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### Down in the Dumps: Administration of the Unfair Trade Laws

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## BOOK REVIEW

**DOWN IN THE DUMPS: ADMINISTRATION OF THE UNFAIR TRADE LAWS.** Richard Boltuck & Robert E. Litan, Editors, Washington, D.C.: The Brookings Institution, 1991. Pp. 350. Index.

*Reviewed by Robert S. Rendell\**

For many years, the United States' trade laws have attempted to counter unfair trade practices by foreign firms exporting their products into the United States. The antidumping law<sup>1</sup> and the countervailing duty law<sup>2</sup> represent two significant provisions in this effort.

The antidumping law authorizes the imposition of additional duties on foreign merchandise that is "dumped" in the United States and causes material injury to an American industry.<sup>3</sup> The statute defines "dumping" as the sale of foreign products in the United States at a price below "fair value."<sup>4</sup> Generally, a determination of a sale below fair value arises if the foreign goods sell (1) at a price below that existing in the exporter's home market or (2) at a price below the exporter's cost of producing the goods (foreign market value).<sup>5</sup> If dumping is found, an antidumping duty is imposed on the foreign products "in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise" (known as the "dumping margin").<sup>6</sup> Consequently, the antidumping law aims to neutralize the effect of price discrimination and pricing below cost.

In contrast, the countervailing duty law addresses foreign governmental subsidies that enable foreign exporters to sell their goods in

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1. 19 U.S.C. § 1673 (1988).

2. *Id.* § 1671.

3. *Id.* § 1673(2).

4. *Id.* § 1673(1).

5. *See id.* § 1677b; *see also* JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 231-32 (1989).

6. 19 U.S.C. § 1673.

the United States.<sup>7</sup> Under the statute, a "subsidy" includes export subsidies as well as certain domestic subsidies such as preferential loans, guarantees or grants of manufacturing costs, and the provision of goods or services at preferential rates.<sup>8</sup> If the foreign country providing the subsidy represents a party to the 1979 General Agreement on Tariffs and Trade ("GATT")<sup>9</sup> Agreement on Subsidies and Countervailing Measures,<sup>10</sup> the subsidized imports must materially injure a United States industry before a countervailing duty in an amount equal to the net subsidy may be imposed.

The International Trade Administration ("ITA"), an organization within the United States Department of Commerce, determines whether product dumping has occurred and whether foreign products benefit from an export or domestic subsidy. However, the International Trade Commission ("ITC"), an independent government agency, resolves the question of material injury to United States industries.

The antidumping and countervailing duty laws' fundamental rationale originates in the notion that the prohibited practices constitute unfair trade practices that harm competing United States industries. Under this rationale, the United States may justifiably impose additional duties on imported foreign goods in order to deter these practices and preserve the competitive position of American industry.<sup>11</sup>

#### ARE THE UNITED STATES' LAWS "PROTECTIONIST"?

While the antidumping and countervailing provisions have existed in United States trade law for some time, they have become quite controversial over the past several years. Advocates of free trade in this country and abroad accuse the United States of administering these laws in a "protectionist" manner. However, many industry representatives and members of Congress assume the contrary position,

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7. *Id.* § 1671(a).

8. *Id.* § 1677(5).

9. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. 5, 55 U.N.T.S. 194 (entered into force on Jan. 1, 1948).

10. CONTRACTING PARTIES TO THE GENERAL AGREEMENT ON TARIFFS AND TRADE, TWENTY-SIXTH SUPPLEMENT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS 56-83 (1980); 19 U.S.C. § 1677(8) (1988).

11. The GATT recognizes that contracting parties may impose antidumping and countervailing duties. Article VI establishes the conditions under which these duties may be imposed. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. 5, A23, 55 U.N.T.S. 194, 212.

asserting that these laws assure a “level playing field” in American markets.

In November 1990, the Brookings Institution sponsored a conference on unfair trade in Washington, D.C. to examine these issues. Approximately 100 economists, attorneys, government officials, and interested corporate representatives attended the conference. In addition, a number of academics, ITC officials, and practicing attorneys submitted papers focusing on various aspects of the antidumping and countervailing duty laws. These papers have now been collected and published by the Brookings Institution in a new book entitled *Down in the Dumps: Administration of the Unfair Trade Laws*. Richard Boltuck, an economist with the Office of Management and Budget, and Robert E. Litan, a Senior Fellow at Brookings, edited the papers and contributed a chapter of their own.

The book examines the Department of Commerce’s administration of the antidumping and countervailing duty laws, or, in other words, how the ITA determines whether foreign merchandise is being dumped and whether a foreign government is providing a subsidy for goods being imported into the United States. The book possesses one drawback in that the papers do not examine the ITC’s material injury determinations. Nonetheless, despite this narrow scope, *Down in the Dumps* explores many of the critical areas in the administration of the antidumping and countervailing duty laws.

The contributors to this volume generally criticize the ITA’s performance, accusing the ITA of pro-United States bias in the way it determines dumping and defines a countervailing subsidy. The contributors’ criticisms of the ITA’s application of the antidumping law include the following:

- The use of “averaging” determines foreign market value. This practice assures that dumping will be found in most cases, even when foreign prices and United States prices are the same.
- The exclusion of home sales at prices below the cost of production increases the possibility that dumping will be found.
- The threshold for determining dumping is set at too low a level, since a dumping margin in excess of 0.005 is actionable.
- Making unreasonable demands for information on foreign manufacturers ultimately results in the use of data supplied

by the United States petitioner (as the "best information available").

- The imposition of estimated duties on a provisional basis leaves the overall liability of the United States importer open-ended.

This reviewer particularly enjoyed David Palmetter's paper, "The Antidumping Law: A Legal and Administrative Nontariff Barrier," as it presents these criticisms and several others in a most convincing manner.

Similarly, with respect to the countervailing duty law, the ITA endures criticism for its overly broad definition of a domestic subsidy. The authors perceive an ITA bias against foreign firms constituted not by favoritism in individual cases, but rather by a conceptual and procedural bias in the way the law is applied. In other words, the ITA's methodologies and statutory interpretations make it difficult for a foreign firm to defend itself from a charge of dumping or exporting subsidized products. Most of the contributors suggest that the ITA has knowingly and intentionally applied the law in this fashion to protect United States industry from the impact of foreign competition. Moreover, in "Antidumping and Countervailing Duty Law: The United States and the GATT," Ronald A. Cass and Stephen J. Narkin conclude that some of ITA's practices may violate the GATT. Likewise, Robert E. Baldwin and Michael O. Moore's paper, "Political Aspects of the Administration of the Trade Remedy Laws," attributes this biased application to political pressure on the Department of Commerce, particularly from the United States Congress.

Although every story possesses two sides, this book includes only one paper that defends the Department of Commerce. This paper, written by a Washington, D.C. trade lawyer, Terence P. Stewart, raises some doubts in the reader's mind as to the validity of the criticisms contained in the book. However, the editors have chosen to present this paper at the end of the book. Thus, although this paper effectively presents an alternate view, it must combat alone the cumulative weight of the other papers that convince the reader that the Department of Commerce represents an evil empire.

Certainly, the Department of Commerce should have been afforded ample opportunity to justify its practices. In addition, it would have been interesting to compare the United States' laws to analogous unfair trade laws in other industrial countries, such as Canada or the

European Community member nations. Finally, it is not clear to this reviewer why the ITC's material injury determinations were omitted from this study. Examining only the ITA's role in the administration of the United States' unfair trade laws fails to provide a complete picture.

Despite these shortcomings, *Down in the Dumps* signifies a valuable addition to the growing literature on United States trade laws. Both the trade law specialist and the international practitioner or scholar will appreciate this book. Moreover, considerable background material complements the work, so the non-specialist can follow the arguments. In the end, the individual reader must determine whether the United States' trade laws are unfair, but contemplating the question will reveal a great deal about these laws and their underlying policies.

