# RECENT DEVELOPMENTS

## ANTIDUMPING LAW: THE COURT OF INTERNATIONAL TRADE ESTABLISHES THE GUIDELINES THE INTERNATIONAL TRADE COMMISSION MUST FOLLOW IN ASSESSING THE VALIDITY OF AN EXISTING ANTIDUMPING ORDER

Plaintiffs, several Japanese manufacturers of television sets,[1] sought review in 1982 of the International Trade Commission's (ITC) ten-year-old determination[2] that their imports threatened an industry in the United States with injury.[3] After a ten-month investigation[4] the ITC ruled that it would not disturb its 1971 find-

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[1] The plaintiffs were Matsushita Elec. Co., Ltd., Matsushita Elec. Corp. of Am., Panasonic Hawaii, Inc., Panasonic Sales Co. (a division of Matsushita Elec. of Puerto Rico, Inc.); Victor Co. of Japan, Ltd., United States JVC Corp.; Sanyo Elec. Co., Ltd., Sanyo Elec., Inc., Sanyo Mfg. Corp.; Hitachi, Ltd., Hitachi Sales Corp. of Am., Hitachi Sales Corp. of Hawaii; Sharp Elec. Corp; Toshiba Corp., Toshiba Am., Inc., Toshiba Hawaii, Inc.; Mitsubishi Elec. Corp.; and Gen. Corp. of Japan. *See* Matsushita Elec. Indus. Co. v. United States, No. 83-69, slip op. (Ct. Int'l Trade July 14, 1983), *reprinted in* 17 Cust. B. & Dec., Aug. 10, 1983, at 37, 39 n.1.

[2] The orginal finding was published in Television Receiving Sets From Japan, 36 Fed. Reg. 4576 (1971).

[3] Television Receiving Sets From Japan, 46 Fed. Reg. 32, 702 (1981). The plaintiffs sought review of the order under the authority of 19 U.S.C. § 1675 (Supp. V 1981), which provides: (b)(1)-Whenever the administering authority or the Commission [ITC] receives information concerning, or a request for the review of,. . .an affirmative determination . . .which shows changed circumstances sufficient to warrant a review of such determination, it shall conduct such a review after publishing notice of the review in the Federal Register.

At the time of the 1971 ruling the ITC was required to find only "injury" to a domestic industry before an antidumping order could be imposed. The Trade Agreements Act of 1979 amended 19 U.S.C. § 1673d(b) (Supp. V 1981) so that the ITC must now find "material injury" before the Treasury Department can issue trade regulations (see *infra notes* 32-36). Section 1673d(b) now reads:

> (i) In general The Commission shall make a final determination of whether-
> (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 the merchandise with respect to which the administering authority has made an affirmative determination [that merchandise is being sold in the United States at less than its fair value].

[4] The ITC announced it would review the earlier determination on Sept. 16, 1980, and it set a deadline of Jan. 13, 1981, for termination of the investigation. Due to difficulties in

ing nor the antidumping order which had been issued in conjunction with it.[5] The ITC acknowledged it was making its ruling in spite of information showing a sharp decrease in imports in Japanese televisions[6] and considerable improvement in the health of the domestic industry;[7] the majority of the Commissioners, however, felt that the ITC's investigative duty did not end with the assessment of present data but that it also entailed the prediction of what economic circumstances would follow lifting of the antidumping order.[8] Based upon its examination of the evidence available concerning the predicted reaction of the Japanese manufacturers, the ITC ruled that material injury to the domestic television industry would recur if the order was lifted.[9] On appeal to

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obtaining data from the Japanese television manufacturers, however, the ITC extended its deadline for gathering data until June 12, 1981. Television Receiving Sets from Japan, 46 Fed. Reg. 24,034 (1981).

[5] Television Receiving Sets From Japan, 46 Fed. Reg. 32,702 (1981).

[6] In the five years preceding the 1981 investigation, imports from Japan had fallen 91%, the ITC found. The commissioners attributed this drop to the establishment by 10 Japanese firms of manufacturing plants within the United States after the imposition of the original antidumping order. This restructuring of manufacturing operations caused the reclassification of television receivers from imports to domestic production. *Id.* at 32,704-05.

[7] The ITC found that in the five years prior to 1981 production in the domestic television manufacturing industry had risen 80%; capacity, 25%; and shipments, 70%; while capacity utilization had increased to 88% of full potential. *Id.* at 32,705.

[8] The ITC found this duty to assess future intentions of importers in the event of lifting of an antidumping order in its own regulations:

> Upon the receipt of information concerning, or upon a request for review of, a determination. . .which resulted in an order issued under the Antidumping Act,. . .the Commission shall institute an investigation to determine, as the case may be: (1) Whether, in light of the changed circumstances, the agreement continues to completely eliminate the injurious effect of imports of the merchandise; or (2) whether an industry in the United States would be materially injured, or would be threatened with material injury, or the establishment of an industry in the United States would be materially retarded, by reason of imports of the merchandise covered by the. . .antidumping order if the order were to be modified or revoked.

Investigation to review outstanding determinations, 19 C.F.R. § 207.45 (1983), Television Receiving Sets From Japan, 46 Fed. Reg. 32,704 (1981).

[9] Commissioner Paula Stern dissented from the determination that the antidumping order was still required. She charged that the majority had departed from the standard of review which the ITC had established for itself in previous cases in which review of existing regulations was undertaken:

> [Section 1675(b)(1) (*see supra* note 3)] provides no explicit criteria for analysis of the presence of material injury, or the threat thereof. However, a careful review of the statute, the legislative history, past Commission practice, relevant international agreements, and the underlying purpose of the relevant section of the law suggests an appropriate basis for review. The underlying purpose of (the section) is to remove unnecessary barriers to trade in the form of antidumping duties which are no longer necessary and will not be necessary to protect U.S. industries

the Court of International Trade, *held*: reversed. The ITC failed to found its prediction of material injury in the face of a lifted antidumping order on the statutorily required basis of "substantial evidence."[10] Matsushita Electric Industry Company v. United States, No. 83069, slip op. (Ct. Int'l Trade July 14, 1983), *reprinted in* 17 Cust. B. & Dec., at 37.

Dumping has been defined as "price discrimination between national markets."[11] The motive of the dumping party in selling its goods in a foreign market at a price lower than their fair value in the home market may vary from the desire to rid itself of temporary oversupply,[12] to gain a foothold in a new market while keeping home prices high,[13] or to drive all competitors out of an established market.[14] Economists have historically agreed that at least the

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from the injury of unfair trade practices.

Television Receiving Sets From Japan, 46 Fed. Reg. at 32,708.

Commissioner Stern also chastised the majority for not using enough diligence in its search for facts but instead placing the burden of proving a lack of intent to import at prices less than fair value after lifting of the antidumping order on the proponents of revocation. Her own investigation of available data led her to the opinion that even if dumping did occur with the lifting of the order, it would only nominally affect prices. She also found that the decrease in imports of Japanese-manufactured television sets was a trend unlikely to be reversed. Commissioner Stern concluded the majority simply did not have the necessary evidence to support its prediction of "material injury" if the antidumping order was withdrawn. Television Receiving Sets from Japan, 46 Fed. Reg. at 32,707-13.

[10] The court conducted its review of the ITC findings under the authority of 19 U.S.C. § 1516a(b)(1) (Supp. V 1981):

> The court shall hold unlawful any determination, finding or conclusion found. . .
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> (B) in an action brought [after a final determination by an administrative agency], to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.

[11] J. VINER, DUMPING: A PROBLEM IN INTERNATIONAL TRADE 3 (Reprinted 1966).

[12] Professor Viner labels the importer seeking fulfillment of this goal a practitioner of "sporadic" dumping. *Id.* at 23-25.

[13] Maintaining high prices at home by exporting surplus goods at less than fair value is characteristic of "long-term," or "continuous," dumping. Viner classifies other goals of the long-term dumper as the desire to maintain economics of scale which may result in surplus production and the desire merely to stimulate export trade at the behest of the home government. *Id.* at 27-29.

[14] According to the Viner categorizations this attempt to drive all competitors out of the import market is "predatory," or "malignant," dumping. A subcategory of "short-run," or "intermittent," dumping, may also be employed "to maintain connections in a market in which prices are on remaining considerations unacceptable,. . .[and] to retaliate against dumping in the reverse direction." *Id.* at 23, 25-27. Viner's categorizations have become the standard reference for classification of the types of dumping. For review of and amplification upon the Viner scheme, see Ehrenhaft, *Protection Against International Price Discrimination: United States Countervailing and Antidumping Duties*, 58 COLUM. L. REV. 44, 46-47 (1958); W. WARES, THE THEORY OF DUMPING AND AMERICAN COMMERCIAL POLICY 3-12

third of these goals is illegitimate, for pursuit of it results in temporarily lower consumer prices which can be dramatically raised once the importer has driven all competitors from the market.[15] The debate concerning dumping thus centers on the remaining question of whether dumpers who pursue either of the first two goals actually damage the economy. "Free trade" economists have long contended that it is improvident to levy duties on importers who are fairly exploiting comparative economic advantages of their home countries and thereby benefitting consumers in the country of importation by undercutting prevailing market prices.[16] "Protec-

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(1977); Weeks, *Introduction to the Antidumping Law: A Form of Protection for American Manufacturers*, 35 ALB. L. REV. 182, 182-83 (1971).

[15] One author summed up the argument against predatory dumping:

> According to the theory of international free trade, free competition among nations will maximize efficiency and result in lower prices, as each nation specializes in producing those goods for which it is best suited. Short-run or predatory dumping of the kind just described, because it derails this "natural law" of comparative advantage, constitutes an unfair international trade practice, against which nations espousing free trade principles may legitimately defend themselves.

Comment, *Dumping by State-Controlled Economy Countries: The Polish Golf Cart Case and the New Treasury Regulations*, 128 U. PA. L. REV. 217, 221. For further commentary on and condemnation of predatory dumping, see J. VINER, *supra* note 11, at 26; L. LLOYD, TARIFFS: THE CASE FOR PROTECTION 158 (1955); Silverman, *An Examination of the Antidumping Provisions of the Trade Agreements Act of 1979: United States Implementation of the Antidumping Code Formulated in the Tokyo Round*, 7 SYRACUSE J. INT'L L. & COM. 239, 241 (1979-80). Economists do differ on the question of whether predatory dumping in reality can often be practiced. One author has argued that the predatory dumper must necessarily have a monopoly in his home market to be able to cover the losses resulting from export of goods at less than their fair market value. Also, the predatory dumper "must be sure that his home market is effectively isolated from the market in which his goods are dumped, lest the cheap goods be reimported and then be used to undercut the producer's high home price." This set of circumstances, the author concludes, "is neither an easily arranged practice nor a common experience." Ehrenhaft, *supra* note 14, at 49. "Because the costs of predation are high and the gains speculative, the empirical evidence indicates that predatory dumping is very rare." Myerson, *A Review of Current Antidumping Procedures: United States Law and the Case of Japan*, 15 COLUM. J. TRANSNAT'L L. 167, 172 (1976). For other explanations of why predatory dumping is the exception rather than the rule, see Schwartz and Harper, *The Regulation of Subsidies Affecting International Trade*, 70 MICH. L. REV. 831, 838-39 (1972); L. YEAGER AND D. TUERCK, FOREIGN TRADE AND U.S. POLICY: THE CASE FOR FREE INTERNATIONAL TRADE 129 (1976). Although he had admitted predatory dumping is a relatively rare phenomenon, another author has questioned whether a monopoly is first necessary to be able to engage in the practice. "Many international markets have a regional character, because of natural or artificial barriers, and predatory dumping may be worthwhile for a dominant supplier and be perfectly practicable." de Jong, *The Significance of Dumping in International Trade*, 2 J. WORLD TRADE L. 162, 171-72 (1968).

[16] A typical defense of the free market-approach is offered by the authors of the following excerpt:

> What difference does it make to an import-competing industry or to the domestic economy as a whole if a foreign good is sold more cheaply here than in the

tionist" economists have countered with the argument that the resulting softening of demand for domestic goods is often unfairly produced and always harmful.[17] They contend unfairness and harm are particularly probable when the foreign manufacturers are granted export subsidies by their governments[18] or when infant in-

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exporter's home market? The harm to the import-competing industry and the benefit to the domestic economy is the same, regardless of the price charged abroad. It hardly makes sense to establish an elaborate procedure for processing complaints against foreigners who discriminate *in favor* of Americans. The circumstances that enable them to discriminate against their fellow countrymen may be regrettable from some point of view; but to Americans, bargains are bargains.

L. YEAGER AND D. TUERCK, *supra* note 15, at 128. One author has insisted that there are other advantages resulting from dumping other than lower consumer prices. Dumping might also force a monopoly in the import market to lower its prices to be able to remain competitive. In addition, dumping of raw materials may enable small manufacturers to reduce start-up costs in the finished goods market. Note, *The Antidumping Act—Tariff or Antitrust Law?*, 74 YALE L. J. 707, 713 (1965). For other arguments supportive of the free trade approach, see de Jong, *supra* note 15, at 171; Barcelo, *Antidumping Laws as Barriers to Trade—The United States and the International Antidumping Code*, 57 CORNELL L. REV. 491, 498 (1972).

[17] Professor Lloyd has argued on behalf of the protectionist approach that:

> Experience indicates that even though the consumer may get a temporary windfall on the purchase of products at bargain prices, the demoralizing effect on the market makes the process undesirable on a long-term basis for all, including the consumer. When dumping is used as a weapon to drive out competition, the consumer pays a sufficiently higher price afterward to more than compensate for the low dumping price. Even if no one is driven out of business, dumping can drive the prices so low that the customer will suffer through shoddy merchandise and inadequate service.

L. Lloyd, *supra* note 15, at 158-59.

Professor Viner has argued that dumping, whether predatory or not, is harmful because of its uncertain duration. He contends that this uncertainty does not allow consumers and producers in the importing country to adjust properly to dumping. J. VINER, *supra* note 11, at 139. Another author has offered four arguments in favor of antidumping regulation:

> First, although free trade raises a nation's welfare above the level obtained in isolation, further gains may be had if limiting imports changes the terms of trade. . . .Second, dynamic considerations. . .may make importation injurious in itself. Unstable imports may do more harm by disrupting markets than good by encouraging specialization and expanding consumers [sic] options. . . . Third, normative goals may outweigh considerations of economic efficiency as a basis for commercial policy. Particular import transactions may be inequitable. . . .Fourth, in all probability the importing economy will not be perfectly competitive. In this and the preceding two instances, restricted trade may be preferable to free trade if corrective policy options are limited.

W. WARES, *supra* note 14, at 60. *See also* J. HOBSON, INTERNATIONAL TRADE 137 (1966), which argues that overproduction of a good which leads to dumping indicates worldwide overproduction in many cases. Dumping in such a case serves only to exacerbate a critical economic situation. For another view of the protectionist argument, see Fisher, *Dumping: Confronting the Paradox of Internal Weakness and External Challenge*, in ANTIDUMPING LAW 23 (1979).

[18] A government may offer such subsidies "to create employment, correct a balance-of-

dustries are targeted by the dumpers.[19]

Although dumping of manufactured goods has been widespread for at least two centuries,[20] nations have regulated it to significant degrees only since the mid-1800's, when the Industrial Revolution gave impetus to explosive growth in international trade.[21] The United States Congress' first attempt to control foreign dumping in domestic markets, § 801 of the Revenue Act of 1916, imposed criminal sanctions on the activity.[22] When this act proved to be ineffective,[23] however, and when competitive European industry began to rebuild after World War I,[24] Congress attempted to further shelter United States industry with passage of the Antidumping Act of 1921.[25] This legislation established the bifurcated administrative procedure still used today to determine if dumping is taking place, further, whether such practice is causing injury.[26] It also provided the mechanism for assessment of duties on imports which were determined to be injurious.[27]

The Antidumping Act remained in effect as the United States' statement on dumping until 1979,[28] when Congress, responding to

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payments deficit, develop a particularly valuable industry, or, archaically, on purely mercantilistic grounds." W. WARES, *supra* note 14, at 8.

[19] J. VINER, *supra* note 11, at 145-46. Professor Viner adds that "[t]here is surely even a stronger case for the temporary protection of an established industry with a long record of successful survival of the test of foreign competition, if such industry is threatened by foreign competition of an abnormal and temporary character." *Id.* at 146.

[20] *Id.* at 35-36.

[21] For a review of the history of dumping regulations during the Industrial Revolution, see *id.* at 35-50.

[22] 15 U.S.C. § 72 (1976). Violation of the statute is a misdemeanor punishable by a fine up to $5,000, one year's imprisonment, or both.

[23] *See* Myerson, *supra* note 15, at 173. The author notes that the government has never brought a criminal dumping action under the authority of the 1916 statute. *Id.*

[24] Congress was evidently especially concerned with the challenge to the infant American chemical industry made by resurgent German chemical firms. In addition, Congress desired to protect American industry from a flood of imports predicted after the post-war devaluation of European currencies. *See* Ehrenhaft, *supra* note 14, at 53.

[25] Antidumping Act of 1921, ch. 14, § 201, 42 Stat. 11 (codified at 19 U.S.C. §§ 160-71(1976)(repealed 1979)).

[26] 19 U.S.C. § 160(a)(1976)(repealed 1979). The bifurcated procedure originally required the Secretary of the Treasury to determine 1) that a good was being imported to the United States at less than its fair value in the country of export; 2) that an industry in the United States was subject to injury or would be subject to injury due to the imports.

[27] 19 U.S.C. § 161 (1976)(repealed 1979).

[28] Several minor amendments were made to the Act through the years. In 1954 Congress vested the duty to determine whether injury has occured or will occur in the United States Tariff Commission, which is now the ITC. Customs Simplifications Act of 1954, ch. 12 & 13, § 301, 68 Stat. 1138 (repealed 1979). Another amendment in 1975 required the ITC to publish its findings in the Federal Register. Trade Act of 1974, Pub. L. No. 93-618, Title III ch.

the final negotiation of an international antidumping code at the Tokyo Round of the General Agreements on Tariffs and Trade,[29] passed the Trade Agreements Act.[30] This legislation revoked the Antidumping Act of 1921[31] and established "material injury" to a domestic industry rather than mere "injury" as the harm the ITC must show to justify implementation of an antidumping order.[32] In addition it codified the "substantial evidence" standard of review the Customs Court, now the Court of International Trade, must use when testing whether an ITC determination has an adequate factual basis.[33]

In 1980 Congress passed the Customs Court Act to complement the Trade Agreements Act.[34] This second piece of legislation changed the name of the Customs Court to the Court of International Trade.[35] It also granted the court full Article III and equity powers,[36] and it enlarged the range of import disputes which would fall under the court's jurisdiction.[37]

The court has struggled throughout its history to define what

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2, § 321(a)(2), 88 Stat. 2045 (amending § 201(b)(c) of the Antidumping Act of 1921)(repealed 1979). For explanations of the provisions of the Antidumping Act, see Note, *Injury Determinations Under United States Law Before and After the Trade Agreements Act of 1979*, 33 RUTGERS L. REV. 1076, 1079-80 (1981). For a comprehensive view of the mechanics of the provisions of the Act, see Baier, *Substantive Interpretations Under the Antidumping Act and the Foreign Trade Policy of the United States*, 17 STAN. L. REV. 409 (1965).

[29] Agreement on Implementation of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, Doc. No. MTN/NTM/W/232, April 9, 1979, *reprinted in General Agreement on Tariffs and Trade: Basic Instruments and Selected Documents* 56 (Supp. 26 1978-79).

[30] Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979) (codified in various sections of title 19 of the United States Code). For explanation of the provisions of the Trade Agreements Act, see Silverman, *supra* note 15, at 239, 244-52; Note, *supra* note 28, at 1095-1107; Note, *Judicial Review of Antidumping Cases and the Trade Agreements Act of 1979: Towards a Unified System of Review*, 14 J. INT'L L. & ECON. 101 (1979); Cohen, *The Trade Agreements Act of 1979: Executive Agreements, Subsidies, and Countervailing Duties*, 15 TEX. INT'L. L.J. 96 (1980); Note, *Administering the Revised Antidumping Law: Allocating Power Between the ITC and the Court of International Trade*, 22 VA. J. INT'L L. 883, 888-93 (1982) [hereinafter cited as *Revised Antidumping Law*].

[31] 19 U.S.C. § 651 (Supp. V 1981).

[32] 19 U.S.C. § 1673d(b) (Supp. V 1981).

[33] 19 U.S.C. § 1516a(b)(1)(B)(Supp. V 1981).

[34] Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (1980) (codified in various sections of titles 19 and 28 of the United States Code). For an explanation of the provisions of the Act, see *Customs Act of 1980*, 26 N.Y.L. SCH. L. REV. 431-504 (1981); *Revised Antidumping Law*, *supra* note 32, at 893-96.

[35] 28 U.S.C. § 251 (1982).

[36] *Id.*

[37] *Id. See also* H.R. REP. No. 1235, 96th Cong., 2d Sess. 18, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 3729.

these congressional acts require of it in its role as judge of the viability of administrative determinations. The court has adopted the tenet of administrative law that it will uphold determinations which are validly based, regardless of whether the court would draw the same conclusion from the given information.[38] This deference has had little practical impact in some cases of review of administrative determinations, for the judges have also indicated that findings from administrative agencies must contain cogent and persuasive reasoning backed by specific facts.[39] The court will closely scrutinize reports to determine whether they are supported by the statutorily required levels of evidence.[40] The court has also

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[38] The reason for this review role was stated by the court in City Lumber Co. v. United States:

> Clearly Congress acted within its constitutional powers in enacting the Antidumping Act of 1921. . . .Under that act Congress entrusted the making of the determination of dumping and injury to designated executive officers. Hence, in reviewing these determinations it is not the function of the court to substitute its discretion for that of the legislative agents. It is the proper function of the court to construe the enabling act, and to determine the meaning of any doubtful word, phrase or provision.

*City Lumber Co.*, 311 F. Supp 340, 345 (Cust. Ct. 1970). *See also* Pasco Terminals, Inc. v. United States, 477 F. Supp. 201, 220 n.18 (Cust. Ct. 1979); Imbert Imports, Inc. v. United States, 475 F.2d 1189, 1191-92 (C.C.P.A. 1973).

[39] *See, e.g.*, SCM Corp. v. United States, 487 F. Supp. 96 (Cust. Ct. 1980), in which the court said the ITC had inadequately documented its finding that imports of portable typewriters were injuring the domestic typewriter industry. Citing Supreme Court authority, the court ruled:

> This Court has relied on the 'simple but fundamental rule of administrative law,' SEC v. Chenery Corp., 332 U.S. 194, 196 (1947), that the agency must set forth clearly the grounds on which it acted. For '[w]e must know what a decision means before the duty becomes ours to say whether it is right or wrong.' United States v. Chicago, Milwaukee, St. Paul & Pacific R. Co., 294 U.S. 499. . . .And we must rely on the rationale adopted by the agency if we are to guarantee the integrity of the administrative process.

*SCM Corp.*, 487 F. Supp. at 103, *quoting* Atchison, Topeka & Sante Fe R. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 807 (1973). The court has also held in some cases that the ITC findings must be rationally based on the available data. *See, e.g.*, Sprague Elec. Co. v. United States, 529 F. Supp. 676, 682-83 (Ct. Int'l Trade 1981); Pasco Terminals, Inc. v. United States, 477 F. Supp. at 220.

[40] The Supreme Court has defined "substantial evidence":

> We have defined 'substantial evidence' as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229. '(I)t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300. This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. NLRB v. Nevada Consolidated Copper Corp., 316 U.S. 105, 106.

held that it will review decisions while taking into consideration the congressional purposes behind the form of import restriction involved.[41]

The cases establishing these standards involved questions of whether new regulations of dumping would be required. In *Matsushita* the ITC and the Court of International Trade were confronted with the different problem of whether an *existing* order should be continued. The ITC had administered this type of review twice previously, but in both cases it was able to decide the problems summarily because of peculiar facts.[42] *Matsushita* presented the first opportunity for both bodies to make full-scale rulings concerning the characteristics of review of an existing order.

The ITC determined it should base its position upon projections of what the actions of the Japanese manufacturers would be if no antidumping order existed.[43] On the basis of its fact-finding the ITC posted three scenarios it believed would occur with lifting of the order. Noting first that the Japanese manufacturers were pres-

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Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 619-20 (1966). For specific instances of application of the "substantial evidence" standard by the Court of International Trade, see Armstrong Bros. Tool Co. v. United States, 483 F. Supp. 312, 327-28 (Cust. Ct. 1980); Alberta Gas Chemicals, Inc. v. United States, 515 F. Supp. 780, 789-91 (Ct. Int'l Trade 1981); Industrial Fasteners Group v. United States, 525 F. Supp. 885, 892-93 (Ct. Int'l Trade 1981).

[41] The court has said "that even when Congress has given wide authority to a Commission, it is the duty of a reviewing court to insure that the Commission's actions are harmonious with the national policy expressed." SCM Corp. v. United States, 487 F. Supp. at 103 (Cust. Ct. 1980). The court in *SCM Corp.* also quoted with approval Supreme Court language that the administrative agency must keep in mind the intent of Congress when it makes its findings:

> To see whether those policies have been implemented we look to the Commission's own summary of the evidence, and particularly to the findings, formal or otherwise, which the Commission has made. Just as we would overstep our duty by undertaking to evaluate the evidence according to our own notions of the public interest, we would shirk our duty were we summarily to approve the Commission's evaluation of the record without determining that the agency's evaluation had been made in accordance with the mandate of Congress.

*SCM Corp.*, 487 F.Supp. at 103, *quoting* Schaffer Transportation Co. v. United States, 355 U.S. 83, 88 (1957).

[42] In Electric Golf Carts from Poland, Inv. No. 751-TA-1, USITC Pub. No. 1069 (1980), the ITC found that no amount of dumping increase could improve the importer's market share. In Potassium Chloride From Canada, 46 Fed. Reg. 22,083 (1981), the ITC found that the importer's market share was so small that it in no way could affect the domestic market price no matter how much of its goods it attempted to dump. To reach its results in these two cases the ITC did not have to initiate the fact-finding mission of predicting the behavior of importers in the face of a lifted antidumping order. This prediction was a central focus of *Matsushita*. *See infra* notes 47-52 and accompanying text.

[43] Television Receiving Sets From Japan, 46 Fed. Reg. 32,702, 32,704 (1981).

ently acquiring increased production and pricing flexibility,[44] the ITC forecast a rapidly increasing period of demand for the television industry and predicted that the Japanese would begin dumping again if the antidumping order were lifted.[45] This dumping would trigger a suppression of prices and profits of domestic manufacturers.[46] Secondly, it found that the affiliated television manufacturers of the Japanese subsidiaries in the United States would have difficulty producing sufficient quantities of inventory to meet the new demand.[47] The impetus would then exist for the Japanese manufacturers to keep their market shares by flooding the American market with foreign-manufactured sets.[48] These sets would, of course, be sold at less than fair value.[49] Finally, the ITC found that after lifting the proposed antidumping order the United States would become a dumping ground for these same reasons not only for fully-assembled television receivers but also for television component parts.[50] These scenarios provided enough evidence for the ITC to find that "material injury" would indeed follow the lifting of the antidumping order.[51]

On appeal, the Court of International Trade found the ITC's reasoning unpersuasive.[52] The court felt that it was proper for the ITC to presume for its determination that any future imports with or without an antidumping order would be sold at prices less than fair value.[53] But at that point, the court ruled, the ability of the

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[44] *Id.* at 32,706. This flexibility would follow from the ability of the importers to reduce prices after lifting of the antidumping order, which had previously penalized sales made at less than fair value.

[45] *Id.* The ITC found the increase in demand could range as high as 50% in the following three to five years.

[46] *Id.*

[47] *Id.* The ITC had found that after imposition of the initial antidumping order, 10 Japanese firms had established manufacturing operations of varying sophistication in the United States. If the order was lifted, then the Japanese manufacturers would supplement this production with goods manufactured in Japan, a combination which would undercut domestic prices, the ITC said.

[48] *Id.*

[49] *Id.*

[50] *Id.* The market in Asia and Europe for Japanese-manufactured picture tubes had recently shown signs of softening, the ITC said. It thus feared dumping of these component parts into the United States market if the antidumping order was lifted.

[51] *Id.* at 32,707.

[52] Matsushita Elec. Indus. Co. v. United States, No. 83-69 slip op. (Ct. Int'l Trade July 14, 1983), *reprinted in* 17 Cust. B. & Dec., Aug. 10, 1983, at 37.

[53] *Id.* at 39-40. The court ruled the ITC could make this presumption because the plaintiffs had not sought a review by the International Trade Administration of the Department of Commerce of that body's original finding that imports were being made at less than fair

ITC to make presumptions ended. Also, in *Matsushita* the court found the ITC had improperly presumed that upon lifting of the antidumping order the foreign producers would automatically increase their imports.[54] The court held that in so presuming, the ITC had impermissibly placed on the proponents of the repeal of the order the burden of proving they would not increase their imports.[55] Instead, the court ruled the only burden of proof the ITC could place on such a party in a review case was cooperation with the investigation by supplying requested information.[56]

The court said that this misplacement of the burden of proof resulted from an incorrect assumption of the purpose behind the review function of the ITC.[57] The ITC had felt it necessary to honor the protectionist intent behind antidumping laws by treating the existing order as *prima facie* valid.[58] In so doing, the court said the commissioners failed to grasp the true purpose behind the Trade Agreements Act of 1979.[59] That purpose was not to restrict

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value. *See* Television Receiving Sets, Monochrome and Color, From Japan, 35 Fed. Reg. 18,549 (1970) for the original determination.

[54] Matsushita Elec. Indus. Co. v. United States, No. 83-69 slip op. (Ct. Int'l. Trade July 14, 1983), *reprinted in* 17 Cust. B. & Dec., Aug. 10, 1983, at 41-42.

[55] *Id.*

[56] *Id.*

[57] *Id.* at 42-43. The court held that:

> [i]n the review, the ITC saw itself in the position of having to honor the basic protective intent of the antidumping law; that is to say, it believed it had to treat the continuing validity of the existing antidumping order as a premise of the review. This led it to go beyond its neutrally stated objective and to engage in a presumption that injury would recur. . . .However, although the purpose of antidumping duties is unquestionably to protect American industry, the provision for review of final injury determinations cannot be given the same protective motive. In the opinion of the Court, in order for the review provision to operate consistently within the structure of this law and in order for it to function in harmony with one of the international agreements which the law was intended to implement, the review must establish the continuing need for the injury determination. If it cannot do so, the original determination has become vestigial.

*Id.*

[58] *Id.*

[59] *Id.* at 43-44. The court noted that the Trade Agreements Act had expressly approved the recently promulgated International Antidumping Code. The court then explained:

> Article 9(a) of the Code relates to the review of antidumping duty orders and provides that 'an anti-dumping duty shall remain in force only as long as, and to the extent necessary to counter-act dumping which is causing injury. . . .It would be unreasonable to take or maintain the potent measure of these laws for anything more diffused than the threat of material injury. It must follow that when the continued necessity for the antidumping duty is placed in question by a change in circumstances, the review required by [19 U.S.C. § 1675(b)(1)] must either find reason for continuation of the duty or lead to revocation.

*Id.*

the flow of imports but rather to assure that international trade would not be inhibited by regulations which had outlived their usefulness.[60] Thus, the court felt, sustaining an antidumping order over a prolonged period would be the extraordinary ruling, not *vice versa*.[61]

The court also criticized the ITC's determination that with the lifting of the antidumping order future import levels would be materially injurious. Conceding that such a prediction must necessarily be made,[62] the court nonetheless found that the ITC's estimates of importers' ability to increase production capacity was factually insufficient to support the conclusion that imports would increase.[63] The court also discounted the probability that the ITC's three scenarios would ever come to pass.[64] For each scenario the

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[60] *Id.*

[61] *Id.*

[62] *Id.* at 41.

[63] *Id* at 44-47. The court questioned the ITC's assertion that, given a coming rapid increase in demand for television receivers, the Japanese manufacturers would exploit production capacity flexibility to increase dumping. The court said that in light of the establishment of extensive American manufacturing operations by the Japanese, it would be "irrational" for them to increase imports rather than to increase production at their American plants. At most the foreign manufacturers would temporarily supplement this latter form of production with short-term increases in imports. Such short-term "penetrations" would not cause material injury, the court ruled. *Id.*

[64] *Id.* at 45-47. Generally the court found that the three scenarios (*see supra* notes 43-48 and accompanying text) were predictions which lacked substantial "factual predicate(s)." The ITC had failed to include in the basis of data collected for the case facts obtained concerning supply of and demand for Japanese televisions in markets other than the United States, facts concerning "important component parts of the products in question," or facts involving "other measurable economic factors upon which it is reasonable to base inferences."

The court went into detail of its criticism of the ITC's second scenario, a prediction that the Japanese would in the short-run increase their dumping to supplement production by their affiliated plants in the United States. The court held such an increase would benefit, not injure, the domestic industry, because it would secure a market share increase for the affiliated producers, who were considered to be part of the domestic industry. A mere shuffling of market shares of domestic producers should not result in any overall harm to the industry, the court said. *Id.*

The court later modified its opinion concerning the second scenario. In the course of a subsequent opinion denying a motion for rehearing, the court said it wished to clarify that the problem with the second scenario was that the ITC's prediction of increased dumping to supplement production of affiliates was improperly based on a finding of coordination between the Japanese producers and their American affiliates. This coordination had been found not to exist by the ITC itself when it decided to include the affiliates in the domestic industry figures, the court ruled. This earlier categorization of the domestic affiliates caused the later finding of coordination to be invalid, so the ITC did not even have logical reasoning on its side when it posited the second scenario. *See* Matsushita Elec. Indus. Co. v. United States, No. 83-192 slip op. (Ct. Int'l Trade Oct. 13, 1983), *reprinted in* 17 Cust. B. &

court found that the ITC lacked the requisite "substantial evidence" from which to draw its conclusions.[65]

More generally, the court held that in a case involving review of an existing regulation the ITC must test the validity of the regulation with more than mere assumptions.[66] Citing appellate court decisions in other contexts of administrative review,[67] the court said that the ITC must base any estimates upon substantive, clearly documented data.[68] The weight of authority was so clearly against the ITC finding that outright reversal was required rather than a remanding for further fact-finding.[69]

This decision by the Court of International Trade provides an important indication of what the court will require of the ITC when it conducts reviews of existing antidumping orders. The decision in *Matsushita* indicates the court will not be as deferential to the ITC as it has been in other contexts in the past.[70] Further, the

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Dec., Nov. 9, 1983, at 43.

[65] *Matsushita*, 17 Cust. B. & Dec., Aug. 10, 1983, at 49.

[66] *Id.* at 47-48.

[67] *Id.* at 47-49. The court called Industrial Union Dept. v. American Petroleum Inst., 448 U.S. 607 (1979) "by far the most instructive of the many cases cited by the parties." In that case the Supreme Court held invalid a regulation promulgated by the Occupational Safety and Health Administration (OSHA) which would have reduced the permissible exposure of workers to the carcinogenic chemical benzene from 10 parts per million (ppm) to 1 ppm. The Court ruled that OSHA had failed to provide substantial evidence that the lowering of the exposure level was "appropriate to provide safe and healthful employment." The burden of proof was on OSHA to show that the 10 ppm regulation presented a health risk, and the court held that the agency had not met that burden with the necessary substantial evidence. The court in *Matsushita* found this result particularly relevant "because the agency in that case was operating in a relatively unknown area to an even greater extent than the ITC." *Matsushita*, 17 Cust. B. & Dec., Aug. 10, 1983, at 47-48.

The court also cited the Ninth Circuit Court of Appeals' opinion in Boise Cascade Corp. v. FTC, 637 F.2d 573 (9th Cir. 1980) as authority. There, the Court of Appeals ruled that the agency lacked substantial evidence that the system of pricing used by several plywood manufacturers was anticompetitive. The *Matsushita* court said *Boise Cascade* reflected its holding that "[i]n the interests of enforcement [agencies] may not take leave of normal practice, may not place burdens where they should not be placed, and may not use impermissible assumptions and suppositions rather than substantial evidence." *Matsushita*, 17 Cust. B. & Dec., Aug. 10, 1983, at 48.

[68] *Id.* at 49.

[69] *Id.* The court determined that remand was unnecessary because "this is not a case in which the ITC failed to sufficiently articulate its rationale to allow judicial review" or "a case in which a corpus of correct data has to be investigated for the first time." *Id.*

[70] This stricter scrutiny of ITC determinations is in part a result of the expansion of the court's powers by the Customs Court Act (*see supra* note 34 and accompanying text). "This expansion of the court's authority necessarily entails a reciprocal diminution in the discretion formerly enjoyed by the ITC in antidumping matters. The court's activist role. . .may therefore be merely the logical result of the court growing into its expanded role." *Revised Antidumping Law*, *supra* note 30, at 905.

court's ruling that the only burden on a proponent of revocation is that of cooperating with the inquiry[71] in effect places upon government customs attorneys the burden to present evidence sufficient for the ITC to confidently estimate that "material injury" would follow the lifting of an antidumping order. This burden is increased by the court's insistence that when considering future intent to import at prices less than fair value the ITC may not presume either that the protective order is presently restraining such sales[72] or that the failure of the proponents of revocation to convince officials they will not recommence such sales shows they are probable.[73] These rules, therefore, force the government to shoulder the difficult task of producing persuasive, concrete evidence on the evasive element of intent.

The problem with making an attempt to predict the future course of any case before the ITC and the Court of International Trade, however, is that in the past the two bodies have not always been consistent in their decision-making patterns. The ITC especially has been subject to criticism that its reviews are hopelessly confused and offer no pattern of the principles under which it operates in decision-making.[74] Criticism has also been leveled at the court in recent cases for varying its scrutiny of ITC reviews.[75] In addition, the court's power to ignore principles of *res judicata*,[76]

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[71] *Matsushita*, 17 Cust. B. & Dec., Aug. 10, 1983, at 41.

[72] *Id. See also supra* notes 55-56 and accompanying text.

[73] *Matsushita*, 17 Cust. B. & Dec., Aug. 10, 1983, at 41.

[74] For criticism of the inconsistency found in ITC reviews, see B. DALE, ANTI-DUMPING LAW IN A LIBERAL TRADE ORDER 193-94 (1980); Hendrick, *The United States Antidumping Act*, 58 AM. J. INT'L L. 914, 924-26 (1964); Herzstein, *The Role of Law and Lawyers Under the New Multilateral Trade Agreements*, 9 GA. J. INT'L & COMP. L. 177, 180 (1979); Note, *Innovation and Confusion in Recent Determinations of the Tariff Commission Under the Antidumping Act*, 4 N.Y.U.J. INT'L L. & POL. 212, 238 (1971).

[75] *See Revised Antidumping Law, supra* note 30, at 905-09.

[76] The Supreme Court has explained why the court does not have to follow the doctrine of *res judicata*:

> There of course should be an end of litigation. . .in customs matters as in other tax cases, but circumstances justify limiting the finality of the conclusion in customs controversies to the identical importation. The business of importing is carried on by large houses between whom and the Government there are inumerable transactions. . . .The evidence which may be presented in one case may be much varied in the next. The importance of a classification and its far-reaching effect may not have been fully understood or clearly known when the first litigation was carried through.

United States v. Stone & Downer Co., 274 U.S. 225, 235-36 (1927).

*See also* Rao, *A Primer on Customs Court Practice*, 40 BROOKLYN L. REV. 581, 599 (1974).

the individual peculiarities of dumping cases,[77] and the distribution of judgeships so that only a bare majority may be members of a single political party[78] all promote a certain non-conformity in court decisions. Based on these conditions, future ITC decisions to continue antidumping orders, even if based on facts similar to those in *Matsushita*, may well be upheld by different judges on the court.

The other important aspect of *Matsushita* lies in its potential for reducing the restrictions on imports into the American market. The court's holding that the ITC must consider the anti-restraint intent of the Trade Agreements Act and other international agreements when considering the validity of an antidumping order,[79] taken in concert with the court's pronouncements on burdens of proof and evidentiary requirements,[80] indicates an attitude that antidumping orders should be short-lived. *Matsushita* in this respect moves the court closer to the position of the free trade economist, at least on this issue of the viability of continuing antidumping controls.[81]

At a time in which many American political and economic leaders have forcefully advocated import controls,[82] *Matsushita* may soon be considered an anomaly in the history of the Court of Inter-

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[77] *See* United States v. Stone & Downer Co., 274 U.S. 225, 235-36; Hendrick, *supra* note 71, at 924.

[78] The appointment of judges to the Court of International Trade is governed by 28 U.S.C. § 251(a) (Supp. V 1981):

> (a) The President shall appoint, by and with the advice and consent of the Senate, nine judges who shall constitute a court of record to be known as the United States Court of International Trade. Not more than five of such judges shall be from the same political party.

[79] *See supra* notes 54-57 and accompanying text.

[80] *See supra* notes 52-53 and accompanying text.

[81] These economists argue, as the court does, that recent international agreements to which the United States has been a signatory and upon which Congress has been basing antidumping legislation share the goal of freeing international trade from excessive restraint. As a result they would make the burden of showing injury heavier, as the court in *Matsushita* did. *See, e.g.*, Baier, *supra* note 28, at 453-56; Barcelo, *supra* note 16, at 526. *See also* 19 U.S.C. § 2502(2) (Supp. V 1981), which states that among the purposes of the Trade Agreements Act is "to foster the growth and maintenance of an open trading system." For a view that the General Agreements of Tariffs and Trade adopt not a free market but a protectionist approach, at least concerning the injury test, see R. DALE, *supra* note 71, at 192.

[82] *See* N.Y. Times, July 25, 1983, at D-2, col. 1; N. Y. Times, Oct. 7, 1983, at B-11, col. 4; Wash. Post, Jan. 2, 1983, at F-1, col. 1; Wash. Post, May 16, 1983, at A-1, col. 2; Kuttner, *The Free Trade Fallacy*, NEW REPUBLIC, Mar. 28, 1983, at 16, 16-22; *A Rising Tide of Protectionism*, NEWSWEEK, May 30, 1983, at 26, 26-28.

national Trade.[83] If the *Matsushita* approach is affirmed and extended to other import contexts, however, the long-term result will be a significant liberalization of foreign trade policy.[84] For the present, *Matsushita* stands on its own as a small victory for free trade economists in the ever-continuing war of words and ideas between those who would open American markets to the world and those who would begin slowly to cut them off.[85]

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[83] The influence of politics on the policy of the court is likely to be at least somewhat blunted by the statute which allows only five of the nine judges of the court to be affiliated with a single political party. *See supra* note 79.

[84] *See supra* note 16, and accompanying text.

[85] *See supra* notes 16-17 and accompanying text.