laws may encourage, or even actually require, oligopolistic or oligopsonistic behavior: the freezing of market shares by domestic companies and collusion between producers to maintain or raise prices.[125] For example, in one case, unfair trade actions brought against Brazilian exporters of frozen orange juice concentrate actually compelled the exporters to coordinate prices rather than compete.[126]

Since many antidumping cases terminate through suspension agreements between the ITA and exporters (to cease exporting or to eliminate the dumping margin)[127] or government-to-government voluntary restraint agreements (to limit the volume of exports), it may be argued that the antidumping laws are really the application of state power on behalf of private interests which have failed to compete in the

---

119. *See* discussion *supra* Part V.

120. *Cf.* 19 U.S.C. § 1671a(b)(1) (1994).

121. *See* Akakwan, *supra* note 112, at 281-82.

122. *See, e.g.*, Finger, *Reform*, *supra* note 88, at 68-69 (discussing imports of Japanese flat-panel displays for portable computers).

123. *See* Akakwan, *supra* note 112, at 281-82.

124. *See* J. Michael Finger, *Lessons from the Case Studies: Conclusions*, *in* ANTIDUMPING: HOW IT WORKS & WHO GETS HURT 35, 40, 49 (J. Michael Finger ed., 1993) [hereinafter Finger, *Lessons*]; Finger, *Reform*, *supra* note 88, at 64-65, 69-71.

125. *See* Mark A. Dutz, *Enforcement of Canadian Trade Remedy Laws: The Case for Competition Policies as an Antidote for Protection*, *in* ANTIDUMPING: HOW IT WORKS AND WHO GETS HURT 203, 210-11 (J. Michael Finger ed., 1993); Angelika Eymann & Ludger Schuknecht, *Antidumping Enforcement in the European Community*, *in* ANTIDUMPING: HOW IT WORKS AND WHO GETS HURT 221, 238 (J. Michael Finger ed., 1993).

126. *See* Braga & Silber, *supra* note 68, at 84; *see also* Andrzej Olechowski, *Chemicals from Poland: A Tempest in a Teacup*, *in* ANTIDUMPING: HOW IT WORKS AND WHO GETS HURT 163, 171-72 (J. Michael Finger ed., 1993) (discussing cartels in the European chemical industry); Patrick A. Messerlin, *Antidumping*, *in* COMPLETING THE URUGUAY ROUND: A RESULTS-ORIENTED APPROACH TO THE GATT TRADE NEGOTIATIONS 108, 109 (Jeffrey J. Schott ed., 1990) (discussing collusive arrangements between parents and subsidiaries).

127. *See* 19 U.S.C. § 1673c(b) (1994).

market.[128] Such application of state power is contrary to the basic premises of a free market system, where the market is supposed to act and react without governmental intervention.

Another criticism of the antidumping laws is that they fail to take account of normal and usual business practices. There is no recognition of the fact of business life that competitive prices are a necessary lever to gain market share.[129] There is no recognition of short-term dumping as a justifiable response to unanticipated market developments,[130] currency fluctuations, or sharp swings in demand.[131]

Other critics claims that the antidumping laws are biased towards a finding of sales at less than fair market value.[132] The dumping margin generally is calculated as the difference between prices in the home market (where the exporter operates) and prices in the U.S. market.[133] Yet the calculation of home market prices excludes sales which are below average cost, and the calculation of U.S. prices ignores sales which are above home market prices, all of which tends to create or increase the dumping margin.[134] Where home market prices are not available, the ITA may resort to constructed prices,[135] which require inclusion of overhead and profit factors.[136]

On the other hand, numerous arguments may be made in defense of the antidumping laws. For example, the laws are necessary when foreign producers subsidize low prices abroad through high prices at home.[137] Another argument is that since the statute requires that the petition for relief be filed "on behalf of" a domestic industry,[138] the

---

128. *See* Finger, *Lessons*, *supra* note 124, at 55.

129. *See* Bark, *supra* note 74, at 126-27; Olechowski, *supra* note 126, at 169.

130. *See* Braga & Silber, *supra* note 68, at 94-95.

131. *See* Mendez, *supra* note 87, at 119 (discussing peak load pricing).

132. *See* Horlick, *supra* note 63, at 146. The URAA amendments require the ITA to compare weighted averages as a general rule. *See* Michael Y. Chung, *U.S. Antidumping Laws: A Look at the New Legislation*, 20 N.C. J. INT'L LAW. & COM. REG. 495, 502-03 (1995). However, below cost sales in the home market are still excludable from the calculation of home market prices. *See id.*

133. *See* Horlick, *supra* note 63, at 146.

134. *See id*.

135. Cases applying constructed prices have become a sizable proportion of antidumping investigations. *See* WHO'S BASHING WHOM?, *supra* note 9, at 268 n.15.

136. *See* 19 U.S.C. § 1677b(e)(1) (1994). Prior to the URAA amendments, the statute provided for *minimum* overhead and profit factors in the calculation of constructed prices, whether or not such factors bore a reasonable relationship to actual business practice. *See* Chung, *supra* note 132, at 502 n.47 and accompanying text.

137. *Cf.* Bark, *supra* note 74, at 124 (discussing the Korean consumer electronics industry).

138. *See* 19 U.S.C. § 1673a(b)(1) (1994). *See also* 19 U.S.C. §§ 1671a(c)(4)(D) & 1673a(c)(4)(D). Both sections noted here state that the petition must have the "support of domestic

antidumping laws cannot be used to further a purely private grievance. Even if the petitioner is the sole or one of the few remaining domestic producers, it still must be demonstrated that its injury is due to unfair trade practices and not its own mistaken business decisions.[139] In fact, the key factor in antidumping cases is the finding of injury; when a petition for relief is rejected, it is nearly always because of a negative injury determination.[140]

Although the antidumping laws do not expressly require consideration of the public interest, the administration of the law may accommodate concerns beyond that of the affected industry. The application of the rules is moderated by compromise in fact. For example, in situations where U.S. companies which use the imported inputs would be adversely affected by imposition of antidumping duties, a practical solution is to find dumping but impose low duties on the dumped goods.[141]

Another argument in favor of the U.S. antidumping laws is that they are necessary in today's world economy. The negotiation of suspension agreements and voluntary restraint agreements have been necessary in a world trading system which does not yet operate according to perfect free market principles.[142] Such agreements provide a vehicle for U.S. response to non-market economies and state capitalism.[143] Under these circumstances antidumping measures should not be viewed as the illegitimate exercise of state power on behalf of private parties because they promote a free market without government restraint. Furthermore, since U.S. trade law is frequently amended, the various

---

producers or workers accounting for more than 50 percent of the total production of the domestic like product." *Id.*

139. *See* Pub. 2900, *supra* note 95, 2-1 to 2-7.

140. *See* Finger & Murray, *supra* note 64, at 241.

141. *See, e.g.*, Finger, *Reform*, *supra* note 88, at 68-69 (discussing imports of Japanese flat-panel displays for portable computers).

142. *See, e.g.*, *id.* at 229. An exporter can avoid antidumping duties by agreeing to voluntarily raise prices. *See id.*

143. *Cf.* Bark, *supra* note 74, at 121-23 (discussing the Korean government's support of the Korean consumer electronics industry); Fors, *supra* note 75, at 151 ("State intervention has been the norm in the European steel industry for generations."); Olechowski, *supra* note 126, at 174 ("In a socialist economy the planning process, not the interaction of market forces, determines what will be done and who will do it."). In the future, voluntary export restraints and orderly marketing arrangements will be impermissible. *See* Uruguay Round Final Act, Agreement on Safeguards, art. 11, para. 1(b) (1994), *in* International Trade Law: Document Supplement 314, 320-21 (Raj Bhala ed., 1996).

interest groups, including consumer protection groups, have ample opportunity to make their views known in the legislative process.[144]

Though not a defense of the antidumping laws themselves, the laws are generally administered in a way which is fair, impartial, and transparent in comparison to the way other countries administer similar laws.[145] If antidumping laws worldwide have protectionist outcomes despite differences in procedure, U.S. law can at least be defended as superior on due process grounds.[146] This is so because U.S. law diffuses the decision-making process over two administrative agencies which are independent of each other: the ITA makes the dumping determination, and the ITC makes the injury determination.[147] The ITC has demonstrated pragmatism and flexibility in dealing with nationality questions, emphasizing the production process rather than the nationality of the producer.[148] United States law limits the discretion of these administrative agencies much more than either their European or Canadian counterparts.[149] Moreover, U.S. law on price determinations and findings of injury is more detailed;[150] the administrative process is more verifiable;[151] and there are liberal opportunities for judicial review.[152] In fact, ITA and ITC determinations are not infrequently reversed and remanded by the courts.[153] There is every indication that the courts function as a protective mechanism against arbitrary agency decision-making.

## VIII. STANDING ISSUES UNDER THE UNITED STATES ANTIDUMPING LAWS

Under current law an antidumping investigation is typically commenced when an "interested party" files a petition "on behalf of an

144. ABA-ILP session, *supra* note 27 (comments on pervasive Congressional concern with effect on consumers).

145. *See* Eymann & Schuknecht, *supra* note 125, at 230 (comparing administration of antidumping laws in the United States to that within the European Community).

146. *See id.*

147. *See* 19 U.S.C. § 1673 (1994).

148. *See* Applebaum & Gaston, *supra* note 17, § 13.03, at 13-13 to 13-14, § 13.04, at 13-19 to 13-20.

149. *See* Eymann & Schuknecht, *supra* note 125, at 228-31; *cf.* Dutz, *supra* note 125, at 205, 209 (discussing enforcement of Canadian trade remedy laws).

150. *See* Eymann & Schuknecht, *supra* note 125, at 230.

151. *See id.*

152. *See id.*

153. A case on point is the decision of the CIT in the Smith Corona/Brother Industries litigation, discussed *infra* Part IX.

industry."[154] For purposes of initiating an investigation, an "interested party" is one or more of the following: (1) a manufacturer, producer, or wholesaler in the United States of a domestic like product (hereinafter referred to as an affected industry);[155] (2) a certified or recognized union or group of workers representative of an affected industry; (3) a trade or business association, a majority of whose members are part of the affected industry; (4) an association, a majority of whose members are interested parties; (5) a government of a country in which the goods under investigation are produced or manufactured; and (6) a foreign manufacturer, producer, or exporter, a U.S. importer, or a trade association of importers of the subject merchandise.[156] In the usual case, an investigation is initiated by a producer or trade association of producers of a like product. The ITA has the authority to initiate an antidumping investigation on its own motion (self-initiation), but because of the agency's limited resources and foreign policy complications, such authority is rarely used.[157]

Since the antidumping laws are geared to the protection of an "industry" and are not the vehicle for protesting individual grievances, the petition, inter alia, must identify the industry on whose behalf the petition is filed, including the identity of other enterprises in the industry.[158] Before the URAA amendments, the ITA would assume that a facially sufficient petition was filed on behalf of an industry unless the respondent disputed the standing of the petitioner.[159] The burden of proving that the petitioner did not have standing was on the respondent.[160] If the petitioner accounted for more than half of domestic production of the product under investigation, there was no question that it had standing.[161] However, the petitioner did not have to demonstrate that it had the support of a majority of the domestic industry.[162] The petitioner could be

---

154. *See* 19 U.S.C. § 1671a(b)(1) (1994).

155. Domestic like product is defined as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an [antidumping] investigation. . . ." 19 U.S.C. § 1677(10) (1994).

156. *See* § 1677(9). In addition, if the affected industry produces a processed agricultural product (i.e. orange juice), a coalition or trade association of processors, processors and producers, or processors and growers, qualifies as an interested party. *See* § 1677(9)(G).

157. *See* Kassinger, *supra* note 80, at 11.

158. *See id.* at 14.

159. *See id* at 12.

160. *See id.*

161. *See id.*

162. *See id.* (quoting *In re* Frozen Orange Juice from Brazil, 52 Fed. Reg. 8324 (March 17, 1987)). "There is nothing in the statute, its legislative history, or our regulations which requires the

deemed representative of the industry even though less than half of the industry affirmatively supported the petition.[163] The ITA could, but was not required to, dismiss the petition even if a majority of U.S. producers opposed the petition.[164] Thus, it was sufficient for standing purposes that the petitioner represented a "major proportion" of the industry, but a "major proportion" did not need to be a "majority."[165]

Although the ITC with its factual investigation of injury is perhaps better situated than the ITA to determine whether the petitioner is representative of an industry,[166] the ITC has consistently deferred to the judgment of the ITA on standing issues.[167] The ITC shares information on industry support or opposition to the petition with the ITA, but the ITA is in no way bound by ITC views on standing issues.[168] In the past, "[the ITA] has gone to great pains to try to define the industry in such a way so as to be able to find support for the petition from more than a mathematical majority."[169]

Nonetheless, U.S. implementation of its antidumping laws with respect to standing was attacked as inconsistent with U.S. obligations under the GATT Antidumping Code (GATT Code).[170] In a 1988 challenge brought by Sweden against the United States relating to the imposition of antidumping duties on stainless steel products, U.S.

---

petitioners establish affirmatively that they have the support of the majority of producers in the industry." *Id.*

163. *See id.*

164. *See* NTN Bearing Corp. of America v. United States, 757 F. Supp. 1425, 1429 (Ct. Int'l Trade 1991). The ITA has the authority to disregard the position of domestic producers who oppose the petition if they are "related" to (i.e. controlled by) foreign producers. *See* 19 U.S.C. § 1673a(c)(4)(B) (1994).

165. *See NTN Bearing Corp. of America*, 757 F. Supp. at 1429-30; 19 U.S.C. § 1677(4)(A) (1994).

166. *See generally* Edwin J. Madaj & Charles H. Nalls, *Bifurcation Without Dedication: The United States International Trade Commission and the Question of Petitioner Standing in Antidumping and Countervailing Duty Cases*, 22 LAW & POL'Y INT'L BUS. 673 (1991).

167. *See* Horlick, *supra* note 63, at 153; *see, e.g.*, Suramericana de Aleaciones Laminadas v. United States, 746 F. Supp. 139 (Ct. Int'l Trade 1990).

168. *See NTN Bearing Corp. of America*, 757 F. Supp. at 1430.

169. Horlick, *supra* note 63, at 155.

170. *See* GATT COMMITTEE ON ANTIDUMPING PRACTICES, REPORT OF THE PANEL, U.S.-IMPOSITION OF ANTIDUMPING DUTIES ON IMPORTS OF SEAMLESS STAINLESS STEEL HOLLOW PRODUCTS FROM SWEDEN, ADP/47, Aug. 20, 1990, at 13 [hereinafter GATT PANEL REPORT]. This was only the third occasion since the establishment of GATT in 1947 that an antidumping determination had been appealed to a GATT panel. *See* Fors, *supra* note 75, at 157. For general discussion of dispute resolution under the GATT and its side agreements, including the Antidumping Code, see JOHN H. JACKSON, THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS (1989), especially chapter four.

standing requirements were criticized as lax and permissive.[171] First, Sweden maintained that the opening of the investigation was inconsistent with Article 5.1 of the GATT Code because the ITA had not verified whether the petition had been filed on behalf of the domestic industry.[172] Sweden argued that it was insufficient for the ITA to simply rely on the representations made in the petition and to assume proper standing unless the respondent demonstrated the contrary.[173] Sweden further contended that the laxness of U.S. standing requirements enabled U.S. companies to bring frivolous complaints and to thereby harass their foreign competitors, in itself an unjustified impediment to trade.[174] Finally, Sweden argued that the 1979 U.S. amendments implementing the GATT Code expanded the concept of standing far beyond what the GATT Code allowed; standing should be limited to domestic producers, or associations of domestic producers of like products.[175]

In response, the United States contended "that the initiation of the investigation by the [ITA] was fully consistent with Article 5.1, in that the petition on its face supported initiation of an investigation."[176] The United States also argued that the ITA had been reasonable in the manner in which it analyzed the information in the petition.[177] Furthermore, the United States claimed that the facts obtained by the ITA and ITC fully supported the ITA's conclusion in favor of initiation of the investigation.[178]

On the question of whether U.S. law was too generous in allowing standing to petitioners other than domestic producers, the United States referred to the drafting history of the GATT Code.[179] The draftsmen had been concerned with discouraging two practices: first, the filing of a complaint by any individual or company which considered itself to be injured, and second, self-initiation by the investigating

171. *See* GATT PANEL REPORT, *supra* note 170, at 13.

172. *See id.* at 12. Article 5.1 of the GATT Code reads: "[A]n investigation to determine the existence, degree and effect of any alleged dumping shall be initiated upon a written application by or on behalf of the domestic industry." Agreement on Implementation of Article VI of the General Agreements on Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 4919, T.I.A.S. No. 9650, 18 I.L.M. 621 (entered into force Jan. 1, 1980).

173. *See* GATT PANEL REPORT, *supra* note 170, at 12.

174. *See id*. at 25-26.

175. *See id*. at 52.

176. *Id*. at 15-16.

177. *See id.* at 19-20.

178. *See id*. at 15-16.

179. *See id.* at 23.

authorities.[180] Prior to the 1979 amendments to the antidumping laws, the statute had permitted "any person" to file a petition.[181] Therefore, by specifying in detail which interested parties had standing, post-1979 U.S. law actually discouraged frivolous petitions.

The panel agreed with Sweden's argument that the ITA had not taken sufficient procedural steps to ensure that the petitioners in this case had indeed filed on behalf of a domestic industry.[182] The panel did not go so far as to declare domestic law as inconsistent with U.S. international obligations, but rather based its conclusion on improper implementation by the investigating authorities.[183] Accordingly, the panel recommended that the antidumping order against Swedish stainless steel products be revoked.[184] Ultimately, the panel report was not adopted by the GATT Antidumping Committee because the United States blocked the report from the Committee's agenda.[185]

However, the panel's conclusion was reflected in the Antidumping Agreement included in the Uruguay Round Final Act[186] and in the URAA amendments to the U.S. antidumping laws.[187] As of January 1, 1995, the ITA can no longer assume that the petition is filed on behalf of the industry.[188] The ITA must affirmatively establish that (1) the domestic producers or workers who support the petition account for at least 25 percent of the total domestic production and (2) domestic producers who support the petition account for more than 50 percent of

---

180. *See id.*

181. *See* S. REP. NO. 95-797, at 89, *reprinted in* 1979 U.S.C.A.A.N. 381, 475.

182. *See* GATT PANEL REPORT, *supra* note 170, at 80.

183. *See id*. at 74, 77.

184. *See id.* at 213-14.

185. *See* Fors, *supra* note 75, at 157.

186. *See* Final Act, Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade, art. 5.4, 33 I.L.M. 15, 17 (1994). For debate on the standing issue during the Uruguay Round, see NEGOTIATING HISTORY, *supra* note 19, at 1575-88. At the Uruguay Round, discussion centered on three significant points: "(1) How should the term 'major proportion' be defined? (2) What types of entities should be considered 'interested parties' for purposes of qualifying as part of the 'domestic industry'? (3) What obligation does the administering agency have to verify the information asserted by the petitioner regarding standing prior to initiating an investigation?" *Id*. at 1579. Exporter countries, such as Hong Kong, Japan, and the Nordic countries, sought tighter standards, while user countries, such as the European Union and the United States, favored more generous standing rules. *See id.* at 1581. In the end, the exporter countries succeeded with respect to the third point, but the user countries prevailed with respect to the other two. *See id.* at 1581-88.

187. *See* 19 U.S.C. § 1673a(c)(4) (1994).

188. *See id.*

domestic production produced by that portion of the industry expressing support for or opposition to the petition.[189]

Since the effective date of the URAA, there have been few cases where there was any question about the petitioner's standing and even in those cases, the petitioner was found to have standing.[190] Read literally, the statute still appears to permit an investigation so long as the petitioner represents a "major proportion" of the industry, though not necessarily a "majority" of the industry. For example, if the petitioner accounts for a quarter of domestic production and other domestic producers do not oppose the petition, the investigation would proceed.

## IX. THE SMITH CORONA/BROTHER INDUSTRIES CASE AND STANDING ISSUES UNDER THE UNITED STATES ANTIDUMPING LAWS

For nearly twenty years, from 1975 to May, 1994, Smith Corona, originally a U.S.-owned company,[191] was embroiled in antidumping litigation against BIUSA, the wholly owned subsidiary of a Japanese company, over the importation of portable electric typewriters.[192] In the early phase of the proceedings, Smith Corona, then the only manufacturer of the product in the United States, succeeded in having antidumping duties imposed on typewriters imported by BIUSA from Japan.[193] In the summer of 1992, Smith Corona, with a British corporation holding

189. *See id*.

190. *See* Initiation of Antidumping Duty Investigations: Polyvinyl Alcohol From Japan, the Republic of Korea, the People's Republic of China, and Taiwan, 60 Fed. Reg. 17053 (Apr. 4, 1995); Initiation of Antidumping Duty Investigations: Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Germany and Japan, 60 Fed. Reg. 38546 (July 27, 1995).

191. Smith Corona was acquired by Hanson P.L.C., a British conglomerate in 1986. *See* Barnaby J. Feder, *Hanson Coup: Smith Corona Offer*, N.Y. TIMES, June 6, 1989, at D1. In 1989 Hanson took Smith Corona public, leaving Hanson with ownership of slightly less than fifty percent of the stock. *See id*.

192. The history of the litigation from 1975 to September 1993 is summarized in Portable Electric Typewriters from Singapore, USITC Pub. 2681, Inv. No. 731-TA-515 (final), at I-17 to I-18 (Sept. 1993) [hereinafter Pub. 2681]. The proceedings began with the filing of an antidumping petition by Smith Corona regarding imports of portable electric typewriters from Japan in February 1974. *See* Certain Personal Word Processors from Japan, USITC Pub. 2411, Inv. No. 731-TA-483 (final), at A-2 (Aug. 1991) [hereinafter Pub. 2411]. The proceedings were finally terminated in May 1994. *See* Portable Electric Typewriters From Singapore: Termination of Suspended Antidumping Regulations, 59 Fed. Reg. 22592 (May 2, 1994) (termination of antidumping duty investigation); Portable Electric Typewriters From Japan: Final Result of Changed Circumstances Duty Administrative Revocation of Order, 59 Fed. Reg. 22584 (May 2, 1994) (revocation of antidumping duty order); Personal Word Processors From Japan; Final Results of Changed Circumstances Antidumping Duty Administrative Review; Revocation of Order; Termination of Anticircumvention Inquiry, 59 Fed. Reg. 22583 (May 2, 1994).

193. *See* Pub. 2411, *supra* note 192, at A-1 to A-3.

almost half its stock, decided to move its remaining manufacturing facilities in the United States to Mexico.[194] In the final phase of the proceedings, BIUSA, which now is one of only two portable electric typewriter producers with production facilities in the United States, succeeded in having antidumping duties imposed on Smith Corona imports from Singapore.[195] In July 1995 Smith Corona, founded in 1926 in a merger of two even older U.S. companies, filed for reorganization under Chapter 11 of the bankruptcy code.[196]

This case raises in acute fashion the problem of defining domestic industry and the origin of products under circumstances of globalized production.[197] It also raises the troubling question of whether antidumping proceedings are an effective use of administrative resources. In the final analysis, after nearly two decades of litigation, there is still only a single major producer in the United States of portable electric typewriters,[198] although the United States remains the largest national market for typewriters.[199] This case further raises the question of whether the antidumping laws are being used by the U.S. government for an improper purpose, as an indirect way of compelling foreign investment in the United States.[200] Such induced investment appears particularly

---

194. *See* Bradsher, *supra* note 18, at D11; *Adios! Smith Corona is Leaving Central New York*, SYRACUSE HERALD-AMERICAN, July 26, 1992, at B1.

195. *See* Pub. 2411, *supra* note 192, at A-2 to A-3.

196. *See* Bob Niedt, *Typewriter's History is Keyed into Central New York*, SYRACUSE HERALD-JOURNAL, July 6, 1995, at A9.

197. *See* Pub. 2681, *supra* note 192, at 41 (dissenting views of Chairman Newquist).

> As a preliminary matter, I am compelled to comment on the obvious irony in this investigation: that the petitioner is a Japanese-owned subsidiary located in the U.S., and the respondent, a long-established U.S. company with a subsidiary located in Singapore. Some suggest that the relief granted in this investigation represents, somehow, a manipulation of our trade laws—in effect, that a foreign-owned company should not have access to U.S. trade law to the detriment of a U.S. company. I cannot say that I disagree with this suggestion. However, the Commission is not a law- or policy-making body; by law, we administer the trade statutes as enacted by Congress and signed by the President. Therefore, I am required to conduct an analysis of the facts and data presented in the investigation *which conforms with the statute as written.*

*Id.* (emphasis added).

198. In this context, criticism of the antidumping laws may be partially valid, in that they help to perpetuate industries which are obsolete and unable to adapt to changing market conditions. Smith Corona ultimately could not compete in a market increasingly dominated by personal computers. *See New Leadership at Smith Corona*, N.Y. TIMES, July 5, 1995, at D6.

199. *See* Pub. 2411, *supra* note 192, at A-18.

200. *See* discussion *supra* note 75 and accompanying text. BIUSA only began to move production onshore in 1987, approximately a decade after the litigation was commenced. *See* Pub. 2681, *supra* note 192, at I-17 to I-18. Unlike many countries, particularly developing countries, the United States does not have investment laws which expressly require direct investment as a

discriminatory against foreign-owned companies in view of the fact that U.S.-owned companies are not proscribed by law from relocating their production facilities abroad and reimporting finished products to the United States.[201] With respect to possible bias, the case is also significant in that it involved a Japanese-owned company. Japan is the country which has been most often subject to antidumping petitions, and (with China) historically the country most likely to have cases ruled against them.[202]

However, at the same time, the case illustrates that the antidumping laws are nondiscriminatory because they apply equally to U.S.-owned companies which import products at dumped prices.[203] The proceedings in this case show that administering agencies are aware of possible bias, and with some help from judicial oversight, will generate a decision based on objective criteria applied in a neutral fashion.[204]

Since the proceedings lasted through the evolution of equipment for composition, correction, and printing of text from manual typewriters to word processors equipped with software, the administering agencies were continually challenged to adapt legal concepts such as "like product" and "domestic industry" to evolving technology. [205] The concept of "domestic industry" was expanded to accommodate the reality of increasing foreign direct investment in U.S. production facilities. During the course of the litigation, a British company acquired a controlling interest in Smith Corona,[206] and Brother Industries, Ltd. of Japan established BIUSA, a wholly owned U.S. subsidiary, to operate its manufacturing operations in Tennessee.[207] "Domestic industry" could no longer be defined, exclusively or even predominantly, by the nationality of the corporation (as both Smith Corona and BIUSA were U.S.

---

condition for access to the local market. The United States is reluctant to impose such controls because it is trying to achieve elimination of barriers to foreign direct investment by U.S. firms operating overseas. *See supra* note 27 and accompanying text.

201. Throughout the period of trade litigation, Smith Corona was moving manufacturing operations offshore. *See* Pub. 2681, *supra* note 192, at I-36. The shift of remaining manufacturing operations in 1992 was only the final stage of a process that began in 1974. *See id.*

202. *See* Pub. 2900, *supra* note 95, at 3-3, 3-5, 3-6.

203. *See* Portable Electric Typewriters From Japan (Brother Industries, Ltd. and Brother Industries (USA), Inc.): Negative Preliminary Determination of Circumvention of Antidumping Duty Order, 56 Fed. Reg. 46594, at 46596 (Sept. 13, 1991) [hereinafter Negative Preliminary Determination 46594].

204. *See* Pub. 2681, *supra* note 192, at 41 (dissenting views of Chairman Newquist).

205. *See* Pub. 2411, *supra* note 192, at A-2 to A-3.

206. *See* Feder, *supra* note 191, at D1.

207. *See* Brother Industries (USA), Inc. v. United States, 801 F. Supp. 751, 754 (Ct. Int'l Trade 1992).

corporations), the location of corporate headquarters,[208] or even reference to ultimate beneficial ownership (since both Smith Corona and BIUSA were controlled by foreign companies).[209]

When BIUSA filed an antidumping petition against Smith Corona in 1991, Smith Corona challenged the petition, arguing that BIUSA did not have standing to file a petition: it was not an "interested party" that had filed "on behalf of a domestic industry."[210] The gist of Smith Corona's argument was that BIUSA was merely an "assembler" or screwdriver operation, and not a manufacturer or producer.[211]

Only after considerable internal debate over the issue did the ITA agree with Smith Corona that BIUSA was not an "interested party" and terminate the investigation.[212] The participants in the intra-agency debate did not disagree as to the standard to be applied, the so-called "six factor" test;[213] rather, they disagreed on the application of the standard to the facts of the case. The Assistant Secretary for Import Administration stated his conclusion as follows:

---

208. See discussion of Chairman Newquist's views, *supra* note 204 and accompanying text.

209. *See* Bradsher, *supra* note 18, at D11.

210. *See* discussion *supra* Part VIII. Both prongs of the test had to be met in order for the proceedings to continue. *See* 19 U.S.C. § 1671a(b)(1) (1994). Under the law in effect at that time, the ITA would examine the question of petitioner's standing only if respondent raised the issue; otherwise, petitioner's standing was assumed. *See* Kassinger, *supra* note 80, at 12. Since the most recent amendments to the antidumping laws, the ITA must establish that the petitioner has standing as a threshold matter. *See* 19 U.S.C. § 1673(a)(c)(4) (1994).

211. *See* Pub. 2411, *supra* note 192, at A-3. Smith Corona used the same argument, without success, in a contemporaneous proceeding against BIUSA, arguing that BIUSA was circumventing an antidumping duty order in violation of 19 U.S.C. § 1677j (1994). *See* Negative Preliminary Determination 46594, *supra* note 203; Negative Final Determination of Circumvention of Antidumping Duty Order: Portable Electric Typewriters From Japan (Brother Industries, Ltd. and Brother Industries (USA), Inc.), 56 Fed. Reg. 58031 (Nov. 15, 1991).

212. *See* Memorandum from Ross Cotjantle *et al*. to Francis J. Sailer, Deputy Assistant Secretary for Investigations, regarding Recommendation on Petitioner's Standing "On Behalf of" the Domestic Industry, (Sept. 24, 1991) (concluding that BIUSA had standing); Memorandum from Francis J. Sailer to Eric I. Garfinkel, Assistant Secretary for Import Administration, regarding Recommendation on Petitioner's Interested Party Standing, (Sept. 24, 1991) (recommending determination that BIUSA had standing) [hereinafter Sailer/Garfinkel Memo]; Memorandum from Eric Garfinkel to Frank Sailer regarding Portable Electric Typewriters from Singapore, (Sept. 25, 1991) (concluding that BIUSA did not have standing) [hereinafter Garfinkel/Sailer Memo]. Copies of these memoranda are on public file with the ITA under file A-559-806.

213. The standard to be applied includes the following six factors: (1) the extent and source of petitioner's capital investment; (2) the technical expertise involved in the production activity in the United States; (3) the value added to the product in the United States; (4) employment levels; (5) the quantity and types of parts sourced in the United States; and (6) any other costs and activities in the United States directly leading to production of the like product. No single factor is determinative, nor is the list of criteria exhaustive. *See* Sailer/Garfinkel Memo, *supra* note 212, and source cited therein.

> As a result of my analysis of all of the above factors, I do not find that the assembly of a foreign designed product, using few and relatively non-critical domestic parts, and adding only a proportion of total value that is not significant can reasonably be characterized as the manufacture or production of a product in the United States.[214]

On appeal to the CIT, BIUSA persuaded the court to reverse and remand the ITA's determination as unsupported by substantial evidence on the record and an arbitrary departure from established practice.[215] BIUSA brought the fact of the prior intra-agency debate to the court's attention.[216] The court faulted the ITA's determination, based on the Assistant Secretary's analysis, as overemphasizing the sixth factor: development, design, and engineering of the product outside the United States.[217] Like the European Court of Justice in an earlier case involving Brother typewriters, the CIT did not insist that a company engage in domestic research and development in order to qualify its manufacturing operations as domestic.[218] The Court seemed to appreciate that a contrary decision would fly in the face of the reality of international integrated production. At least, it was not mandated by the language of the statute itself, which speaks, in general terms, only of "manufacturers" and "producers."[219] Nor would it have been consistent with agency interpretation in other cases.

## X. CONCLUSION

The likelihood of future antidumping cases like Smith Corona/Brother Industries is not great. As a threshold matter, antidumping and countervailing duty cases involve a very small portion of the U.S. economy.[220] Major sectors like automobiles and steel have been covered by voluntary restraint agreements for more than a

---

214. *See* Garfinkel/Sailer Memo, *supra* note 212.

215. *See* Brother Industries (USA), Inc. v. United States, 801 F. Supp. 751, 758 (Ct. Int'l Trade 1992).

216. *See id*. at 757.

217. *See id*.

218. *See* Case 26/88, Brother International GmßH v. Hauptzollamt Gieben, 1989 E.C.R. 4253 (Dec. 13, 1989) *available in* LEXIS; EURCOM Library; ECLAW File; *Brother Industries*, 801 F. Supp. at 757.

219. *See Brother Industries*, 801 F. Supp. at 757 (citing 19 U.S.C. § 1677(a)(c) (1988)).

220. *See* Pub. 2900, *supra* note 95, at ix.

decade.[221] Furthermore, Smith Corona was highly unusual in that it moved all of its manufacturing operations offshore.[222] In addition, foreign companies with U.S. subsidiaries, whether European or Asian MNCs, are more likely to use diplomatic channels to resolve a problem than an aggressive resort to litigation.[223]

However, even if another case with the peculiar facts of Smith Corona/Brother Industries is unlikely, there is no way of measuring the full impact of an unusual case on the development of the law, since so much dispute resolution occurs in the "shadow of the law."[224] The "shadow of the law" affects the planning of business behavior so as to avoid any kind of dispute in the first place.

Although at one level of analysis, the issue of standing under the U.S. antidumping laws is a technical and arcane subject, it is emblematic of ideological tensions in our entire legal system. The American legal system is still heavily influenced by a laissez-faire philosophy, which has a deeply ingrained hostility towards government regulation. A significant proportion of the electorate still refuses to accept that the country has become an "administrative state" and that government is the proper instrument for achieving social welfare or national economic objectives.[225] In the recent standoff between Congress and the executive branch over the federal budget, conservative politicians were simply appealing to, though certainly reinforcing, a stubbornly held popular belief.[226]

Among the major economic powers, the United States is virtually alone in clinging to the notion of minimalist government.[227] The fact that trade policy is driven by concerns for job creation or job maintenance frequently goes unacknowledged in the United States.

As a consequence, the antidumping laws and the administering agencies bear a heavy burden, having to respond simultaneously to

---

221. *See id.* ch. 3.

222. *See supra* note 201 and accompanying text.

223. *See* Ronald A. Brand, *GATT and the Evolution of United States Trade Law*, 18 BROOKLYN J. INT'L L. 101, 124-25 (1992).

224. *See* Kenneth W. Abbott, *GATT As A Public Institution: The Uruguay Round and Beyond*, 18 BROOKLYN J. INT'L L. 31, 47 (1992).

225. *See generally* Rubin, *supra* note 21.

226. *See, e.g.*, James Fallows, *Farewell to Laissez-Faire! Clinton Pulls a Reagan on Free-Market Republicans*, WASH. POST, Feb. 28, 1993, at C1.

227. *See* David J. Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe*, 42 AM. J. COMP. L. 24, 81 & n.204 (1994); *cf.* David J. Gerber, *The Transformation of European Community Competition Law?*, 35 HARV. INT'L .J. 97, 132 (1994).

changes in the business scene, evolution in the international trading regime, and domestic political pressure. The antidumping laws have had to pick up the slack left by indifferent enforcement of the antitrust laws[228] and federal labor laws.[229] While it may be argued that the antidumping laws should not become indirectly responsible for subjects of regulation entrusted to other areas of law, they have been made responsible nonetheless. The Smith Corona/Brother Industries case indicates that both the ITA and ITC are seriously concerned with the maintenance of production facilities and employment in the United States.[230] The lesson of this case is clear: any "American" company which moves all of its production facilities offshore does not enjoy immunity from the antidumping laws for goods imported into the United States.[231]

The decision of the CIT is an illustration of the mediating role, and moderating influence, which courts often play in situations where both the legislative and executive branches are driven by nationalist and protectionist pressures. Congressmen and presidents have to worry about re-election; executive appointees to government agencies serve at the pleasure of the President.[232] Equal treatment of parties similarly situated is a classic judicial concern. While U.S. affiliates of foreign companies have to take the burdens with the benefits of foreign investment in the United States, they should not be held to a different and higher standard than U.S.-based companies.[233]

---

228. *See* discussion *supra* notes 78-79 and accompanying text.

229. *See* Hilary K. Josephs, *Labor Law in a "Socialist Market Economy": The Case of China*, 33 COLUM. J. TRANSNAT'L L. 559, 577-78 (1995).

230. *See* discussion *supra* Part IX; Pub. 2411, *supra* note 192, at A-1 to A-3.

231. *See* Brother Industries (USA), Inc. v. United States, 801 F. Supp. 751, 759 (Ct. Int'l Trade 1992).

232. *See, e.g.*, David E. Sanger, *Suddenly, as the Election Nears, Ship Subsidies Don't Seem So Bad*, N.Y. Times, Oct 3, 1996, at A1.

233. *See, e.g.*, Barclays Bank v. Franchise Tax Bd., 512 U.S. 298, 303 (1994) (state unitary tax upheld as constitutional whether applied to domestic or foreign based MNCs).