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NON-PRICE PREDATION AND THE IMPROPER USE OF U.S. UNFAIR TRADE LAWS

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I. INTRODUCTION

The conflicting goals of the antitrust laws and of the trade laws, a pro-competitive policy for the former, and the protection of domestic industry for the latter, produce an inevitable tension. This article examines the interplay between the two sets of statutes and the means by which the courts and the executive branch manage that tension. It will also show how U.S. firms that misuse the U.S. unfair trade statutes run the risk of engaging in non-price predation[1] which may result in liability under U.S. antitrust laws. Finally, the article will deal with antitrust ramifications posed by an increasingly popular method of "settling" unfair trade practice proceedings—the voluntary restraint agreement.

U.S. trade laws[2] enable parties who are being injured by imports which are being dumped or subsidized to obtain relief from foreign competition. Under U.S. antidumping law, an antidumping duty can be imposed to offset the amount by which a foreign company's sales to the United States undersell its sales of the same or similar merchandise in

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[1] Non-price predation encompasses all activities aimed at raising competitors' costs. Some commentators have maintained that abuses in the invocation of U.S. trade laws is a form of non-price predation. *See* Calvani & Tritell, *Invocation of United States Import Relief Laws as an Antitrust Violation*, 31 ANTITRUST BULL. 527 (1986).

[2] U.S. laws providing for the imposition of import relief are of two general types. Unfair trade practice remedies deal with foreign practices such as dumping or subsidization which are defined as unfair under international agreements, or those which are deemed unfair under U.S. law. *See, e.g.*, 19 U.S.C. §§ 1337, 2411, *et seq*. Other statutes provide for import relief even where the imports in question are not being unfairly traded, *see, e.g.*, 19 U.S.C. §§ 2251 *et seq*. This article will be limited to an examination of the interplay between U.S. antitrust laws and two specific unfair trade practice statutes, the antidumping and the countervailing duty laws, as well as voluntary restraint agreements. For a summary of U.S. import relief statutes, *see* USITC Pub. No. 1972 (April 1987).

its home, or other appropriate comparison market.[3] Under U.S. countervailing duty law, a countervailing duty can be imposed to offset the amount of any foreign government subsidies granted on the manufacture, production, or exportation of merchandise.[4] Findings of dumping and subsidization are made by the U.S. Department of Commerce.[5]

In all antidumping cases, and in most countervailing duty cases,[6] before the added duties can be imposed, the U.S. industry must be found to be materially injured, or threatened with material injury, or the establishment of a U.S. industry must be materially retarded by reason of the imports.[7] Injury determinations are made by the U.S. International Trade Commission (ITC).[8]

The remedies provided by U.S. unfair trade statutes result in a lessening of competition in the U.S. market as imports become more costly once the remedies are imposed. This result is in direct conflict with the objectives of U.S. antitrust laws which seek to stimulate competition and thereby provide U.S. consumers with the greatest variety of goods at the lowest prices possible.[9]

The prohibitions of the antitrust laws are broad and far reaching. Under Section 1 of the Sherman Act, contracts, combinations, or conspiracies in restraint of trade are deemed illegal.[10] Some practices prohibited by Section 1 include price fixing,[11] concerted refusals to deal,[12] and tying arrangements.[13] Section 2 of the Sherman Act[14] proscribes monopolization and attempts to accomplish the same.[15] Section 5 of the Federal Trade Commission Act[16] renders illegal "unfair methods of competition." Section 5 reaches not only conduct proscribed by other antitrust statutes,[17] but also conduct that is inimical to the spirit of the antitrust laws and conduct that threatens to ripen into an antitrust violation.[18]

II. THE *NOERR-PENNINGTON* GUIDELINES

It is black letter law that despite the prohibitions of the antitrust laws, U.S. firms may band together to petition the government to act, even if the result of such action would be anticompetitive and even if the intent of those seeking the governmental action is to eliminate competition. This principle derives from a trilogy of U.S. Supreme Court cases which established the parameters of the so-called *Noerr-Pennington* doctrine.

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,[19] a group of trucking companies and their trade association sued a group of railroads and an association of their executives alleging a violation of Sections 1 and 2 of the Sherman Act on grounds that the railroads sought to influence the state legislature and the governor to adopt and retain laws that would injure the state trucking business. The Court held that no liability was incurred by the railroad interests since concerted efforts to obtain government action did not constitute a violation of the Sherman Act.[20]

> [T]he Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take a particular action with respect to a law that would produce a restraint or a monopoly. . . . It is neither unusual nor illegal

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[3] 19 U.S.C. § 1673. If a foreign company's sales in its home market are insufficient for purposes of comparison with U.S. sales (less than 5% of non-U.S. sales), the Commerce Department will make its calculations based either on sales to a third country market, or on the constructed value of the merchandise. 19 C.F.R. § 353.3–.6. Futhermore, where a substantial amount of home market sales are made at prices representing less than the cost of production (generally 90% or more), the Commerce Department will turn to constructed value as the basis for its calculations. 19 C.F.R. § 353.7 (1987).

[4] 19 U.S.C. § 1671(a).

[5] 19 U.S.C. §§ 1671b(b), 1671d(a), 1673b(b), and 1673d(a).

[6] Injury determinations in countervailing duty cases are required only when the imports are duty free, 19 U.S.C. § 1303(a)(2), or when the exporting country is considered to be a "country under the Agreement," 19 U.S.C. § 1671(b). In most cases, a "country under the Agreement" is one which has either signed or adopted the provisions of the international Subsidies Code.

[7] 19 U.S.C. §§ 1671(a)(1), 1673(2).

[8] *Id.*

[9] *See generally* 1 P. AREEDA & D. TURNER, ANTITRUST LAW ¶¶ 103–113, at 7–33 (1978), on the objectives of the antitrust laws.

[10] 15 U.S.C. § 1. For activities to constitute a Section 1 violation, the following elements must be present: (1) the activities must be in or affect interstate or foreign commerce; (2) the actitivites must be performed by two or more persons; (3) the activities must be the result of concerted action; (4) the concerted action must constitute a restraint on trade or commerce; and (5) the restraint must be unreasonable. A Section 1 violation, however, can take place even if the sought after restraint on trade is not ultimately achieved. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); 2 E. KINTNER, FEDERAL ANTITRUST LAW § 9.1 (1980).

[11] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

[12] Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 209 (1959).

[13] International Salt Co. v. United States, 332 U.S. 392 (1947).

[14] 15 U.S.C. § 2.

[15] United States v. American Airlines, Inc., 743 F.2d 1114 (5th Cir. 1984).

[16] 15 U.S.C. § 45.

[17] Federal Trade Comm'n v. Cement Institute, 333 U.S. 683 (1948); Fashion Originators' Guild v. Federal Trade Comm'n, 312 U.S. 457 (1941); *see generally* Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C.L. REV. 227, 239–41 (1980).

[18] *See* Calvani & Tritell, *supra* note 1.

[19] 365 U.S. 127 (1961).

[20] Joint efforts in restraint of trade undertaken prior to petitioning the government are not immunized from antitrust liability. Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983).

> for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors.[21]

The Court reiterated the *Noerr* principles in *United Mine Workers v.* Pennington.[22] There, several large coal companies and the United Mine Workers jointly lobbied the Secretary of Labor to raise the minimum wage payable by contractors selling coal to the Tennessee Valley Authority (TVA). They also asked the TVA to purchase coal only from producers covered by the higher minimum wage provision. These actions were designed to make it more difficult for smaller coal producers to compete. The Court held that this activity was protected by *Noerr*:

> *Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose. . . . Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.[23]

In *California Motor Transport Co. v. Trucking Unlimited*,[24] the Court extended the *Noerr-Pennington* doctrine to make it apply not only to attempts to influence legislative and executive branch bodies, but administrative agencies and the courts as well. There, a group of highway carriers sued a group of competing highway carriers alleging that defendants had violated the federal antitrust laws by filing baseless administrative and legal actions in an attempt to prevent plaintiffs from acquiring operating rights. The Court noted that "the right to petition extends to all departments of the Government"[25] and therefore concluded:

> [I]t would be destructive of rights of association and petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-à-vis their competitior.[26]

A. THE SHAM EXCEPTION

The first amendment right to petition the government formed a legal basis for the Court's decisions in *Noerr-Pennington* and *California Motor Transport*. This right to petition, however, the Court noted, is not absolute. When the exercise of such rights is "a mere sham to cover what is actually

[21] 365 U.S. at 136–39.

[22] 381 U.S. 657 (1965).

[23] *Id.* at 670.

[24] 404 U.S. 508 (1972).

[25] *Id.* at 510. Lower courts have extended *Noerr-Pennington* protection to threats to litigate. Coastal States Marketing, Inc. v. Hunt, 694 F.2d 1358 (5th Cir. 1983).

[26] 404 U.S. at 510–11.

nothing more than an attempt to interfere directly with the business relationships of a competitor,"[27] antitrust liability will accrue. In *California Motor Transport*, despite extending *Noerr-Pennington* to joint efforts to petition administrative agencies and the courts, the Court held that such immunity was forfeited because the petitioning was predicated on baseless claims.

> [A] pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused. But once it is drawn, the case is established that abuse of those processes produced an illegal result, *viz.*, effectively barring respondents from access to the agencies and courts. Insofar as the adminstrative or judicial processes are involved, actions of that kind cannot acquire immunity by seeking refuge under the umbrella of "political expression."[28]

While a party's intent is irrelevant if its actions stay within the scope of *Noerr-Pennington* immunity, intent is an important consideration for purposes of applying the sham exception. A sham proceeding and antitrust liability is likely to be found where the party proceeds with his action, not with the intent to influence governmental action or to succeed in the proceeding, but rather for the purpose of injuring his competition.[29]

B. THE SHAM EXCEPTION IN THE TRADE LAW CONTEXT

The implication of these principles for U.S. companies seeking relief under U.S. unfair trade statutes is clear.[30] While they can meet and consult together for purposes of petitioning for relief, their petitions[31]

[27] 365 U.S. at 144.

[28] 381 U.S. at 513–15.

[29] Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983).

[30] While the sham considerations discussed above apply with equal force to actions brought under any of the trade laws, this article will focus on their application in antidumping and countervailing duty cases only.

[31] While an antitrust violation is easier to establish in cases where there are repeated baseless filings, there is some authority to indicate that even the filing of a single baseless petition may subject the petitioners to antitrust liability under the sham exception. While "a pattern of repetitive, baseless claims is strong evidence of sham petitioning," multiple unsuccessful claims are not "essential to proof of sham." Feminist Women's Health Center v. Mohammad, 568 F.2d 530, 546 n.6 (5th Cir. 1978). Cases finding a single baseless complaint sufficient include: MCI Communications v. AT&T, 708 F.2d 1081 (7th Cir.), *cert. denied*, 104 S. Ct. 234 (1983); Grip-Pak, Inc. v. Illinois Tool Works, Inc., 694 F.2d 466 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 2430 (1983); Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, 674 F.2d 1252 (9th Cir. 1982), *cert. denied*, 459 U.S. 1227 (1983).
Courts requiring multiple baseless claims to support an allegation of sham include: Hospital Bldg. Co. v. Trustees of Rex Hospital, 691 F.2d 678 (4th Cir. 1982), *cert. denied*, 464 U.S. 490 (1983); Razorback Ready Mix Concrete Co. v. Weaver, 761 F.2d 484 (8th Cir. 1985) (but one suit is enough if conduct involves "serious misconduct").

must not present information which they know to be false and misleading,[32] or otherwise be without foundation.

The mere filing of an antidumping or countervailing duty petition can have a chilling effect on competition. In antidumping and countervailing duty proceedings, the U.S. Department of Commerce acts in an impartial investigatory role. It must decide within twenty days of the filing of an antidumping or countervailing duty petition containing information regarding foreign companies' sales, prices, marketing practices, and government subsidies, whether or not to initiate an investigation.[33] In practice, in only extremely rare circumstances will the Commerce Department decline to initiate an investigation.

A petition need only allege the elements necessary for imposition of antidumping or countervailing duties and contain such information as is reasonably available to the petitioner supporting the allegations.[34] The Commerce Department generally makes no independent investigation of the allegations in a petition before deciding whether or not to commence an investigation and cannot accept any submission from any third party before making such decision.[35] Therefore, to insure that unwarranted investigations are not commenced, it is essential that the information presented in a petition not be false and misleading and the petition itself not be without foundation.

This is particularly critical because of the profound impact that an investigation can have on a foreign producer's ability to compete. First, the initiation of an investigation leaves U.S. purchasers of the products implicated in the proceeding in great uncertainty. If the Commerce Department finds evidence of dumping or subsidization, liquidation of imports is suspended and importers are required to post security in the estimated amount of dumping or subsidization found. In such case, importers, who are the ones responsible for the payment of antidumping or countervailing duties, cannot be certain of their ultimate exposure for such duties until the proceeding is terminated or, more probably, until an administrative review is conducted. Such reviews generally do not take place until approximately two years from the date the petition is filed. U.S. buyers may therefore change their sources of supply from foreign to domestic.

[32] *See, e.g.*, Woods Exploration & Prod. Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir.), *cert. denied*, 404 U.S. 1047 (1971).

[33] 19 U.S.C. §§ 1671a(c), 1673a(c).

[34] 19 U.S.C. §§ 1671a(c)(1), 1673a(c)(1).

[35] United States v. Roses, Inc., 706 F.2d 1563 (Fed. Cir. 1983).

This uncertainty can extend not only to imports from the particular foreign country named in the petition, but to imports from third countries as well, whose producers begin to fear that petitions will also be filed against them. Such fear can discourage them from aggressively marketing their goods in the United States.

Second, the initiation of an investigation can also result in foreign producers incurring hundreds of thousands of dollars in out-of-pocket costs and substantial diversion of executive time which could be used for procompetitive purposes, such as marketing and product development, as they attempt to defend themselves in the proceedings. This can have a significant impact on the ability of a foreign producer to compete vigorously in the U.S. market.

In antidumping proceedings, producers are presented with lengthy questionnaires seeking information about their selling practices in their home and U.S. markets and, in many cases, their costs of production as well. Answers must be provided in writing and on computer tape. In countervailing duty proceedings, foreign governments and producers receive questionnaires seeking information on subsidy programs and benefits.

Foreign parties have a large incentive to provide responses to these questionnaires. If they do not, the Commerce Department will calculate the antidumping and subsidy margins based on so-called "best information available,"[36] which is generally that found in the petition and is most adverse to the foreign party.

After submission of questionnaire responses, these responses are verified by Commerce Department officials. These verifications sometimes involve up to five investigators reviewing source documents at the respondents' corporate offices and factories for periods ranging between three days and three weeks.

In addition to the questionnaire responses and verifications, foreign respondents generally also expend considerable resources in preparing for hearings on the Commerce Department's findings and at the ITC on the issue of material injury.

For these reasons, if the information in an antidumping or countervailing duty petition is false and misleading, or the petition is otherwise baseless, and an unwarranted investigation is commenced, a sham pro-

[36] 19 U.S.C. § 1677e(b).

ceeding has developed.[37] Even if the foreign respondents are ultimately successful in demonstrating that dumping or subsidization has not occurred, their ability to compete in the U.S. market will almost certainly have been impaired and petitioners' sham proceeding may be actionable as non-price predation under the antitrust laws.[38]

In analyzing whether an antidumping or countervailing duty petition can be considered baseless for "sham" purposes, it is important to consider at what stage of the proceedings the foreign respondent(s) prevails. A petition is considered by both the Department of Commerce and the ITC, which conduct separate investigations on parallel tracks. The ITC, responsible for investigating material injury, must make its preliminary determination within forty-five days of its petition being filed. An affirmative determination requires only that the ITC find a "reasonable indication" of material injury or threat thereof based upon the best information available to it at the time of the determination.[39] A negative determination terminates the proceeding.[40] The ITC makes its final injury determination at the end of the proceeding.[41] If it is negative, the investigation is terminated.[42]

The Commerce Department has twenty days after the filing of a petition to decide whether or not it will commence an antidumping or countervailing duty investigation.[43] The standard used by the Department in making these decisions is a very low one and petitioner's burden is not onerous. If Commerce decides to commence an investigation, it then goes on to make preliminary and final investigations of dumping or subsidization.[44] Only a negative final determination will terminate a proceeding.[45]

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[37] The Court has noted that "the principle of *Noerr* may also apply to the use of administrative or judicial processes where the purpose to suppress competition is evidenced by repetitive lawsuits carrying the hallmark of insubstantial claims and thus is within the 'mere sham' exception announced in *Noerr*." Otter Tail Power Co. v. United States, 410 U.S. 366, 380 (1973).

[38] A violation would exist under Section 1 of the Sherman Act if two parties were involved in bringing the sham proceeding. If only a single party were involved, liability would lie, if at all, under Sherman Act Section 2, or Section 5 of the Federal Trade Commission Act.

[39] 19 U.S.C. §§ 1671b(a), 1673b(a).

[40] *Id.*

[41] 19 U.S.C. §§ 1671d(b), 1673d(b).

[42] 19 U.S.C. §§ 1671d(c), 1673d(c).

[43] 19 U.S.C. §§ 1671a(c), 1673a(c).

[44] 19 U.S.C. §§ 1671b(b), 1671d(a), 1673b(b), and 1673d(a).

[45] 19 U.S.C. §§ 1671d(c) and 1673d(c).

In this light, an antitrust action based on allegations of baseless litigation would seem to have the greatest likelihood of success where antidumping or countervailing duty proceedings are dismissed at the stage of either a Commerce Department decision not to commence an investigation or an ITC negative preliminary determination. Such an action might also be successful where the Commerce Department's preliminary and final determinations are both negative, particularly where such determinations are repeated in several proceedings involving the same product from different countries. It seems unlikely that a court would find actions baseless where the Commerce Department and the ITC have both made preliminary and final determinations. However, antidumping or countervailing duty petitions which are successfully pursued to the imposition of antidumping or countervailing duties do not guarantee that a sham suit will be unsuccessful if other sham activities have been involved.[46]

III. OTHER ANTITRUST CONCERNS IN PETITIONING FOR ANTIDUMPING OR COUNTERVAILING DUTIES

The information gathering process itself also contains potential antitrust pitfalls when U.S. firms join together for the purpose of petitioning the government for relief under U.S. unfair trade statutes. As noted above, before antidumping or countervailing duties can be imposed, the ITC must determine that the U.S. industry is experiencing material injury or is threatened with material injury by reason of imports of the subject merchandise.

In their petitions, U.S. producers are required to produce evidence of such material injury. Such evidence includes information regarding U.S. sales, prices, production, shipments, inventories, investment, profits, losses and lost sales, and similar information. It is obvious that such information is often the most competitively sensitive in a company's possession. Any sharing of such information between producers preparing an antidumping or countervailing duty petition could facilitate activities such as price fixing, which would result in an antitrust violation.[47] As a result, such producers must be careful to appoint an independent party such as an attorney, economist, or accountant to receive such information and assemble it for purposes of inclusion in aggregate form in a petition and presentation before the Commission.

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[46] Other potential sham activities which the court identified in *Noerr* include perjury, bribery, and fraud.

[47] *See e.g.*, United States v. United States Gypsum Co., 438 U.S. 422 (1978); United States v. Container Corp. of America, 393 U.S. 333 (1969).

IV. ANTITRUST RISKS INVOLVED IN THE SETTLEMENT OF UNFAIR TRADE PRACTICE PROCEEDINGS

A. TERMINATION AND SUSPENSION AGREEMENTS

Sections 704 and 734 of the Tariff Act of 1930, as amended,[48] provide a variety of possible means of terminating or suspending unfair trade practice proceedings. The proceedings can be terminated by the petitioner withdrawing his petition. The proceeding can be suspended if the foreign producers agree to stop exporting or dumping, or the foreign government agrees to stop subsidizing the implicated product or agrees to offset completely the amount of the net subsidy. Suspensions can also be achieved if extraordinary circumstances are present and the foreign government or producers agree to eliminate completely the injurious impact of their exports to the United States, i.e., raise prices,[49] or the foreign government agrees to limit the quantity of exports to the United States.[50]

In providing these termination and suspension mechanisms, the U.S. Congress was very much aware of their competitively sensitive nature and their potential for abuse. Agreements to raise prices and limit market access are traditional tools used by producers to limit competition. It was for this reason that Congress provided that such means of suspending investigations could only be used if (i) the proposed agreements were made available for public comment prior to adoption; (ii) after reviewing the comments, the Secretary of Commerce determined the adoption of the proposed settlement agreement was in the "public interest,"[51] and

[48] 19 U.S.C. §§ 1671c, 1673c.

[49] If prices are raised, they must no longer suppress or undercut U.S. prices and the price increase must be high enough to offset at least 85% of the net subsidy or 85% of the dumping margin.

[50] Quantitative restriction agreements may only suspend countervailing duty investigations. 19 U.S.C. § 1671c(c)(3). Such agreements may be concluded by the Commerce Department only with foreign governments and not foreign exporters.

[51] Termination of investigations based on quantitative restriction agreements can take place also only if such agreements are in the "public interest." The public interest factors the Commerce Department is required to take into account include:

> (i) whether, based upon the relative impact on consumer prices and the availability of supplies of the merchandise, the agreement would have a greater adverse impact on United States consumers than the imposition of countervailing or antidumping duties;
> (ii) the relative impact on the international economic interests of the United States; and
> (iii) the relative impact on the competitiveness of the domestic industry producing the like merchandise, including any such impact on employment and investment in that industry.

19 U.S.C. §§ 1671c(a)(2)(B), 1673c(a)(2)(B).

(iii) the agreement could be effectively monitored. These safeguards attempt to insure that any anticompetitive consequences of such agreements are outweighed by the benefits of removing the negative impact of the unfair trade practice.

Because of the potential for anticompetitive consequences, firms that try to achieve the same objectives (price increases, quota limitations) without following the rigid procedures set forth in the statute run the clear risk of violating U.S. antitrust laws. Therefore, agreements between U.S. firms and their foreign competitors to limit their exports to the United States, or raise the prices of such exports outside of the rigid procedures, would almost certainly result in a per se violation of Section 1 of the Sherman Act, even if done under the guise of the unfair trade practice statutes.

For example, a U.S. producer might announce publicly that he is preparing an antidumping petition against foreign producers from a particular country because he believes the imports are being dumped or subsidized by a margin of ten percent. The foreign producers, aware of the cost of defending such petitions and the uncertainty the filing of such petitions can mean for their U.S. sales, decide to contact the U.S. producer to see if an arrangement can be made to "settle" the matter even before a petition is filed. They agree that the foreign producers will raise their U.S. prices by ten percent and no petition is filed. A Sherman Act Section 1 violation has occurred.[52] A violation will almost certainly also have occurred if, after a petition is filed, it is withdrawn by the petitioner based on such a private agreement.

A Sherman Act Section 2 violation might also be found if the U.S. producer, together with those responsible for sales of the competing imports, account for a U.S. market share sufficient to base a claim of monopolization. Also, under the reasoning of *American Airlines*,[53] an attempted monopolization count might lie against the foreign producers even if the U.S. producer refuses to agree to their pricing proposal. Similarly, if the U.S. producer initiates the "settlement" discussions and the foreign producers refuse to cooperate, it might be held liable for an attempt to monopolize under Section 2.

[52] In United States v. National Board of Fur Farm Orgs., 395 F. Supp. 56 (E.D. Wis. 1975), U.S. mink ranchers were concerned about exports from Sweden and attempted to secure quota legislation from the Congress limiting imports. They agreed to drop these efforts to have quota legislation enacted in return for a pledge from the Swedes to limit their exports and maintain minimum prices. The U.S. producers were convicted of criminal violations of the Sherman Act.

[53] United States v. American Airlines, Inc., 743 F.2d 1114 (5th Cir. 1984).

B. VOLUNTARY RESTRAINT AGREEMENTS

A much more difficult situation, however, is posed from an antitrust point of view when U.S. producers do not enter into such agreements directly with their foreign counterparts, but rather exert political pressure on U.S. Government officials to negotiate and conclude agreements with foreign parties to limit exports to the United States, either inside or outside of the context of any unfair trade practice proceeding. Indeed, these so-called voluntary restraint agreements (VRAs)[54] have become an increasingly popular method of "settling" trade disputes. They may be entered before any trade litigation is commenced, or sometimes even after a proceeding has been terminated.

1. *The First Steel VRAs*

Faced with the possibility of import quotas on steel being enacted by the U.S. Congress, Japanese and European steel producers met in 1968 with representatives of the U.S. State Department to negotiate and conclude the first steel VRA.[55] While the negotiations took place directly between the U.S. State Department and the foreign producers, the American Iron and Steel Institute was undoubtedly consulted and accepted the arrangement, although its members did not want to become parties. In return for three-year quantitative restraints on exports from the European Economic Community and Japan, efforts to enact the quota legislation were dropped.

When the foreign producers, aware of the anticompetitive nature of the VRA, asked the U.S. Government for assurances that they would not incur exposure under U.S. antitrust laws, they were apparently told that as long as the U.S. Government through the State Department, and not U.S. producers, did the negotiating on the American side, no antitrust liability would be incurred. Indeed, the formal documents of the Japanese and Europeans entering the VRA made their acceptance contingent on the premise that the agreement did not infringe on any U.S. laws. The Justice Department, however, did not want to give a formal

[54] There is no reference to VRAs in the General Agreement on Tariffs and Trade (GATT), 61 Stat. part (5) and (6); T.I.A.S. No. 1700; 4 Bevans 639; 55–51 U.N.T.S., which sets forth the basic rules of trade among nations. The GATT, concluded in 1947, allows a contracting party to impose import restraints only in very particular situations and after strict procedures have been followed. Those who argue that VRAs do not need to comply with GATT requirements for the imposition of import restraints note that because VRAs are voluntarily entered and do not limit imports but only restrain exports, such compliance is not required.

[55] The historical discussion of the steel and automobile VRAs contained in Sections 1–3 of Part IV. B. of this article is based on A. LOWENFELD, PUBLIC CONTROLS ON INTERNATIONAL TRADE, 195–243, 399–419 (2d ed. 1983).

opinion and later stated publicly that no assurances of immunity from the antitrust laws had been given.

In December 1970, President Nixon directed the State Department to seek extensions of the VRAs which were scheduled to expire the next year. Again, the State Department negotiated directly with the Japanese and European producers and a second set of three-year VRAs was concluded. As before, consultations took place with the U.S. industry and appropriate congressional committees.

2. *The Legal Challenge to the Steel VRAs*

Shortly after conclusion of the second set of steel VRAs, they were challenged in a suit by Consumers Union as being in violation of Section 1 of the Sherman Act and the procedural provisions of the Trade Expansion Act[56] for reaching trade agreements with foreign countries.[57] The Secretary of State, the American Iron & Steel Institute, the Japanese Iron and Steel Exporters Association, and certain foreign producers were named as defendants. They argued that the executive branch had acted pursuant to law and therefore, any action taken by the private parties under encouragement from the State Department was immune from the purview of the antitrust laws.[58]

Although during the litigation plaintiffs dropped their antitrust allegations, the court, in upholding the propriety of the government's action in concluding the VRAs, made it clear that it felt that the agreements may have violated U.S. antitrust laws.

> [I]t is apparent on this limited record that very serious questions can and should be raised as to the legality of arrangements under the Act, and all undertakings of the foreign steel companies were made on a mistaken assumption which at least was encouraged, albeit in good faith by the Secretary.[59]

On appeal, the court of appeals would not deal with the antitrust issues in view of the fact that plaintiffs had dropped their antitrust allegations. Therefore, the lower court's statements regarding the same were held to be without judicial force or effect.[60]

[56] PUB. L. No. 87-794 (Oct. 11, 1962).

[57] Consumers Union of U.S., Inc. v. Rogers, Civ. No. 1029-72 (D.D.C. filed May 24, 1972).

[58] Under Parker v. Brown, 317 U.S. 341 (1943), when the State, as sovereign, compels private conduct which would otherwise violate the antitrust laws, there is no antitrust liability.

[59] Consumers Union of U.S., Inc. v. Rogers, 352 F. Supp. 1319, 1323 (D.D.C. 1973).

[60] Consumers Union of U.S., Inc. v. Kissinger, 506 F.2d 136, 144 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975).

However, the antitrust issues did not disappear. In view of the lower court's statements regarding the Sherman Act, the steel producers were concerned that importers and other parties might later decide to pursue the antitrust claims that Consumers Union had dropped and therefore expose them to potential treble damages, when they had expected not to incur any antitrust liability. They therefore pressed the U.S. Congress, during consideration of the Trade Act of 1974,[61] to grant a legislative exemption from the antitrust laws for the steel VRAs. The Congress acceded to their request.[62]

> In light of the reasonable expectation of the foreign steel producers regarding the legitimacy of their actions, and the active role of the U.S. Government in inducing them to enter into the arrangements the Committee believes that it would be inequitable to subject them to potential monetary damages or other legal penalties.[63]

3. *The Japanese Automobile VRA*

Similar antitrust concerns surfaced in 1981, when in the face of proposed quota legislation introduced after the ITC had determined that imports of automobiles were not a substantial cause of serious injury to U.S. industry,[64] the United States reached a multi-year VRA on exports by Japan of automobiles to the United States. Although the anticompetitive nature and economic effect of this VRA was very much the same as with the prior steel VRAs, there were at least two important differences. First, the negotiations took place on a government-to-government level between the United States Trade Representative and the Japanese Minister of International Trade and Industry. Second, the automobile export restraints were imposed on Japanese producers by the Japanese Government.

In this light, the Justice Department felt comfortable in "clearing" the agreement from an antitrust perspective.

> In these circumstances, we believe that the Japanese automobile companies' compliance with export limitation directed by MITI would properly be viewed as having been compelled by the Japanese government, acting within its sovereign powers. The Department of Justice is of the view that the implementation of such an export restraint by the Government of Japan, including the division of the maximum exportable number of units among the companies by MITI, and compliance with the program by Japanese automobile companies, would not give rise to violations of United States antitrust laws. We believe that United States

[61] PUB. L. No. 93-618 (Jan. 3, 1975).

[62] 19 U.S.C. § 2485.

[63] S. REP. No. 93-1298, 93d Cong., 2d Sess. 232 (1974).

[64] Inv. No. TA-201-44, 45 Fed. Reg. 85,194 (1980).

> courts interpreting the antitrust laws in such a situation would likely so hold.[65]

4. *The Second Steel VRAs*

After the conclusion of the automobile VRA with Japan, the use of VRAs by the Reagan Administration has expanded and, in most cases, to minimize antitrust concerns, the negotiations have taken place on a government-to-government basis and have resulted in the foreign government taking the necessary legal measures under its domestic laws to enforce the export restraints.[66] Thus, despite rejecting the ITC's recommendations for relief from imports for five types of steel products pursuant to an "escape clause" proceeding in 1984,[67] President Reagan decided to adopt a comprehensive program for the steel industry which had as its centerpiece the negotiation of five-year VRAs with major foreign supplying countries designed to limit finished steel mill product imports to 18.5 percent of U.S. consumption.[68] In return for such VRAs, U.S. producers agreed not to pursue trade law-based actions against these foreign suppliers.

While authority for enforcing these agreements was provided to the President in the Steel Import Stabilization Act,[69] that Act made it clear that the national policy should not be implemented in a manner contrary to the antitrust laws.[70] Thus, the Administration for the most part, has been careful to (i) negotiate only with foreign governments which require their producers to procure export licenses for steel shipments to the United States, and (ii) allow imports from the affected foreign countries only upon presentation of such export licenses.

[65] Letter from Attorney General Smith to Japanese Ambassador Okawara (May 7, 1981), *reprinted in* A. LOWENFELD, *supra* note 55, at 406.

[66] In negotiating termination of suspension agreements, the Commerce Department has also made sure that any export restraint measures to be taken are imposed by the foreign government acting under the authority of its own laws. Thus, in 1982, when U.S. steel producers dropped their antidumping and countervailing duty proceedings against Western European producers based on a VRA, the EC established an export licensing scheme for exports to the United States. Similarly, in the case of the 1986 agreements between the U.S. and Japanese Governments Concerning Trade in Semiconductor Products, Japanese producers were required to submit to the Ministry of International Trade and Industry of Japan, cost and price data on products to be monitored. Furthermore, the agreement commits the Japanese government to take all appropriate actions available under its laws to prevent exports at prices less than company specific fair value. The agreements are reprinted in 25 INT'L LEGAL MATERIALS 1409 (1986).

[67] USITC Pub. 1553, Inv. No. TA-201-51 (1984).

[68] For a description of the President's steel program and its implementation, *see* H.R. REP. No. 99-937, 99th Cong., 2d Sess. 8–17 (1986).

[69] Trade and Tariff Act of 1984, PUB. L. No. 98-573, Title VIII (Oct. 30, 1984), 19 U.S.C. § 2253 note.

[70] Section 803(2) of the Trade and Tariff Act of 1984.

V. POTENTIAL LIABILITY OF GOVERNMENT NEGOTIATORS AND ATTORNEYS

When negotiations are not conducted on a government-to-government basis, but rather take place directly between the U.S. Government and foreign producers, the antitrust spectre looms large. For example, in a recent suit, *Hamilton Copper and Steel Corporation v. Committee on Pipe and Tube Imports*, alleging restraints of trade in violation of Section 1 of the Sherman Act,[71] plaintiff contended that as part of defendants' antitrust conspiracy, an employee of the U.S. Trade Representative's office spoke to the owners of a Taiwanese pipe producing mill about the need to reduce its exports of steel pipe to the United States. The effect of this conversation was that the mill discontinued further pipe-making operations thereby eliminating plaintiff's traditional source of supply of pipe. This visit, it was alleged, was part of an attempt by defendants to procure illegally the implementation of the VRA program described in the preceding section contrary to the antitrust laws of the United States. According to plaintiffs, the employee of the U.S. Trade Representative's office was carrying out the plans of the defendants when he visited the Taiwanese mill.

While the U.S. Trade Representative was not named as a defendant, these allegations once again point out the need for VRA negotiations to be conducted in a manner designed to minimize antitrust exposure.[72]

The *Hamilton* suit also raises directly the potential antitrust liability of attorneys in the trade law context. The suit names as a defendant the attorney and Managing Agent for the Committee on Pipe and Tube Imports alleging that he conspired with the members of the Committee to fix prices and limit supplies of pipes and tubes in the United States and to use the office of the U.S. Trade Representative to force plaintiff out of business.

[71] Civ. No. 87-00720 (C.D. Cal. complaint filed Feb. 3, 1987).

[72] Prior to commencement of the Japanese automobile VRA, then Attorney General Smith in a letter to U.S. Trade Representative Bill Brock, Feb. 18, 1981, noted:

> In order to minimize the likelihood of [allegations of liability on the part of government negotiators], we believe that any negotiations seeking import restraints should be kept on a government-to-government level, and direct dealings with foreign manufacturers . . . avoided. Similarly . . . United States negotiators are best advised to avoid contacts that could be characterized as facilitating or serving as a conduit for private arrangements between American firms and their foreign counterparts.

Reprinted in A. LOWENFELD, *supra* note 55, at 404–05 n.f.

Where an attorney functions purely in a legal advisory capacity, case law seems to indicate that antitrust liability will not accrue.[73] However, if he goes beyond this role and begins to be involved in directing an antitrust conspiracy, whether by bringing sham litigation or otherwise, antitrust liability may lie.

Some evidence of involvement in an antitrust conspiracy may be found in an attorney's conduct during the course of an antidumping or countervailing duty proceeding. As noted above, in such proceedings, certain very competitively sensitive information must be submitted to government investigators. Attorneys for the opposing party have the right to receive access to such information under administrative protective order,[74] which prohibits disclosure of information to their clients. Any sharing with his client of the opposing party's confidential information received by the attorney under administrative protective order may be evidence of the attorney's involvement in an antitrust conspiracy and may form the basis of a private treble damage action by the party whose information was disclosed, particularly where it can be shown that the litigation was commenced in order to get access to such confidential information.

Other evidence of an attorney's involvement in an antitrust conspiracy may be found in his participation in the preparation and filing of a petition which is baseless and therefore subject to the sham exception. While the courts have generally not definitively decided the issue,[75] attorneys have been named as party-defendants in several recent cases alleging conspiracy to institute sham litigation.[76]

While there is presently no direct administrative counterpart to Rule 11[77] in the context of unfair trade practice proceedings before the Department of Commerce and the ITC, and thus attorneys do not run the risk of having Rule 11 sanctions imposed for the filing of baseless claims, both agencies do provide sanctions for improper conduct by attorneys

[73] Tillamook Cheese & Dairy Ass'n v. Tillamook County Creamery Ass'n, 358 F.2d 115, 118 (9th Cir. 1966).

[74] *See, e.g.*, 19 C.F.R. §§ 353.30, 355.20 (1987).

[75] *Cf.* Invictus Records v. ABC, Inc., 98 F.R.D. 419 (E.D. Mich. 1982), in which the court dismissed a claim against attorneys who were alleged to have prosecuted sham litigation.

[76] *See* Energy Conservation, Inc. v. Heliodyne, Inc., 698 F.2d 386 (9th Cir. 1983); Hospital Bldg. Co. v. Trustees of Rex Hospital, 691 F.2d 678 (4th Cir. 1982); Rosenberg v. Cleary, Gottlieb, Steen & Hamilton, 598 F. Supp. 642 (S.D.N.Y. 1984).

[77] Rule 11 of the Federal Rules of Civil Procedure requires that sanctions be imposed against lawyers who do not fulfill their obligation to refrain from litigating for improper purposes and to perform a reasonable inquiry into the facts and law prior to filing a suit and any other pleading before the court.

during the course of a proceeding. If an attorney receives confidential information under an administrative protective order and improperly discloses such information, he and his firm may be barred from practice before the agency for a period of seven years, the matter may be referred to the ethics panel of the appropriate bar associations, and other sanctions such as striking from the record any briefs or information submitted may be imposed.[78]

VI. CONCLUSION

In view of the fact that it is only in the last decade that U.S. producers have looked with any frequency to U.S. trade laws to deal with import problems, the interplay between these laws and the antitrust laws is still developing. As U.S. consumers become increasingly injured by invocation of the trade laws and the conclusion of voluntary restraint agreements, more antitrust actions based on claims of abusive use of the trade laws seem likely.

One interesting potential claim which raises many of the issues discussed in this article might involve antidumping and countervailing duty petitions which are brought not for the purpose of having antidumping or countervailing duties imposed, but rather as a means of forcing the foreign producers to agree to a voluntary restraint agreement on their exports to the United States. Would such petitions be covered by *Noerr-Pennington* or be caught within the sham exception? With the increase in litigation, the courts will be given the opportunity to resolve this problem and others and thereby shape more precisely the parameters of the sham exception in the trade law context.

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[78] *See* 52 Fed. Reg. 25,246 (1987) for the Department of Commerce's latest proposals on sanctions for violations of administrative protective orders.