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NOTES AND COMMENTS

An Analysis of "Material Injury" Under the 1979 Trade Agreements Act

I. INTRODUCTION

The Trade Agreements Act of 1979 (1979 Act)¹ substantially changed the trade policies of the United States with respect to dumped and subsidized imports. The 1979 Act was a direct result of United States participation in the "Tokyo Round" of the Multinational Trade Negotiations.²

When Congress passed the 1979 Act, it enacted into law the agreements made by the United States negotiating committee at the Tokyo Round. The Act of 1979 represents the United States' acquiescence to the position of other members of the MTN that the procedures regulating non-tariff trade barriers should be made uniform. The Trade Act of 1974³ provides that agreements such as those made at the Tokyo Round are not self-executing; rather, they must be officially enacted into law by Congress.⁴

One of the most significant agreements made at the Tokyo Round that was enacted into law by the Act of 1979 involves the imposition of countervailing and antidumping duties. Congressional intent in enacting these provisions is perhaps best indicated by the words of Senator Danforth when he introduced the bill into

1. Pub. L. No. 96-39, 93 Stat. 144 (1979) (codified in scattered sections of 5, 13, 19, 26, 28 U.S.C.) (Supp. III 1979).

2. The most recent session of the Multinational Tariff Negotiations began in September 1978 with the signing of the Tokyo Declaration by more than one hundred countries. The Tokyo Declaration required full negotiation of tariffs and harmonization, reduction, or elimination of non-tariff trade barriers. The most active participants in the Tokyo Declaration are the United States, the European Economic Community, Japan, Canada, and Australia.

The negotiations were conducted under the auspices of the General Agreement of Tariffs and Trade, which is the multinational trade agreement concerning the conduct of trade and the settlement of trade disputes. Signed in 1967, the Agreement's purposes are to reduce trade barriers and to create harmony in international trade.

3. Pub. L. No. 93-618, § 102(e)(3), 88 Stat. 1978 (codified in scattered sections of 19 U.S.C.) (1975 & Supp. III 1979).

4. The 1979 Act was officially enacted July 1, 1979 and will take effect January 1, 1980. Pub. L. No. 96-39, § 2(c) (codified in scattered sections of 5, 13, 19, 26, 28 U.S.C.).

Congress. Senator Danforth stated that Congress should encourage free trade but not at the expense of domestic industry, which has been victimized by unfair competition from abroad. He explained that the 1979 countervailing duty and antidumping provisions are not designed to eliminate competition, but rather to equalize the advantages gained by foreign manufacturers and producers who flood the United States market with dumped or subsidized products.⁵ Senator Danforth further stated that free trade may produce short-term benefits for domestic consumers, but the long-term economic effects of such practices could be devastating. He predicted that the long-term effect of free trade would be an increase in prices because domestic producers would be crippled by the presence of foreign imports and would be forced to reduce production. Thus, the demand for foreign products would increase, and their prices would also increase. Senator Danforth called for the United States to halt the manipulation of its trade economy by countries which try to achieve their political and economic goals by dumping their products in our nation's marketplace.⁶

The United States has long been aware of the need to regulate dumping in the domestic marketplace and the need to minimize the presence of foreign-subsidized exports. The first statutes regarding countervailing duties and antidumping duties were enacted in 1897 and 1916.⁷ Worldwide recognition of these problems is evidenced by their embodiment in an international treaty⁸ enacted in 1967, which followed the Kennedy Round of the MTN. The 1967 treaty comprises Article VI of the General Agreement on Tariffs and Trade (GATT) and is also known as the International Antidumping Code.

Although Article VI of GATT was enacted in 1967 by other member states, the United States did not ratify it because it was believed that the existing antidumping procedures under the Antidumping Act of 1921⁹ provided sufficient protection for United States manufacturers, producers, wholesalers and importers. With the enactment of the Act of 1979, the United States is not technically approving the procedures outlined in the international code, but it is

5. 125 CONG. REC. S 655, 656 (daily ed. Jan. 25, 1979) (remarks of Senator Danforth).

6. *Id.* at 656.

7. *Id.*

8. General Agreement of Tariffs and Trade, June 30, 1967, 19 U.S.T. 4348, T.I.A.S. No. 6431 (entered into force July 1, 1968).

9. 19 U.S.C. §§ 160-171 (Supp. III 1979) (repealed 1979).

giving its tacit approval of them because the antidumping and countervailing duty enforcement procedures are similar to those outlined in GATT.

The 1979 Act repealed the Antidumping Act of 1921,¹⁰ by announcing new antidumping and countervailing duty provisions. Most of the new provisions are procedural and are intended to streamline and revitalize enforcement procedures so that the investigatory and relief rendering process will be more efficient.¹¹ The most important change in the substantive law is the adoption of the "material injury test," which provides a means to measure harm to a domestic industry which is allegedly suffering the effects of foreign products which have been dumped on the United States market.¹²

This article shall attempt to explain the material injury test, especially for the benefit of domestic companies and foreign manufacturers faced with antidumping or countervailing duty investigations.

II. THE MATERIAL INJURY TEST

The material injury test which now applies to antidumping and countervailing duty investigations is as follows:

If:

- (1) the administering authority determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value, and
- (2) the Commission determines that
 - (A) an industry in the United States
 - (i) is materially injured, or
 - (ii) is threatened with material injury, or
 - (B) the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise, then there shall be imposed upon such merchandise an antidumping duty, in addition to any other duty imposed, in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise.¹³

The statute sets forth two requirements that must be fulfilled in order to establish that a foreign firm has dumped its merchandise in

10. S. REP. No. 249, 96th Cong., 1st Sess. 60 (1979). The 1979 Act is codified at 19 U.S.C. §§ 1671, 1673 (1980).

11. *Id.* at 66.

12. H.R. REP. No. 317, 96th Cong., 1st Sess. 2 (1979).

13. 19 U.S.C. § 1673 (1980).

the United States market. First, foreign goods must have been sold at "less than fair value" (LTFV) in the United States. The test is whether the product has been sold at less than fair value or less than the comparable price of the same product or a like product produced domestically.¹⁴ Second, the industry in which such products are dumped must have suffered material injury because of or "by reason of" such import sales.

If a domestic industry believes that dumping is taking place, a representative of such industry or a representative of the government, usually the United States Customs Service branch of the Department of Treasury, will initiate a dumping complaint. The complaint sets out in full a description of the goods involved, price data indicating the LTFV sales, and allegations that the industry is being injured as a result of the LTFV sales.¹⁵ The complaint is filed with the Department of Commerce, which reviews the complaint and determines whether LTFV sales are occurring and whether the allegations regarding injury are sufficient to allow the complaint to be forwarded to the International Trade Commission (ITC) for a determination of injury. The ITC then assesses the injury to the industry and decides whether it is material and whether it has been caused by the presence of the LTFV imports. The ITC must make a determination based upon injury-indicating factors within forty-five to ninety days from the date the investigation begins.¹⁶

III. DETERMINATION OF MATERIAL INJURY

The terms "material injury" and "threat of material injury" are used without precise definition in GATT.¹⁷ The treaty merely states the indicators which must exist in order to reach a determination that injury is "material."¹⁸

In contrast to the GATT approach, the Trade Agreements Act of 1979 defines "material injury" as "harm [to the domestic industry] which is not inconsequential, immaterial or unimportant."¹⁹

14. S. REP. NO. 249, 96th Cong., 1st Sess. 37-39 (1979).

15. Pub. L. No. 96-39, § 101 (codified at 19 U.S.C. 1673(a) (1980)).

16. 19 U.S.C. § 1673b (1980). For an extensive review of procedural changes, see Comment, *The New Anti-dumping Procedures of the Trade Agreements Act of 1979: Does it Create a New Non-Tariff Trade Barrier?*, 2 N.W.U.J. INT'L L. & BUS. 200 (1980).

17. 19 U.S.T. 4348, 4351.

18. See *infra* note 27 and accompanying text.

19. Pub. L. No. 96-39, § 101 (codified at 19 U.S.C. § 1677(7)(A) (1980)); see also S. REP. NO. 249, 96th Cong., 1st Sess. 86 (1979).

This definition, however, is even more vague than the corresponding GATT indicators of injury.

In practice, a determination of material injury under the 1979 Act would appear to require an analysis of various factors similar to those provided in GATT. Not surprisingly, the ITC has adopted, almost verbatim, the GATT indicators of injury set forth in Article 3 of the International Antidumping Code.²⁰ The utilization of the GATT factors has been endorsed by the United States Customs Court and the district courts.²¹

The indicators of injury are divided into those showing injury to the affected industry and those measuring the impact of dumped or subsidized imports on the overall economy. If an injury is established, it must then be shown that the LTFV imports caused the injury.

Before the Act of 1979, the GATT rule was that the dumped products must be the "principal cause" of the injury.²² The administrative agency made this determination by weighing all attendant factors adversely affecting the industry. If dumping had a minimal effect upon the industry as compared to other economic factors, no causal determination of injury could be made. This GATT test made it difficult to arrive at conclusive injury determinations because the "principal cause" language, in effect, restricted findings of causality to situations where virtually no other economic, social, or political factors had affected the industry.

By requiring only a "causal connection" between the LTFV sales and the injury, Congress, in the 1979 Act, implicitly rejected the "principal cause" requirement of the GATT treaty.²³ Title 19 states that material injury must be caused "by reason of" the presence of dumped goods²⁴ and that the threshold of injury be something more than "de minimis."²⁵ The ITC can make a positive injury determination upon a showing that the injury arising from the LTFV imports is not "inconsequential, immaterial or unimportant." After the ITC finds some injury attributable to the presence

20. 19 U.S.T. 4348, 4351 (codified at 19 U.S.C. §§ 1671d(d), 1673d(d) (1980)).

21. *See, e.g.*, *Sprague Electric Co. v. U.S.*, 488 F. Supp. 910, 914 (Cust. Ct. 1980); *SCM Corp. v. U.S.*, 487 F. Supp. 96, 106 (Cust. Ct. 1980); *Armstrong Bros. Tool Co. v. United States*, 483 F. Supp. 312, 320-22 (Cust. Ct. 1980).

22. 19 U.S.T. 4348, 4351.

23. S. REP. No. 249, 96th Cong., 1st Sess. 74 (1979).

24. 19 U.S.C. §§ 1671b(a), 1673b (1980).

25. H.R. REP. No. 317, 96th Cong., 1st Sess. 46 (1979).

of LTFV imports, it then assesses the overall condition of the trade or industry in relation to the presence of dumping by evaluating the difference between the United States market price and the import sales price to determine the industry harm.²⁶

What are the factors which determine whether the injury to an industry is not "inconsequential, immaterial or unimportant"? The ITC criteria are as follows:²⁷

1. Price depression—Have the competitive domestic products been forced to lower their sales prices while production costs remain constant?

2. Price suppression—Have production costs increased due to inflation while the presence of LTFV imports have prohibited sales prices from proportionately increasing?

3. Market share—Does market penetration by the LTFV imports in one area of the country justify the imposition of duties upon the imports entering in another part of the country? "Market share" refers to the LTFV percentage of the total sales of such products.

4. Documented lost sales—What is the volume of lost sales directly linked to the presence of LTFV imports?

5. Production capacity—Are domestic facilities working at full capacity? Are the causes for the decrease in operations due to the status of the industry as a whole or due to the presence of LTFV imports?

6. Unemployment rates—To what extent has the rate of unemployment for the particular industry involved increased? Consideration is not given to unemployment attributable to advances in technology and changes in consumer tastes.

7. Foreign capacity to produce—Has foreign industry acquired an increased capacity to produce, causing a corresponding increase in the presence of LTFV imports?

8. Volume of imports—Has there been a significant increase in the number of products imported relative to the production and consumption of like products within the United States? If production has not decreased in the United States and consumption has not increased, the ITC has a *prima facie* showing of dumping.

9. To determine materiality of injury, the Commission, in addition to the above factors, looks at all other relevant economic fac-

26. S. REP. No. 249, 96th Cong., 1st Sess. 74 (1979).

27. S. REP. No. 249, 96th Cong., 1st Sess. 48 (1979); *see* *Armstrong Bros. Tool Co. v. United States*, 483 F. Supp. at 322.

tors affecting the industry. For example, rapid increase in market penetration is an appropriate early warning signal of material injury.²⁸

10. The fact-finding process is always within the ITC's discretion, and the ITC has sole authority to make the determination. The presence or absence of any one factor is not determinative.

After the ITC makes a positive injury determination, it must make a Statement of Findings and Conclusions to substantiate its finding. The ITC must then publish it in the Federal Register with an accompanying Statement of Reasons.²⁹ All interested parties³⁰ may thereby be apprised of reasons for the ITC determination.

IV. JUDICIAL REVIEW OF INJURY DETERMINATIONS

Because of the sui generis nature of injury determination, there is significant cause for concern that such determinations will result in an onslaught of appeals for judicial review. Prepared for such a wave of appeals, Congress enacted, as part of the Trade Agreements Act of 1979, guidelines for judicial review of injury determinations.

Judicial review of determinations made by an administrative agency is limited to an inquiry into whether the determination has been made in accordance with the statutory requirements of the particular agency, or whether it is arbitrary, capricious, or an abuse of discretion by such agency.³¹ Because the administrative agencies are required to articulate the standards and principles upon which each decision is based,³² the court must inquire as to whether the agency has given reasoned consideration to all material facts and issues.³³ The purpose of such scrutiny of administrative decisions is not to substitute the court's judgment for the agency's, but rather to educate the court as to the scope of the agency's jurisdiction and allow the court to judge whether the agency acted permissibly and justly within its jurisdiction.³⁴

The foregoing standard of review, as applied to ITC determina-

28. S. REP. NO. 1298, 93d Cong., 1st Sess. (1974).

29. 19 U.S.C. § 1673d(d) (1980) (requirements continued from the Trade Act of 1974, § 321(a)(2)).

30. Pub. L. No. 96-39, § 101 (codified at 19 U.S.C. § 1516a (1980)).

31. *Sprague Electric Co. v. United States*, 488 F. Supp. 910 (Cust. Ct. 1980).

32. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

33. *Environmental Defense Fund, Inc. v. Ruckleshaus*, 439 F.2d 584, 598 (D.C. Cir. 1971).

34. *Id.*

tions, is illustrated in the case of *SCM Corp. v. United States*,³⁵ in which the appellant, SCM, challenged the scope of inquiry made by the United States Customs Court. Appellant contended that the court's in-depth probe of the Commission's determination was, in effect, tantamount to trying de novo the facts of the case, a function which is beyond the court's jurisdiction in reviewing administrative decisions. Justice Re of the United States Customs Court responded by citing *Citizens to Preserve Overton Park v. Volpe*,³⁶ in which the United States Supreme Court held that "even under the arbitrary and capricious standard of review, the reviewing court is required to 'engage in substantial inquiry'." Justice Re then returned to the facts of *SCM* and concluded, "[H]owever narrow the standard of judicial review, the Commission's determination is not shielded from a thorough, probing, in-depth review . . . the court is required to engage in a searching and careful inquiry in the facts."³⁷

The provisions of the Trade Agreements Act of 1979 regarding judicial review of antidumping and countervailing duty determinations are found in Title 19, section 1516a of the United States Code.³⁸ Section 1516a codifies the principles of judicial review for ITC injury determinations.

Section 1516a(b)(1)(B) requires that judicial review of an ITC injury determination be limited to finding whether the ITC's decision was rendered upon a rational basis supported by substantial evidence. The courts refer to this as the "substantial evidence test."³⁹

The record used by the courts in reviewing an ITC decision consists of the Commission's Statements of Findings and Conclusions, which is published in the Federal Register within ten days after the decision is rendered.⁴⁰ If the accompanying Statement of Reasons sets forth sufficient injury determining criteria, supported by the Findings and Conclusions, the court upholds the ITC determination.

United States manufacturers, producers and wholesalers have been concerned that certain confidential information given to the ITC to aid a material injury determination may be disclosed to the

35. 487 F. Supp. 96 (1980).

36. 401 U.S. 402, 415-16 (1970).

37. *SCM Corp. v. United States*, 487 F. Supp. at 96.

38. Pub. L. No. 96-39 (codified at 19 U.S.C. 1516a (1980)).

39. *SCM Corp. v. United States*, 487 F. Supp. at 98.

40. Pub. L. No. 96-39, § 101 (codified at 19 U.S.C. 1673b(f) (1980)).

public through publication of the required Statement of Findings and Conclusions in the Federal Register. For example, if certain trade secrets and other non-protectible information were disclosed, a manufacturer's competitive edge could be destroyed. Opponents of the confidential information issue argue that all the evidence considered in a ITC injury determination should be open to cross-examination and subject to judicial review to provide a full and fair adversary hearing on the determination.

New section 1516a was intended by Congress to resolve this confidentiality controversy by giving the ITC full discretion and authority to identify the information that would be kept confidential, based upon the nature of the information disclosed and any request for confidentiality received from the manufacturer, producer, or wholesaler who provides such information.⁴¹

In addition to clarifying the standards of judicial review, new section 1516a also gives the reviewing court extended relief-rendering powers.⁴² The reviewing court can now grant limited equitable relief in the form of an injunction and can also remand a decision to the ITC if the court finds that the ITC's determination is erroneous. Another area clarified in the 1979 Act is the effective date of any reviewing court's decision. Section 1516a provides that the effective date of the court judgment is the date of its publication in the Federal Register.

The new injunctive powers granted by section 1516a confer limited equity jurisdiction on the reviewing court. The court can suspend liquidation of entries (i.e., finalization of duty assessments) until the final decision of the reviewing court is rendered. This means, in effect, that LTFV imports which enter the United States between the time the investigation is commenced and the time of final decision may not have their customs entries finally liquidated; rather, the imports can be held in abeyance until it is determined whether further duties are to be assessed.⁴³ Prior law granted only prospective relief effective from the date of the decision, and any imports entering during the interim period escaped the additional duties.

The issuance of such an injunction is an extraordinary measure

41. S. REP. No. 249, 96th Cong., 1st Sess. 19 (1979).

42. 19 U.S.C. § 1516a(c)(2) (1980 & Supp. 1981).

43. *Id.* at § 1516a(e).

which is immediately appealable. The factors the court considers prior to granting an injunction are:

- 1) Is the party filing the action likely to prevail?
- 2) Would the filing party be irreparably harmed if liquidation of some or all of the entries is not enjoined?
- 3) Would public interest be best served by the issuance of an injunction?

A balancing test is employed to determine whether the harm to the person filing for the injunction would be greater if the liquidation is not enjoined⁴⁴ than the harm to others if the liquidation is enjoined.

The last area of judicial review enlarged upon by the 1979 Act is that of standing to bring suit.⁴⁵ The previous law is changed with respect to the individuals who may initiate a dumping investigation with the ITC as well as to those who may challenge the ITC determinations. Prior law allowed any person to file a petition with the Secretary of the Treasury to initiate a dumping investigation, but only those with an appropriate interest were allowed to present evidence before the ITC and to challenge the ITC decisions. Under the old law, a person with "an appropriate interest" could only be a United States manufacturer, producer, wholesaler, or importer.

The new law defines five categories of interested persons who have standing to bring evidence before the ITC and who may challenge the ITC findings in the courts: (1) a foreign manufacturer, producer, or exporter, or the United States importer counterpart (including a trade or business association of which the majority of members are such importers), whose product is the subject of the antidumping or countervailing duty investigation; (2) the government of a country which produced or subsidized the product that is being dumped upon the United States market; (3) a manufacturer, producer, or wholesaler in the United States of the same product or a like product; (4) a certified union or recognized union or group of workers representative of workers of a United States industry engaged in the manufacture and sale of a like product; and (5) a United States trade or business association, the majority of whose members manufacture, produce, or wholesale such a product or like product in the domestic market.⁴⁶

44. Pub. L. No. 96-39, 93 Stat. 144 (1979).

45. 19 U.S.C. § 1516a(d) (1980 & Supp. 1981).

46. *Id.* at § 1677(a) (1980).

It is important to note that the categories of individuals with standing are not exclusive; courts have the authority to determine whether any individual or entity has standing to challenge an ITC finding.⁴⁷ To acquire standing, a party must show that it has a personal or business interest which is affected by the industry harm and that the harm affecting the interest is attributable to the presence of LTFV sales.⁴⁸

V. CONCLUSION

Echoing the words of Senator Danforth in his opening remarks upon introduction of the 1979 Act in Congress, the goal of the Act is to foster free trade but restrict unfair trade practices. The provisions of the Act are not protectionist, but rather they are to free United States imports from unfair price discrimination practices in a simple, expeditious manner. The provisions of the Act, which are recognized by the United States' major trading partners, are intended to foster free trade by ensuring that all partners play by the same rules so that free trade and free competition are not only free, but are also fair.⁴⁹

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47. *Id.*

48. *Id.*

49. 125 Cong. Rec. S656 (daily ed. Jan. 25, 1979) (remarks of Senator Danforth).

