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I. Introduction

The Omnibus Trade and Competitiveness Act of 1988 (Act) contains numerous amendments to the dumping and countervailing duty laws. Many of the important amendments are targeted at assisting specific industrial sectors, such as steel, aircraft manufacturers, agriculture, and high-tech industries such as semiconductor manufacturers. In addition, there are important amendments which affect the International Trade Commission's (ITC) analysis of whether a domestic industry is suffering material injury or threat thereof by reason of dumped or subsidized imports. There are also amendments which affect the Commerce Department's determination of whether imports are dumped or subsidized. The Act also enhances the Commerce Department's ability to prevent circumvention of antidumping and countervailing duty orders. This paper will analyze the most important provisions in the Act and will explain who the likely beneficiaries and losers will be.

II. Sector-Specific Provisions

A. *Steel*

For the United States steel industry, the Act provides the United States Trade Representative (USTR) with two tools to limit imports from countries without Voluntary Restraint Agreements (VRAs) with the United States. The "melted and poured"[1] provision provides that steel melted and poured in a

* Wiley, Rein & Fielding, Washington, D.C.

1. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1322, 102 Stat. 1107, 1195 (1988).

country with a VRA, which is rolled in a non-VRA country and exported to the United States, may be counted against the quota of the VRA country. This provision could prove useful to the domestic steel industry in stemming the flow of imports from Turkey and Thailand, which roll billets imported from VRA countries. However, because this provision would antagonize VRA countries by counting third country imports against existing VRA quotas, USTR has indicated reluctance towards invoking this provision.

USTR is more likely to use the so-called "third country equity" provision to limit non-VRA imports.[2] Most VRAs contain "third country equity" clauses which provide that the United States should prevent import surges from non-VRA countries from taking advantage of the VRAs. The Act provides USTR with authority to limit imports from non-VRA countries in order to carry out the "third country equity" provisions in existing VRAs. Because third country imports would not be counted against existing VRA country quotas, this provision is more likely to be used than the "melted and poured" provision.

B. *Aircraft Manufacturers*

United States aircraft manufacturers benefit from an amendment which enables the Commerce Department to cumulate subsidies granted by individual countries to enable their manufacturers to participate in an international consortium.[3] This amendment is aimed directly at the Airbus consortium, and it closes an arguable loophole in the law that could have made it difficult, for example, to countervail a Spanish government subsidy granted to a company to manufacture wings, when the plane is assembled in West Germany.

In addition, United States aircraft manufacturers are among the industries that benefit from a provision that clarifies the powers of the Commerce Department to subject lease transactions to the dumping and countervailing duty laws.[4] This could prove to be of increasing importance to the United States aircraft industry, as well as to other domestic industries, because

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2. *Id.*

3. Pub. L. No. 100-418, § 1315, 102 Stat. 1107, 1185-86 (to be codified at 19 U.S.C. § 1671) (1988).

4. Pub. L. No. 100-418, § 1327, 102 Stat. 1107, 1205 (to be codified at 19 U.S.C. § 1677) (1988).

leasing is an increasingly common alternative to purchasing aircraft and other capital equipment.

C. *Agriculture*

The domestic agricultural sector benefits from several provisions in the Act. The common theme in all of the agricultural amendments is that the distinction between growers and producers, versus processors and packagers, should be eliminated under certain conditions.

One amendment provides that subsidies granted to producers of raw agricultural products may be countervailed in cases involving processed agricultural products, if demand for the prior stage product is "substantially dependent" on demand for the latter stage product, and the processing of the product adds only limited value to the raw commodity.[5]

Another amendment provides that growers and producers of raw agricultural products may be included as part of the industry producing processed agricultural products.[6] This provision permits the ITC to consider the condition of both growers and processors when determining whether a domestic industry is materially injured, or threatened with material injury, by reason of dumped or subsidized imports of processed agricultural products.

A third amendment increases the likelihood that the ITC will find threat of material injury in cases involving raw and processed agricultural products. This amendment is significant where the ITC finds material injury with respect to either the processed or raw agricultural product, but not both. The Act permits the ITC to consider the prospect of product shifting by an exporter in determining whether there is a threat of material injury.[7]

The final agricultural provision provides that a trade association or coalition of processors, producers and processors, or producers and growers, may file petitions and participate in cases involving raw or processed agricultural products. Such intervention can occur unless USTR notifies the ITC and the

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5. Pub. L. No. 100-418, § 1313, 102 Stat. 1107, 1185 (to be codified at 19 U.S.C. § 1677-1) (1988).

6. Pub. L. No. 100-418, § 1326, 102 Stat. 1107, 1203-04 (to be codified at 19 U.S.C. § 1677(4)) (1988).

7. *Id.*

Commerce Department that this paragraph is inconsistent with the international obligations of the United States.[8]

D. *Semiconductor and High-Tech Industries*

The domestic semiconductor industry benefits from the short life-cycle product provision.[9] Short life-cycle products are defined as products that are state-of-the-art technology for a period of less than four years. The provision provides that a petition must be filed with the ITC by a member of the domestic industry in order to designate a product category as short life-cycle. The petition must establish the existence of a short life-cycle product category and demonstrate that there have been at least two dumping orders in a product category with estimated duties of at least fifteen percent.

Once the ITC establishes a short life-cycle product category, the statute provides for expedited preliminary determinations in dumping investigations, prevents the extension of preliminary determinations by the Commerce Department without petitioner's consent, and mandates an affirmative critical circumstances finding by the Commerce Department.[10]

The domestic semiconductor industry may be able to use the short life-cycle product provision to obtain expedited dumping investigations on semiconductors not covered by the semiconductor agreement if the semiconductor agreement is terminated. In addition, this provision could prove useful for the domestic computer and telecommunications industries should such industries desire to file a series of dumping cases at some point in the future.

The Act also makes minor changes to the statutory standards for the ITC's material injury and threat determinations that benefit high-tech industries. The Act includes a provision that explicitly permits the Commission to consider the actual

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8. *Id.*

9. Pub. L. No. 100-418, § 1323, 102 Stat. 1107, 1195-99 (1988).

10. If both the ITC and the Commerce Department find critical circumstances, then dumping and countervailing duties will be imposed retroactively for a period 90 days earlier than normal. The critical circumstances provision has generally been regarded as meaningless because the ITC has only once made an affirmative critical circumstances determination. Although the Act contains a provision that is supposed to increase the possibility of ITC making an affirmative critical circumstances decision, it largely incorporates current administrative standards that are virtually impossible for a domestic industry to meet. Thus, the Act's requirement of a Commerce Department critical circumstances finding is unlikely to result in the retroactive assessment of dumping duties.

and potential negative effects on the domestic industry's ability to develop derivative or more advanced versions of the like product in its injury analysis.[11] This should assist domestic high-tech industries in obtaining injury findings from the ITC.

III. Provisions of General Applicability

A. *Changes in Practice Before the ITC*

1. *Cumulation*

The Act makes two significant changes which will affect the practice before the ITC. First, the Act exempts "negligible imports" from mandatory "cumulation." Although this provision has received little press, as a practical matter it could make it more difficult for domestic producers to win antidumping and countervailing duty cases against small suppliers.

One of the most important provisions of the Trade and Tariff Act of 1984 was the requirement that the ITC cumulatively assess the impact of imports from several countries simultaneously subject to investigation when determining if imports are a cause of material injury to the domestic industry. Mandatory cumulation was a significant change in the law because, prior to the Trade and Tariff Act of 1984, the Commission viewed cumulation as discretionary. Consequently, the ITC would often refuse to cumulate imports. As a result, the Commission regularly made negative determinations based solely on its decision not to cumulate imports from small suppliers with other import sources.

Section 1330 of the Act provides an exemption to mandatory cumulation for negligible imports that have no discernable impact on the domestic industry. The Act provides that the ITC may consider, among other factors, the following when determining whether imports are negligible:

1. the volume and market share of imports;
2. whether sales transactions involving the imports are isolated and sporadic; and
3. whether the domestic market is price sensitive, so that a small quantity of imports can result in price suppression or depression.

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11. Pub. L. No. 100-418, § 1329, 102 Stat. 1107, 1206 (to be codified at 19 U.S.C. § 1677(7)(f)) (1988).

Depending on how the ITC interprets and applies the negligible import provision, the mandatory cumulation provision could be rendered virtually meaningless. If this turns out to be the case, domestic industries such as the steel industry could face difficulty in prosecuting cases against the numerous countries that individually supply a small percentage of imports, but cumulatively account for a meaningful portion of the market.

Section 1330 of the Act also clarifies the law by granting the ITC discretion to cumulate imports from several countries when determining whether imports are threatening to cause material injury. In addition, it permits the ITC to exempt Israeli imports from cumulation if these imports are not an independent cause of material injury.

2. *Access to confidential information*

The Act also permits counsel and consultants to have access to all business proprietary data submitted to the ITC under an administrative protective order.[12] This provision will enhance the ability of parties to dumping and countervailing duty cases to prepare their respective cases. Although this provision is thought to provide some advantage to foreign respondents because they will be gaining access to data on the economic condition of each domestic producer, the Commission has misinterpreted confidential data in enough instances to warrant this provision, which will allow counsel to independently analyze business proprietary data.

3. *Revocation of injury test*

The Act codifies the current practice which permits USTR to revoke the injury test for countries that violate their bilateral subsidies code commitments with the United States.[13] In addition, the Act also requires USTR to review compliance of all bilateral subsidies code commitments and to recommend to Congress how compliance can be improved. This study could make it difficult for USTR to ignore countries that violate their bilateral subsidy commitments with the United States. Brazil and Turkey are two candidates for having their injury tests revoked.

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12. Pub. L. No. 100-418, § 1332, 102 Stat. 1107, 1207-09 (to be codified at 19 U.S.C. § 1677(f)) (1988).

13. Pub. L. No. 100-418, § 1314, 102 Stat. 1107, 1185 (to be codified at 19 U.S.C. § 1671) (1988).

B. *Changes in Proving Dumping and Subsidies Before the Commerce Department*

1. *Non-market economies*

The Act makes significant changes in the treatment of non-market economy countries under the antidumping law. Pursuant to the antidumping laws, dumping is normally determined by comparing a foreign company's prices for sales to the United States with the manufacturer's prices in its home market or its actual cost of production. Because home market prices and manufacturing costs are not determined by competitive forces in non-market economies, these prices and costs are not used to determine the presence or absence of dumping in cases involving non-market economies. Instead, home market prices in a surrogate market economy are used to determine whether goods sold in the United States are dumped.

The surrogate system was criticized by both domestic producers and foreign respondents alike because dumping margins could vary widely depending upon the surrogate country selected by the Commerce Department, and because it was difficult to find companies that were willing to cooperate by being a surrogate. Section 1316 of the Act provides for a "factors of production" approach as the preferred means for determining foreign market value. Pursuant to this approach, the Commerce Department measures the number of hours required, quantities of raw material employed, the amount of energy and other utilities consumed, and the representative capital costs (including depreciation) for an NME manufacturer to produce a product. Commerce then values these factors in a comparable market economy. Because much of this information can be obtained from public sources, (*i.e.*, industry wage rates) the cooperation of a surrogate may not be necessary. In addition, this approach is regarded as being more fair than the surrogate approach because the foreign market value of an NME producer is related to the efficiency of the NME producer. Thus, efficient producers are less likely to have dumping margins, while inefficient producers are more likely to be found dumping, or dumping by higher margins.

2. *Domestic subsidies*

The domestic subsidy provision could also result in the Commerce Department finding more subsidy programs

countervailable. Under current practice, a domestic subsidy (*i.e.*, a subsidy that is unrelated to export activities) is countervailable only if it is provided to a specific company, industry group of companies, or group of industries, either *de jure* or *de facto*.

Section 1312 of the Act appears to codify current practices. However, the Senate Finance Committee Report indicates that the Senate intended to codify the Court of International Trade's decision in *Cabot Corp. v. United States*,[14] which held that any domestic subsidy, even if it is generally available, can be countervailed if it provides a competitive advantage to a particular industry. While it is unlikely that the Commerce Department provision will immediately change its practice, the provision could eventually result in a major expansion in the types of domestic subsidies that are countervailable.

C. *Amendments to Rules for Enforcement of Dumping and Countervailing Duty Orders*

1. *Prevention of circumvention*

Circumvention of the dumping law has evolved into a growing problem. The Act clarifies existing practice by clearly enabling the Commerce Department to include merchandise under an order if it is assembled in the U.S., or a third country, from parts and components imported from other countries where the finished merchandise is subject to an order.[15] In addition, the law also enhances the ability of the Commerce Department to include within a dumping order articles which are subject to minor alterations or processing in order to avoid a dumping order. The Act also clarifies the Commerce Department's authority to include later-developed merchandise which has the same general characteristics and uses as earlier generations of merchandise that are subject to order.

2. *Government imports and duty drawback*

The Act largely eliminates an exemption to the dumping and countervailing duty laws for merchandise imported by or on

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14. 620 F. Supp. 722 (Ct. Int'l Trade 1985).

15. Pub. L. No. 100-418, § 1321, 102 Stat. 1107, 1192-95 (to be codified at 19 U.S.C. § 1677) (1988).

behalf of the U.S. government.[16] In addition, duty drawback is eliminated for dumping and countervailing duties.[17]

3. *Fictitious markets*

The Act permits the Commerce Department to reject home market prices that are intentionally manipulated in order to reduce dumping margins following the issuance of a dumping order, if those home market prices follow a different trend than in other markets.[18] This provision could curtail attempts to reduce dumping margins by lowering home market prices. However, the usefulness of this provision is largely dependent upon the Commerce Department's willingness to enforce it, and this is unlikely.

This article is the second in a series of three by the author. The third part will appear in a future edition of the Review.

16. Pub. L. No. 100-418, § 1335, 102 Stat. 1107, 1210 (to be codified at 19 U.S.C. § 1677) (1988).

17. Pub. L. No. 100-418, § 1334, 102 Stat. 1107, 1209-10 (to be codified at 19 U.S.C. § 1677(h)) (1988).

18. *Id.* § 1319.