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The Trade Act of 1974 represented the most significant reformulation of United States international economic policy since the Trade Agreements Act of 1934.[1] Responding to criticism from several quarters,[2] Congress included in the Act major additions to the laws dealing with unfair foreign trade practices.[3] In particular, the Act contained several measures intended to expedite the processing of antidumping complaints. One of these measures, the so-called "fast-track" provision,[4] created a potentially powerful administrative mechanism to permit the summary dismissal of clearly unmeritorious complaints. Unfortunately, implementation of this amendment has suffered from a lack of legislative guidance, and it is not at all clear that the provision has produced significant changes in the administration of the antidumping laws. This article will review the origins of the fast-track provision, and some of the problems associated with its administration.

THE NEED FOR A FAST-TRACK PROCEDURE

The primary American antidumping legislation today is the Antidumping Act of 1921.[5] In general terms, the Act provides for the imposition of special dumping duties equal to the dumping price margins whenever the Secretary of the Treasury determines that dumping is taking place. Dumping occurs when sales at less than fair market value (hereinafter LTFV) cause injury or threat of injury to domestic industry.[6]

Since its inception, the Act has been subject to much criticism. One of the most frequently cited problems has been the often lengthy delays in processing antidumping complaints.[7] Such delays cause uncertainty and confusion. In many cases, the sluggish response of the antidumping procedures denies to American industry the relief to

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which it is entitled under the Act. More often, however, the effect is quite the opposite. When Treasury withholds appraisement on a shipment of goods,[8] the importer, if he wishes to continue importing, is required to post a bond in an amount equal to any duties that might be incurred.[9] This amount is often substantial. If the importer cannot afford to tie up his funds in such a manner, he may simply cease importing.[10] Even the mere announcement of the initiation of antidumping proceedings can bring about the same result, as the importer will fear being labelled a "dumper" and being subjected to costly and time-consuming procedures. Thus, even without a final determination of dumping, imports have been effectively barred. The antidumping procedures themselves may therefore operate as a powerful protectionist device.[11]

Much of the delay in antidumping procedures has been attributable to the separation of the injury determination from the LTFV determination.[12] The inquiry into injury, conducted by the International Trade Commission, does not even begin until Treasury has issued a preliminary finding of LTFV sales.[13] The fast-track procedure is designed to short-circuit the process by permitting an early examination of the injury question in cases where there is good reason to doubt that injury can be proved. If, on the basis of the information developed in the course of the preliminary investigation of an antidumping complaint, Treasury concludes

> that there is substantial doubt whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of merchandise suspected of being sold at LTFV prices into the United States, he shall forward to the Commission the reasons for such substantial doubt and a preliminary indication, based on whatever price information is available, concerning possible sales at less than fair value . . . If within thirty days after receipt of such information from the Treasury, the Commission, after conducting such inquiry as it deems appropriate, determines that there is no reasonable indication that an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States, it shall advise the Secretary of its determination, and any investigation . . . then in progress shall be terminated.[14]

The fast-track provision thus raises the possibility that a complaint may be dismissed without a full-scale investigation. Before dismissal, however, the complaint must pass through two levels of administrative decision making: Treasury must determine that

there is "substantial doubt" that injury is occurring, and the Commission must find "no reasonable indication" of injury. These terms are not defined, nor do they appear elsewhere in the Act. The legislative history of the provision is also of very little help in giving precise meaning to this language.[15]

ADMINISTRATION OF THE FAST-TRACK PROVISION

On the basis of a finding of "substantial doubt" of injury, Treasury has invoked the fast-track procedure in twenty-three separate investigations. These cases represent approximately 10 percent of the total number of antidumping investigations initiated since the provision took effect. In seventeen of the cases referred to it under the fast-track provision, the International Trade Commission concluded it was unable to say, on the basis of the evidence available, that there was no reasonable indication of injury.[16] Treasury was therefore obliged to continue its investigation. The following sections examine the reasoning the two agencies have followed in making their respective determinations.

Department of the Treasury[17]

In concluding that there exists substantial doubt of injury Treasury has apparently relied heavily upon evidence of market penetration by the suspected LTFV imports (measured by reference to domestic production and domestic sales). In the ten cases in which Treasury cited low market penetration as a factor in reaching its decision, the market shares of the suspect imports were generally less than 5 percent of either sales or production.[18] Although market penetration is usually considered as only one of several factors, in at least one case an extremely low level of import penetration was sufficient in itself to create substantial doubt of injury.[19] In several other cases, the trend in market shares has apparently been significant.[20]

Treasury has also placed heavy emphasis on utilization of productive capacity,[21] trends in profitability,[22] and levels of employment in the affected industry;[23] other factors have included evidence of underselling[24] and trends in total domestic sales.[25] In at least one case, *Certain Automotive and Motorcycle Repair Manuals from the United Kingdom*,[26] the failure of the complainant to supply relevant data appeared to play a significant role in Treasury's decision. Although evidence of lost sales was provided, the complainant was unable to provide year-by-year comparisons of earnings, market shares, volume of imports, or information pertaining to " . . . capital investment, price suppression, or margins of underselling."[27] On the

basis of this lack of evidence, plus an indication that the number of complainant's employees had increased, Treasury found substantial doubt of injury.

In several cases, Treasury has concluded that while injury to domestic industry exists, there is substantial doubt that such injury results from LTFV sales. In *Carbon Steel Bars and Carbon Steel Strip from the United Kingdom,*[28] Treasury stated that "although . . . profitability and employment declined appreciably throughout the domestic industry producing the classes or kinds of merchandise . . . there is no evidence before Treasury that those declines were caused by imports of the alleged sales at less than fair value from the United Kingdom."[29] In *Methyl Alcohol from Canada,*[30] Treasury found that the decline in profitability alleged in the complaint was more likely due to an increase in the cost of production than the impact of LTFV imports. Finally, in *Photographic Color Paper from Japan and West Germany,*[31] Treasury concluded that a decline in market share "may have been due in substantial part to factors other than imports."[32] It continued,

> most of the decline in the market share held by the domestic industry was attributable to Kodak. Some of the decline experienced by Kodak may have been due to its considerable antitrust problems. In addition, there is information on record indicating that GAF's withdrawal from the market was due in large part to competition from Kodak. Finally, the decline in 3M's selling prices appears to have been a reflection of both its increased efficiency in the manufacture of this product, which it expressly acknowledges as having occurred, and price competition from Kodak.[33]

It is difficult to draw from the cases an easily applicable standard that might serve as a valid predictive tool. However, some patterns are evident. Where the domestic market share exceeds 85 to 90 percent, and there is no evidence of a rapid increase in the import market share, it is highly likely that fast-track proceedings will be instituted. This is especially true if the market share of imports from the particular country named in the complaint is itself less than 5 percent. Furthermore, where the alleged injury appears to accrue only to a single firm, and the rest of the industry remains substantially unaffected, Treasury may well conclude that the requisite substantial doubt exists.[34]

The International Trade Commission

Despite its experience in making injury determinations, the Commission was initially unable to agree upon the standards to be applied in

fast-track cases.[35] In fact, two distinct views developed in the early cases. The majority approach was first stated by Commissioners Bedell, Parker, and Leonard in *Butadiene Acrylonitrile Rubber from Japan.*[36] Applying a strict standard of proof, these Commissioners indicated that they would halt Treasury's investigation only where the respondent-importers could make a "clear and convincing showing" that there was no reasonable indication of injury.[37] Because the necessary showing could not be made, the Commission returned the case to Treasury. In the next case to come before it, the Commission again applied this strict standard.[38] Commissioner Minchew quarreled with the majority's position on the grounds that requiring such a high standard of proof would render the fast-track provision useless as a means of reducing the burdens of an antidumping investigation. He would have required the domestic petitioners to carry the burden of proving that there was some possibility of injury and that the investigation should for that reason go forward.[39] The majority approach could make it impossible ever to terminate an investigation by means of the fast-track procedure except where the claim of injury was so patently frivolous that one could imagine no possible basis for a finding of injury. And in the first three fast-track cases to come before it, the Commission did indeed refuse to terminate the investigation. Although the Commission has not explicitly relaxed the standard it is applying, it has shown its willingness in more recent cases to make a finding of no reasonable indication of injury and dismiss the complaint where not all of the evidence points to this conclusion.[40]

In substantive terms, the Commission has generally considered the same indicators as are noted in Treasury's determinations, although in much greater detail.[41] Thus market penetration by LTFV imports has been of major significance, as, for example, in *Multi-Metal Lithographic Plates from Mexico,*[42] where the Commission unanimously found no reasonable indication of injury where import market penetration was only 3 percent and other indicators did not support the complainant's allegations.[43]

The Commission has also been forced to wrestle with the problem of defining the relevant industry. In most cases, the products have been fungible, imports have been distributed on a national basis, and the firms affected by the imports have been easily identifiable.[44] However, in *Portland Hydraulic Cement from Mexico,*[45] the Commission found a reasonable indication of injury to industry in a limited geographical area, where transportation costs for the imported goods were high and consequently all of the imports were sold in the area immediately surrounding the port of entry. Similarly, in *Perchloroethylene from Belgium, France, and Italy,*[46] the Commission recognized that almost all of the imports in question

entered through northeastern ports and were sold within a two hundred-mile radius. While domestic producers' shipments nationally had fallen only 9 percent over the three years prior to the filing of the complaint, their shipments into the Northeast had declined 34 percent during that period. Thus the Commission appears willing to examine injury on a regional basis where the market structure indicates it is appropriate.

The fast-track provision requires that there be some causal link between injury and the LTFV imports. Direct evidence of causation is difficult to find, except for those cases in which it can be established that purchasers shifted from domestic goods to imported goods because of the latter's lower prices.[47] Although this sort of evidence is at least mentioned in many of the fast-track determinations, in virtually none has it been the determinative factor. In most cases, the Commission appears to have concluded that the simultaneous occurrence of LTFV sales and injury is in itself sufficient to show a causal link, absent strong evidence that such injury results from factors unrelated to imports.

Because of the complex and varied nature of the factual circumstances, it is difficult to generalize from the cases to date. Yet it is clear that the Commission will ordinarily favor continuing the Treasury investigation if the amount of injury seems at all significant, and there is evidence of a causal link, if only that injury and LTFV sales occurred within the same general time frame. Furthermore, it must be noted that the Commission is likely to insist that Treasury investigation continue when it believes that the information available is incomplete.

In several instances, the fast-track procedure has allowed Treasury to avoid what otherwise would have been a long and costly investigation. Yet Treasury and the Commission have used the provision sparingly and conservatively. With only six investigations dismissed, out of the almost one hundred initiated since the fast-track procedure became available, one must conclude that the new procedure has so far had only a minimal effect on the administration of the Antidumping Act. The time saved by the use of the procedure may well have been outweighed by the added burden for the Commission of a new administrative proceeding.

The caution displayed by both agencies in administering the provision appears to stem more from uncertainty about what standards to apply than from any policy favoring longer investigations. As antidumping proceedings become more common, a clearer set of standards may well emerge. Congress could certainly facilitate this development by providing more explicit guidelines for the administration of the provision.

NOTES

1. Ch. 474, § 1, 48 Stat. 943 (1934).
2. The literature on the response to unfair foreign trade practices is extensive. For a collection of views on the situation before the enactment of the Trade Act of 1974, *see* COMMISSION ON INTERNATIONAL TRADE AND INVESTMENT POLICY, UNITED STATES INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD: PAPERS I 139–535 (1971). More extensive discussion of antidumping policy in particular can be found in Coudert, *The Application of United States Antidumping Law in the Light of a Liberal Trade Policy*, 65 COLUM. L. REV. 189 (1965), and Schwartz, *The Administration by the Department of the Treasury of the Laws Authorizing the Imposition of Antidumping Duties*, 14 VA. J. INT'L L. 463 (1974).
3. Title III of the Trade Act of 1974, Pub. L. 93–618, 88 Stat. 2041 (1975), contains sections dealing with foreign import restrictions (§§ 301–02, 19 U.S.C. § 1202 (1976)); antidumping duties (§ 321, 19 U.S.C. §§ 160–73 (1976)); countervailing duties (§ 331, 19 U.S.C. § 1303 (1976)); and unfair trade practices (§ 341, 19 U.S.C. § 156 (1976)).
4. Section 201(c)(2) of the Antidumping Act of 1921, *as amended*, 19 U.S.C. § 160(c)(2) (1976). For an early analysis of the provision by two members of the International Trade Commission staff, see McDermid & Foster, *The U.S. International Trade Commission's 30-Day Inquiry Under the Antidumping Act: Section 201(c)(2)*, 27 MERCER L. REV. 657 (1976).
5. Ch. 14, tit. II, 42 Stat. 11 (1921), *as amended*, 19 U.S.C. §§ 160–73 (1976).
6. Under the procedural framework created by the Act, a dumping finding is a two-step process: upon receipt of information giving rise to a suspicion of dumping (usually in the form of a complaint by a domestic producer), Treasury initiates an investigation to determine if LTFV sales are in fact occurring. If this investigation reaches an affirmative conclusion, the International Trade Commission is notified; they in turn decide whether those sales are causing (or are likely to cause) injury to domestic industry. If injury is found, the Secretary of the Treasury is required to impose a duty equal to the adjusted difference between the import price and the fair value in the exporting country. Although the Act requires the Commission to complete its investigation within thirty days (19 U.S.C. § 160(a) (1976)), it placed no time limits on the LTFV determination, or on the assessment of duties once a dumping finding had been made.
7. *See* Coudert, *supra* note 2, at 198–200; *see also* Ehrenhoft, *Protection Against International Price Discrimination: United States Countervailing and Antidumping Duties*, 58 COLUM. L. REV. 44, 60 (1958).

8. Withholding of appraisement takes place after the Secretary of the Treasury makes a preliminary determination that dumping is occurring or is likely to occur (19 U.S.C. § 160(b) (1976)). The 1974 Act requires that this preliminary determination be made within six months of the initiation of antidumping proceedings.
9. *See* 19 C.F.R. §§ 153.50–53 (1977).
10. This assumes, of course, that the importer is unwilling to raise his prices.
11. *See* J. JACKSON, WORLD TRADE AND THE LAW OF GATT 47 (1969). A detailed analysis of this argument may be found in Prosterman, *Withholding of Appraisement Under the United States Antidumping Act: Protectionism or Unfair-Competition Law?*, 41 WASH. L. REV. 315 (1966).
12. The United States practice of separate LTFV and injury investigations has been criticized as a violation of the United States international obligations under the International Antidumping Code (Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade, GATT Doc L/12812 (July 12, 1967), T.I.A.S. No. 6431), which requires that those determinations be made simultaneously. Although the 1974 Trade Act did not formally modify this segregation, it may be argued that, in practical effect, the new fast-track proceedings have brought the United States into conformity with the Code. It would be difficult to imagine how an injury investigation would proceed without some indication of the nature and extent of LTFV sales; yet the fast-track provision allows consideration of injury after only thirty days of preliminary investigation by Treasury. Once the fast-track procedure is initiated, the investigations do become simultaneous since Treasury's investigation proceeds concurrently. The real question is whether the Commission's determination of "no reasonable indication," *see* text at notes 35–47, constitutes an examination of the injury question. This issue must be resolved by reference to the Code's requirements for finding injury to industry; at the very least, it seems that the fast-track provision provides the United States with a colorable claim to conformity with the Code.
13. The original Act gave Treasury authority to conduct both the LTFV and the injury determinations, but a 1954 amendment (ch. 1213, tit. III, § 301, 68 Stat. 1138 (1954)) turned that function over to the Tariff Commission (now the International Trade Commission).
14. 19 U.S.C. § 160(c)(2) (1976).
15. The relevant portions of the Senate report merely indicate in general terms that the purpose of the provision was to reduce the "administrative burden and impediment to trade" of unnecessary investigations. *See* S. REP. No. 1298, 93d Cong., 2d Sess. 170 (1974).
16. The Commission has used various phrases in announcing their decisions in fast-track proceedings, including "a

negative determination" of "no reasonable indication" of injury, and a "reasonable indication" of injury. Their difficulty in establishing a useful phrasing is perhaps indicative of the ambiguity of the statutory language.

17. The fast-track provision requires Treasury to inform the Commission of its reasons for "substantial doubt" (19 U.S.C. § 160(c)(2) (1976)). These reasons are contained in the forwarding letter accompanying Treasury's preliminary information at the commencement of the fast-track inquiry and are summarized in the notices of the initiation of fast-track proceedings published in the Federal Register. Forwarding letters for the first seven fast-track inquiries (AA1921–Inq.–1 through AA1921–Inq.–7) are available for public inspection at the Commission offices; those for subsequent cases are contained in the appendices to the relevant USITC reports.
18. *See* Butadiene Acrylonitrile Rubber from Japan, 40 Fed. Reg. 13,532 (1975) (imports accounted for less than one percent of domestic consumption); Portland Hydraulic Cement from Mexico, 40 Fed. Reg. 54,267 (1975) (imports declined from 3.5 percent to 2.5 percent of total market); Multimetal Lithographic Plates from Mexico, 41 Fed. Reg. 17,581 (1976) (imports were 0.14 percent of market); Monosodium Glutamate from Korea, 40 Fed. Reg. 19,990 (1975) (3.6 percent of domestic market); Methyl Alcohol from Brazil, 42 Fed. Reg. 46,626 (1977) (contract for the delivery of a quantity of alcohol representing 0.6 percent of United States sales and 0.2 percent of United States production); Carbon Steel Bars and Carbon Steel Strip from the United Kingdom, AA1921–Inq.–8, –9, USITC Publ. 855 (1978) (imports of bars accounted for 1.4 percent of United States consumption; those of strip for 0.2 percent); Uncoated Free Sheet Offset Paper from Canada, AA1921–Inq.–10 (1978) (import market share in three years prior to filing of complaint ranged from 1.7 to 2.1 percent); Standard Household Incandescent Lamps from Hungary, AA1921–Inq.–18, USITC Publ. 912 (1978) (imports from Hungary never exceeded 5 percent of domestic market); Sugar from Belgium, France, and West Germany, AA1921–Inq.–20, –21, –22, USITC Publ. 916 (1978) (imports constituted 1.0 percent of United States production and 0.5 percent of sales); Titantium Dioxide from Belgium, France, and West Germany, AA1921–Inq.–23, USITC Publ. 930 (1978) (import market share increased from 4.1 percent to 10.2 percent over the four years prior to the complaint).
19. Multimetal Lithographic Plates, *supra* note 18.
20. *See, e.g.*, Portland Hydraulic Cement, *supra* note 18 (market share decline of 1 percent in the year preceding complaint); *see also* Monosodium Glutamate, *supra* note 18 (decline of 3.1 percent).
21. *See, e.g.*, Butadiene Acrylonitrile Rubber, *supra* note 18, (United States industry at 95 percent capacity utilization);

Titanium Dioxide, *supra* note 18 (capacity utilization stable and expected to rise).

22. *See, e.g.,* Uncoated Free Sheet Offset Paper, *supra* note 18 (profitability paralleling market demand).
23. *See* Carbon Steel Bars, *supra* note 18, (profitability and employment declined).
24. *See* Stainless Steel Round Wire from Japan, AA1921–Inq.–17, USITC Publ. 907 (1978).
25. *Id.* (sales increasing); *see also* Photographic Color Paper from Japan and West Germany, AA1921–Inq.–11, –12, USITC Publ. 885 (1978) (domestic consumption increasing).
26. AA1921–Inq.–19, USITC Publ. 913 (1978).
27. *Id.* at A–30.
28. AA1921–Inq.–8–9, USITC Publ. 855 (1978).
29. *Id.* at A–80.
30. AA1921–Inq.–13, USITC Publ. 898 (1978).
31. *Supra* note 26.
32. *Id.* at A–27.
33. *Id.*
34. *See, e.g.,* Photographic Color Paper, *supra* note 26, where the decline in industry market share was found to be due to the decline in one manufacturer's share.
35. Since 1954, the Commission has been charged with the responsibility for conducting the full injury investigation after a finding of LTFV sales (*see* note 13 *supra*). The development of the standards used in these determinations is reviewed in Krauland, *The Standard of Injury in the Resolution of Antidumping Disputes, post.*
36. AA1921–Inq.–1, USITC Publ. 727 (1975).
37. *Id.* at 5.
38. New, On-the-Highway, Four-Wheeled, Passenger Automobiles from Belgium, France, Italy, Japan, Sweden, United Kingdom, and West Germany, AA1921–Inq.–2, USITC Publ. 739 (1975).
39. *Id.* at 34.
40. *See, e.g.,* Uncoated Free Sheet Offset Paper, *supra* note 18, where one Commissioner was unable to find "no reasonable indication" of injury, while the majority voted to dismiss the complaint.
41. Import market penetration, capacity utilization, lost sales, price suppression, levels of production and employment, trends in inventories and foreign capacity to produce for export. *See* Titanium Dioxide, *supra* note 18, at 11.
42. AA1921–Inq.–4, USITC Publ. 775 (1976).
43. The Commission noted that "minimal import penetration by itself is not sufficient to conclude that there is no reasonable indication of injury or likelihood thereof. Other indicators . . . must be examined." *Id.* at 5.
44. This has been true in approximately three-fourths of the cases.
45. AA1921–Inq.–3, USITC Publ. 751 (1978).
46. AA1921–Inq.–14, –15, –16, USITC Publ. 904 (1978).
47. *See, e.g.,* Standard Household Incandescent Lamps, *supra* note 18, (majority failed to find significant evidence of alleged lost sales); Methyl Alcohol from Canada, *supra* note 30 ("the Commission's investigation indicates that a significant volume of sales may have been lost to Canadian imports.")