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Antidumping and Countervailing Duty Laws: The Quest to Control Nonmarket Economy Countries

I. INTRODUCTION

International trade has recently become a very hot topic. Interest in this subject has been fueled by better international communication, accessibility to foreign goods, a rising trade deficit, and constant allegations of unfair trade practices by politicians.

Antidumping and countervailing duty laws are regularly invoked by U.S. manufacturers seeking relief from unfair trade practices.¹ In making the new Omnibus Trade and Competitiveness Act of 1988,² a controversial issue was how the United States would deal with dumping and subsidies by nonmarket economy countries (NME).³ Improvements have been made, but the current antidumping and countervailing duty laws still need improvement because their application remains arbitrary, unpredictable, and does not give sufficient guidelines for NME's to follow. To understand the difficulty in preventing dumping and subsidies by NME's, a general review of antidumping and countervailing duty laws is appropriate.

II. ANTIDUMPING LAW

Antidumping law was designed to counter dumping by foreign countries.⁴ Dumping is simply defined as price discrimina-

1. See *Comprehensive Trade Legislation: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 100th Cong., 1st Sess. 652 (1987) [hereinafter *1987 House Hearings*].

2. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (to be codified at scattered sections in 19 U.S.C.) [hereinafter the 1988 Omnibus Trade Act].

3. A "nonmarket economy country" is defined as a country that "does not operate on market principles of cost or pricing structures, so that sales of merchandise do not reflect the fair value of such merchandise." 19 U.S.C.A. § 1677(18)(A) (West Supp. 1988).

4. Jacob Viner, who provided the definition of dumping used by the General Agreements on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter GATT], stated that dumping is used for such price practices as customs undervaluation, local price cutting, and selling in one national market at a lower price than in another. J. VINER, *DUMPING: A PROBLEM IN INTERNATIONAL TRADE* 3 (1923 & reprinted 1966).

tion between national markets. The House Committee of Ways and Means noted: "Dumping generally refers to a form of international price discrimination, whereby goods are sold in an export market (such as the United States) at prices which are lower than the prices at which comparable goods are sold in the home market of the exporter or in other export markets."⁵

In order to control dumping, a sanction equal to the adjusted price differential of the dumped goods was created.⁶ This penalty, known as an antidumping duty, is the difference between the foreign purchaser's price and the home market's or U.S.'s price.⁷ This law contains a bifurcated statutory process where, (1) the Department of Commerce (or Commerce Department) determines whether imports are being dumped into the U.S.; and (2) the International Trade Commission (ITC) determines whether: (a) an industry in the United States is materially injured or is threatened with material injury,⁸ or (b) the establishment of an industry in the United States is materially retarded by reason of the foreign imports.⁹

III. COUNTERVAILING DUTY LAW

Countervailing Duty Law is designed to prevent subsidies by foreign countries. The purpose of this law is to prevent the giving of subsidies to manufacturers which enable them to produce and sell their product at a much lower price. The term "subsidy" has the same meaning as the term "bounty or grant."¹⁰ Subsidies are provided to both exporters and

5. STAFF OF HOUSE SUBCOMMITTEE ON TRADE, 98TH CONG., 2D SESS., OVERVIEW OF CURRENT PROVISIONS OF U.S. TRADE LAW 39 (Comm. Print 1984).

6. Antidumping Duty Act of 1921, ch. 14, § 201, 42 Stat. 11 (codified as amended at 19 U.S.C. §§ 160-171 (1976)). The 1921 Antidumping Act was *repealed* by the Trade Agreements Act of 1979, Pub. L. No. 96-39, tit. I, § 106(a), 93 Stat. 193, and then the 1921 Act was *replaced* by the Tariff Act of 1930, ch. 497, tit. VII, § 701, 93 Stat. 151 (codified at 19 U.S.C. §§ 1671-1677g (1982)).

7. Antidumping law is remedial and not punitive in nature; it was designed to protect domestic industry from sales of imported merchandise as less than fair value which either caused or threatened to cause injury. *Badger-Powhatan, Div. of Figgie Int'l, Inc. v. United States*, 608 F. Supp. 653 (Ct. Int'l Trade 1985).

8. The term "material injury" is defined in the Trade Agreements Act as, "a harm which is not inconsequential, immaterial, or unimportant." 19 U.S.C. § 1677(7)(A) (1982).

9. 19 U.S.C.A. § 1673(2) (West 1982 & Supp. 1988).

10. 19 U.S.C.A. § 1677(5) (West 1982 & Supp. 1988) provides as follows:

(5) Subsidy. The term "subsidy" has the same meaning as the term "bounty or grant" as that term is used in section 1303 of this title, and includes, but is not limited to, the following:

nonexporters as a means of reducing the overall costs of manufacture, production, and distribution.¹¹ Subsidies usually entail the following: (1) capital or loans with inconsistent terms; (2) goods or services at preferential rates; (3) a grant of funds or forgiveness of debt to cover operating losses; and (4) assumption of any costs of manufacture, production, or distribution.¹² U.S. law authorizes countervailing duties on goods only when a foreign government, person, partnership, association or corporation bestowed a grant or bounty upon the manufacture or export of an article produced in a foreign country and then imported into the United States.¹³

The countervailing duty law proscribes two forms of assistance: export subsidies and domestic subsidies.¹⁴ Export subsidies affect the marginal cost of production of exported goods only, whereas domestic subsidies affect the marginal cost of production of goods for both domestic consumption and export.¹⁵ Unlike export subsidies, to be actionable against a domestic subsidy, the subsidy must be provided to a specific enterprise or industry, and it must be paid directly or indirectly to the manufacture of a certain product.¹⁶

When the United States is investigating the possibility of a

(A) Any export subsidy described in Annex A to the Agreement (relating to illustrative list of export subsidies).

(B) The following domestic subsidies, if provided or required by government action to a specific enterprise or industries, whether publicly or privately owned, and whether paid or bestowed directly or indirectly on the manufacture, production, or export of any class or kind of merchandise;

(i) The provision of capital loans, or loan guarantees on terms inconsistent with commercial considerations.

(ii) The provision of goods or services at preferential rates.

(iii) The grant of funds or forgiveness of debt to cover operating losses sustained by a specific industry.

(iv) The assumption of any costs or expenses of manufacture, production, or distribution.

11. *Id.* § 1677(5) (West 1982 & Supp. 1988).

12. *Id.*

13. 19 U.S.C. § 1303(a)(1) (1982) provides that in the case of an article or merchandise which is the product of a country under the Agreement, whenever any country, association, or corporation, shall pay, directly or indirectly, any bounty or grant upon the manufacture or export of any article or merchandise manufactured in such country, then upon the importation of such article or merchandise into the United States there shall be levied and paid a duty equal to the net amount of such bounty or grant.

14. 19 U.S.C.A. § 1677(5) (West 1982 & Supp. 1988).

15. Domestic subsidies are provided to both exporters and nonexporters as a means of reducing the overall costs of manufacture, production, and distribution. 19 U.S.C.A. § 1677(5)(B) (West Supp. 1988).

16. 19 U.S.C.A. § 1677(5)(B) (West Supp. 1988).

subsidy, as in the case of dumping, evidence of subsidization is evaluated by the Department of Commerce. The difference between countervailing duty law and antidumping law is that there is no material injury test.¹⁷ The ITC injury finding is only required for those countries which are either signatories to the GATT¹⁸ Subsidies Code¹⁹ or those which provide reciprocal benefits.

With this overview of antidumping law and countervailing duty law in mind, the remainder of the paper will deal with the relationship between dumping, subsidies, and NME's.

IV. THE OMNIBUS TRADE AND COMPETITIVENESS ACT OF 1988 AND ITS ROLE IN DEALING WITH NONMARKET ECONOMY COUNTRIES

A. *Measuring the Dumping Margins of Nonmarket Economy Imports*

A controversial issue in the 1988 Omnibus Trade Act was the problem of dumping and subsidies by NME's. NME's have two basic problems: (1) they do not have economies based on market factors; and (2) they have nonconvertible currency.

In the simplest antidumping cases, the Commerce Department must determine whether a foreign producer has dumped by discriminating in price between its home market sales price and export sales price. If the Commerce Department determines that dumping has occurred, then the ITC looks to see if the U.S. industry producing comparable merchandise has been materially injured.²⁰ If U.S. industry has been materially injured, the Commerce Department will issue an antidumping order equal to the difference between the producer's adjusted foreign market value and the U.S. price (the dumping margin).²¹

Cases involving dumped imports from NME's are unique because domestic costs and prices in an NME are not based upon market factors. Thus, they do not provide the Commerce

17. "Material injury" is a harm which is not inconsequential, immaterial, or unimportant. *See supra* note 8.

18. *See supra* note 4.

19. Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT, April 12, 1979, 31 U.S.T. 513, T.I.A.S. No. 9619 (entered into force Jan. 1, 1980).

20. 19 U.S.C. § 1677(7)(A) (1982).

21. 19 U.S.C. § 1673d(c)(2) (1982).

Department with a proper basis of comparison between the NME's sales price and the U.S. sales price.²²

NME's also have nonconvertible currency. This makes it difficult for the Commerce Department to convert the NME's currency to a U.S. dollar basis, which is necessary for dumping computation and duty assessment purposes.²³

In order to remedy these problems, the Commerce Department developed three methods to determine the dumping margin. These methods are called: (1) the "surrogate country" method, (2) the "standard constructed value" approach, and (3) the "factors of production" method. All three methods use a surrogate country market.²⁴

The Commerce Department used these three methods until the 1988 Omnibus Trade Act when the methods were replaced by the newly refined "factors of production" method. The "surrogate country" method priced similar merchandise at a similar stage of development from a market economy country and used their currency to determine the foreign market value of the subject imports.²⁵ The relevant prices were used from this "surrogate" market economy as a substitute for the prices of the NME.

If verifiable domestic and export prices were not available from a surrogate country, the Commerce Department then used a standard constructed value approach.²⁶ This approach substituted a value based upon costs of production in the NME plus an additional ten percent overhead factor and a minimum eight percent profit markup.²⁷

If similar merchandise was not produced in a comparable surrogate country, then a value based upon factors of production method was used.²⁸ This value was based upon prices and manufacturing costs in a market economy that were reasonably comparable in economic development to the NME.²⁹

22. The relevant statutory provision, 19 U.S.C.A. § 1677b(c) (West Supp. 1988), provides that when the economy of a country is controlled to the extent that fair market value cannot be determined, then the Commerce Department is to use either a "surrogate country" or constructed value methodology. *See also* 19 C.F.R. § 353.8 (1988).

23. 19 U.S.C.A. § 1677b(c) (West Supp. 1988).

24. *Id.*

25. *Id.*

26. This occurs because some producers are not under a legal obligation to divulge prices and other data to the United States. S. REP. No. 71, 100th Cong., 1st Sess. 106 (1987).

27. 19 C.F.R. § 353.6 (1988).

28. 19 C.F.R. § 353.8(c) (1988).

29. *See, e.g.,* Barium Carbonate from the PRC, 49 Fed. Reg. 33,913 (Int'l Trade

It was against these "surrogate" prices that the NME's sales to U.S. industry were measured to determine whether dumping had occurred. If dumping had occurred and the ITC found material injury,³⁰ then the Commerce Department could use these "surrogate" figures to determine the amount of the antidumping duties.³¹

The surrogate country method was almost always the method used and it created a great deal of unpredictability for both the NME's and for their competing domestic industry.³² Because this method was so highly discretionary, it was almost impossible for an exporter from an NME economy to predict whether or not he would be hit with antidumping duties.³³

As a result of the deficiencies with the current surrogate country methodology to value NME's exports, numerous proposals were advanced in Congress that would make the administration of the NME's antidumping provisions more predictable.³⁴ While the House bill did not contain an NME dumping provision, the Senate and the Administration suggested alternative pricing formulations.³⁵

Two benchmark tests were proposed,³⁶ but the Senate and House realized that the benchmark formulations were as arbitrary as the "surrogate country" methodologies. Thus, the House and the Senate eliminated the "surrogate country" methodology

Admin. 1984)(final determination); Potassium Permanganate from the PRC, 48 Fed. Reg. 57,347 (1983)(final determination).

30. See *supra* note 8.

31. 19 U.S.C.A. § 1677b(c) (West Supp. 1988).

32. S. REP. No. 71, 100th Cong., 1st Sess. 106 (1987).

33. *Id.* at 108; see also H.R. REP. No. 725, 98th Cong., 2d Sess. 41 (1984).

34. For example, in 1984, an artificial pricing provision was proposed under which the Commerce Department determined foreign market value based on the lowest free market price in a U.S. market. If that price was a competitive free market price, then it could be used as an alternative to the statutory "surrogate country" test. See H.R. REP. No. 725, 98th Cong. 2d Sess. 40 (1984).

35. 1987 House Hearings, *supra* note 1, at 652.

36. The Senate proposed a dumping benchmark test based upon the foreign market value (FMV) of merchandise in an eligible market economy country (an "eligible market economy country" is any country that is not an NME, where comparable goods are produced and exported. S. REP. No. 71, 100th Cong., 1st Sess. 108 (1987)). The FMV would be determined by using a trade-weighted average price of sales in the U.S. of comparable merchandise produced by the eligible market economy country that was accounting for the largest volume of U.S. imports in the most recent period. S. 490, 100th Cong., 1st Sess., 132 CONG. REC. S1852 (daily ed. Feb. 5, 1987). The Administration's benchmark test differed in that the FMV would be determined by using the lowest import price to the U.S. from an eligible market economy country. 1987 House Hearings, *supra* note 1, at 652.

and the standard constructed value approach, but kept and refined the "factors of production" method.³⁷

This refined method established in the 1988 Omnibus Trade Act is based upon the "factors of production" incurred in producing merchandise in an NME.³⁸ The refined "factors of production" method requires the use of data based on production of comparable merchandise in a market economy at a similar production scale and level of technology of the NME being investigated.³⁹ This refined method also requires use of a market economy country that is at a comparable economic level with the NME and is a significant producer.⁴⁰

Although Congress and the Senate felt they improved the manner of dealing with dumping by NME's, the same problems that existed with the previous methods will continue to exist with the newly refined "factors of production" method. The first problem with the new method is that its application to NME's is very arbitrary. Although the scope of the list of potential countries which can be selected for the factors of production method has arguably been narrowed, it is still an arbitrary decision by the Commerce Department as to what country will be selected. Congress should make lists with some firm assignments on them. For example, China's radial tire prices could be matched with Japan's radial tire prices. If this is not done, the assignment of surrogate country prices to NME's prices will continue to be an arbitrary decision made by the Commerce Department.

The second problem is the unpredictability of the results obtained by this method. Since a different country can be chosen for each different product produced by an NME, or two or three countries can be chosen for a specific product, the results obtained by the "factors of production" method will continue to be unpredictable.⁴¹ It will still be a guessing game to try to de-

37. Therefore, the 1988 Omnibus Trade Act omitted the surrogate country method and the standard constructed value approach. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1316, 102 Stat. 1107, 1186 (codified at 19 U.S.C.A. §§ 1673c, 1677, 1677b (West Supp. 1988)). See also *Joint Explanatory Statement of the Committee of Conference*, 133 CONG. REC. H2032 (daily ed. Apr. 20, 1988) [hereinafter *Joint Conference Statement*].

38. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1316, 102 Stat. 1107, 1186 (codified at 19 U.S.C.A. §§ 1673c, 1677, 1677b (West Supp. 1988)).

39. *Joint Conference Statement*, *supra* note 37, at H2032.

40. "Significant producers" are countries that are significant exporters of merchandise. *Id.*

41. S. REP. No. 71, 100th Cong., 1st Sess. 108 (1987); see also H.R. REP. No. 725, 98th Cong., 2d Sess. 41 (1984).

termine when an NME is involved in dumping and what amount the antidumping duty should be. If the Commerce Department made detailed price lists, etc., the dumping and its results would be much more predictable for NME's and U.S. industry.

The third problem with the new method is the lack of any guidelines for NME's. At the present time, NME's can only guess as to when a price they charge will be considered dumping.⁴² An NME cannot spend all of its time trying to compare its exports with other countries exports in hopes of avoiding dumping. It is not realistic to require nonmarket countries to follow guidelines which only vaguely exist. If the U.S. is going to require NME's to exist within guidelines, then it needs to set up clear guidelines for them to follow.

In dealing with NME's, it may be easier for the U.S. to cope with a limited amount of dumping, by supporting free trade, than to try to administer antidumping sanctions that are arbitrary, unpredictable, and do not provide NME's with any guidelines of how to prevent dumping in the future.

B. Imposition of Countervailing Duties on Products From Nonmarket Countries

The 1988 Omnibus Trade Act does not provide the United States with a special provision geared to directly attack subsidies by NME's.⁴³ Throughout the years, the Commerce Department has held that countervailing duty law does not apply to NME's. Although there is not any statutory law regarding subsidies by NME's, there are a group of cases which have wrestled with the applicability of countervailing duty law to NME's. The two most prominent cases are *Continental Steel*⁴⁴ and *Georgetown Steel*.⁴⁵

In *Continental Steel*, actions were brought to challenge the conclusion of the Commerce Department that, as a matter of law, subsidies cannot be found in NME's. The Court of Interna-

42. See *Golf Cars from Poland*, 40 Fed. Reg. 25497 (1975).

43. There is not any statutory law which provides that subsidies can be found in NME's. 19 U.S.C.A. § 1677 (West 1982 and Supp. 1988). See also, Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1316, 102 Stat. 1107, 1186 (codified at 19 U.S.C.A. §§1673c, 1677, 1677b (West Supp. 1988)).

44. *Continental Steel Corp. v. United States*, 614 F. Supp. 548 (Ct. Int'l Trade 1985), *rev'd sub. nom. Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986).

45. *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986).

tional Trade disagreed with the Commerce Department in this case and held that countervailing duty law covers countries with nonmarket economies.⁴⁶ This court's decision was the first time that a reviewing court had stated that bounties or grants, which constitute subsidies, could exist in NME's.⁴⁷

The court's application of countervailing duties to NME's in *Continental Steel* would have required the Commerce Department to detect and measure alleged subsidies in NME's had it not been for the *Georgetown Steel* decision. The Federal Circuit Court in *Georgetown Steel* reversed the Court of International Trade in *Continental Steel* and held that alleged subsidies provided by NME's were not "bounty" or "grant" within the meaning of the statute which requires a countervailing duty. Thus, the statute was inapplicable to NME's.⁴⁸

The Court of International Trade made a strong argument by noting that Article 15 of the Subsidies Code⁴⁹ gave "a country the choice of using subsidy law [countervailing duty law] or antidumping law for imports from a country with a state-controlled economy. . . ."⁵⁰ For this reason, the Court of International Trade felt there was overwhelming evidence that countervailing duty law was to cover NME's.⁵¹

The Federal Circuit Court rejected the Court of International Trade's argument by stating that Congress had decided that the proper method for protecting U.S. markets against selling by NME's at unreasonably low prices is through antidumping law.⁵² The Court went on to state that if that remedy is inadequate to protect U.S. industries, then it is up to Congress to provide additional remedies.⁵³

Since both statutory law and case law currently do not allow countervailing duties to be applied against NME's, two other alternatives have been looked at as possibilities to attack subsidies

46. *Continental Steel*, 614 F. Supp. at 548.

47. See *International Trade: Imposition of Countervailing Duties on Products From Nonmarket Countries*, 27 HARV. INT'L L.J. 745 (1986).

48. *Georgetown Steel*, 801 F.2d at 1309.

49. Agreement on Interpretation and Application of Article XV of the GATT, April 12, 1979, 31 U.S.T. 513, T.I.A.S. No. 9619 (entered into force Jan. 1, 1980).

50. *Continental Steel*, 614 F. Supp. at 556-57.

51. *Id.*

52. *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1318 (Fed. Cir. 1986).

53. *Id.*

by NME's. These two alternatives are section 406 of the Trade Act of 1974⁵⁴ and the statutory antidumping law.

Section 406 requires an investigation by the ITC and action by the Administration if market disruption is caused by imports from Communist countries. Market disruption exists when "rapidly"⁵⁵ increasing imports from Communist countries are a "significant cause"⁵⁶ of material injury to U.S. industry.

In the 1988 Omnibus Trade Act, section 406 was strengthened to provide protection against unfair trade by Communist countries. This section was believed to be a better solution by Congress and the Senate, rather than attempting to initiate new countervailing duty law against NME's.

In 1987, legislation was introduced to both the House and Senate to overturn the *Georgetown Steel* decision and apply countervailing duty laws against NME's.⁵⁷ Fortunately, considering the many problems that have arisen due to antidumping laws being assessed against NME's, Congress and the Senate considered the proposed methods inadequate and did not include them in that Trade Act or in the current 1988 Omnibus Trade Act.⁵⁸ If Congress and the Senate were to enact legislation to apply countervailing duties and attempt to assess subsidies against NME's, they would end up with the same problems that exist with antidumping law.

V. CONCLUSION

Attempting to apply antidumping laws to NME's is admirable, but the fact still remains that the process is arbitrary, unpredictable, and does not provide sufficient guidelines for NME's to follow. Congress should examine the cost of dumping by NME's in relation to the administrative burden and set up clear guidelines. By not applying countervailing duty law to

54. 19 U.S.C.A. § 2436 (West 1982 & Supp. 1988).

55. "Rapidly" is defined as a significant increase during a recent period of time. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1411, 102 Stat. 1107, 1241 (codified at 19 U.S.C.A. § 2436 (West 1982 & Supp. 1988)).

56. "Significant cause" is defined as a cause which contributes significantly to the material injury of the industry, but need not be equal to or greater than any other cause. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1411, 102 Stat. 1107, 1241 (codified at 19 U.S.C.A. § 2436 (West 1982 & Supp. 1988)).

57. See, e.g., Trade and International Economic Policy Reform Act of 1987, H.R. 3, § 157, 100th Cong., 1st Sess. (1987).

58. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1316, 102 Stat. 1107, 1186 (codified at 19 U.S.C.A. §§ 1673c, 1677, 1677b (West Supp. 1988)).

NME's, Congress is relieving some of the administrative burden and is attempting to encourage fair trade by using other methods.

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