Antidumping Investigations: Procedural Reform and Substantive Change Through the Trade Agreements Act

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"Dumping" has generally been defined as "price discrimination between national markets." Although there may be variations, the typical dumping case involves a manufacturer who sells goods in a foreign market at a price lower than that demanded in the domestic market. Generally, the inducement for such activity lies in an anticompetitive goal. That is, the exporting manufacturer may hope to capture a section of a foreign market by artificially reducing prices with the intent of rendering the competitor's business unprofitable. The price reduction will typically be only a temporary one: lasting only long enough to achieve the anticompetitive goal. Thus, dumping may occur when the exporter has an overstock it wishes to eliminate without destroying the domestic market for its goods.

Professor Viner, in his authoritative treatise, has classified three major types of dumping activity: sporadic, intermittent, and persistent.²

Sporadic dumping is not a major concern for the importing country as it usually will not have a permanent effect upon any particular domestic market. Sporadic dumping may proceed from a producer who did not originally intend to obtain a competitive advantage but is faced with the problem of eliminating an overstock which would hamper market conditions if it were sold in the producing country. The producer may therefore resort to price reductions in foreign markets in order to assure the sales of the surplusage.

Intermittent dumping is the result of anticompetitive motives on the part of the exporting producer. The intermittent dumper seeks to destroy competition in the foreign market by periodic price reductions which attract purchasers to its product. After the desired advantage is secured in the foreign market and the result-

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2. Id. at 23.
ing harm is inflicted upon competitors, the producer will raise the price of its goods to a level more reflective of their true value. The practice of intermittent dumping may have a profound effect not only upon the particular domestic market but also upon the domestic work force.³

Persistent dumping, as opposed to intermittent, may have a positive effect upon the economy of the importing country. Persistent dumping is the continuous sale of goods in a foreign market for a price below that demanded in the home market. Since the price of the goods will not fluctuate to a great degree, the effect of persistent dumping may be to encourage more rigorous competition in the foreign market and to benefit purchasers through lower prices.⁴ The persistent dumper is typically motivated by the possibility of increased profits through volume sales.

One might conclude, therefore, that the injurious effects of dumping stem mainly from the intermittent variety and that antidumping legislation should be focused mainly on this practice. The Antidumping Act of 1921⁵ authorized the imposition of certain

³ Viner states that unregulated dumping "may result in serious injury to or even total elimination of the domestic industry." Id. at 140.
⁴ Where a domestic market has become stagnant and the prices inflexible, some economists believe that dumping may be the stimulus needed to spur competition. See, e.g., Adams & Dirlam, Steel Imports and Vertical Oligopoly Power, 54 Am. Econ. Rev. 626 (1964).
Whenever the Secretary of the Treasury (hereinafter called the "Secretary") determines that a class or kind of foreign merchandise is being, or is likely to be, sold in the United States or elsewhere at less that its fair value, he shall so advise the United States International Trade Commission (hereinafter called the "Commission"), and the Commission shall determine within three months thereafter 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 such merchandise into the United States. The Commission, after such investigation as it deems necessary, shall notify the Secretary of its determination, and, if that determination is in the affirmative, the Secretary shall make public a notice (hereinafter in sections 160 to 171 of this titled called a "finding") of his determination and the determination of the Commission. For the purposes of this subsection, the Commission shall be deemed to have made an affirmative determination if the Commissioners of the Commission voting are evenly divided as to whether its determination should be in the affirmative or in the negative. The Secretary's finding shall include a description of the class or kind of merchandise to which it applies in such detail as he shall deem necessary for the guidance of customs
sanctions against an exporting producer which is selling, or about
to sell, merchandise in the United States "at less than fair value"
(LTFV) which may result in injury to an industry of the United
States. Although the statute does not differentiate between the
above-mentioned categories, the legislative history demonstrates
that the Act was aimed primarily at the deleterious effects of inter-
mittent dumping. 6

The Antidumping Act was repealed in 1979 and replaced with
the Trade Agreements Act of 1979 7 which became effective Janu-
ary 1, 1980. Section 1673 of the Act now sets forth the procedural
steps that are to be followed in the investigation of alleged dump-
ing activity. The investigation must start with a determination by
the administering authority (Secretary of the Treasury) that a
class or kind of foreign merchandise is being, or is likely to be, sold
in the United States at less than its fair value. If the Secretary
determines in the affirmative, he must then notify the Interna-
tional Trade Commission which will then determine whether an
industry of the United States "is materially injured, or is
threatened with material injury," or whether the establishment of
a domestic industry is "materially retarded" by reason of the im-

6. 61 CONG. REC. 262 (1921). Congressman Fordney said of the proposed bill's
purpose:
It protects our industries and labor against a now common species of
commercial warfare of dumping goods on our market at less than cost or
home value, if necessary until our markets are destroyed, whereupon the
dumping ceases and prices are raised at [sic] above former levels to
recoup dumping losses.
7. 19 U.S.C. §§ 1673-77g (1979). Section 1673 of the Act now provides:
If—
(1) the administering authority determines that a class or kind of
foreign merchandise is being, or is likely to be, sold in the United
States at less than its fair value, and
(2) the Commission determines that—
(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 that merchandise,
then there shall be imposed upon such merchandise an antidumping
duty, in addition to any other duty imposed, in an amount equal to the
amount by which the foreign market value exceeds the United States
price for the merchandise.
ported merchandise. The Act then requires that the Commission make its determination within a specified time period and notify the Secretary of its decision. The Secretary must then issue an antidumping duty "order" which directs customs officers to assess an antidumping duty equal to the amount by which the "foreign market value" exceeds the "United States price" of the merchandise.

This two-tiered process, involving both the Secretary of the Treasury and the International Trade Commission, is a carry-over from the Antidumping Act of 1921. Since many of the provisions of the two acts are substantially similar, an examination of the relevant interpretations of the Antidumping Act is necessary in order to better predict and understand the course that proceedings under the Trade Agreements Act will take. This note will review some of the major decisions in this area as well as some of the major policy considerations which have become intertwined with the procedure under the Antidumping Act.

Both the Antidumping Act and the Trade Agreements Act seem to give the Secretary of the Treasury complete discretion in initiating or terminating a dumping investigation. The power of the Secretary under the Antidumping Act has been upheld against attacks alleging an unconstitutional delegation of legislative power and a violation of due process. The broad range of the Secretary's power and the limited scope of judicial review were emphasized in Kleberg & Co. v. United States where the Court of Customs and Patent Appeals stated:

The Congress has laid down 'by legislative act an intelligible principle' to which the Secretary of the Treasury is directed to conform, and, therefore, such legislative action is not a forbidden delegation of legislative power. . . .

It is equally well established by the authorities that if the

8. Id. § 1673d(b).
9. Id. § 1673e. For a discussion of the procedure under the Antidumping Act see Timken Co. v. Simon, 539 F.2d 221, 223-24 (D.C. Cir. 1976).
11. 71 F.2d 332 (C.C.P.A. 1933). At the time this case was decided the Act provided that the Secretary was to make both the LTFV and the injury determination. It was not until 1954 that the function of determining injury was shifted to the Commission by the Customs Simplification Act, ch. 1213, § 301, 68 Stat. 1138 (1954).
Secretary of the Treasury has proceeded in the method prescribed by Congress, we may not judicially inquire into the correctness of his conclusions. The constitutionality of the law under which he proceeds having been once determined, then the judicial power extends only to a correction of his failure to proceed according to and within the law. . . .12

While it appears that the Secretary's decision of whether or not to initiate a dumping investigation is not subject to intense judicial review, once the procedure progresses beyond this stage, the Secretary's discretion is reduced and his duties become ministerial. In *Timken Co. v. Simon*13 a federal court of appeals held that after an affirmative determination by the Commission has issued, the Secretary has no authority to withhold publication of its dumping finding. In this case, after the Secretary had received a dumping complaint filed by the Timken Company, he issued a withholding of appraisement notice which ordered customs officials to withhold appraisement upon the imports subject to the dumping investigation until a final determination could be reached. The Secretary then made an affirmative LTFV finding and the Commission determined that a domestic industry was likely to be injured. After notification from the Commission of its affirmative determination, however, the Secretary refused to issue a formal dumping finding as required under the Antidumping Act. The effect of this delay was to permit those goods subject to the withholding notice to escape assessment of the dumping duty.

The court of appeals held that the Antidumping Act requires prompt publication of dumping findings after notification of an affirmative determination from the Commission. The court reasoned that the section of the Act which provided that the withholding notice is to remain in effect "until further order of the Secretary, or until the Secretary makes a public finding"14 is intended only to cover those situations where the Secretary or the Commission has made a negative determination.15 Thus, the *Timken* case stands for the principle that, although LTFV determinations are still effectively immune from the judicial process, meaningful review of other functions of the Secretary in antidumping investigations is a

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12. 71 F.2d at 334-35. The court in *Kleberg* also stated that the Secretary is not confined to any particular source or means of investigation when examining a purported dumping activity. *Id.* at 335.
13. 539 F.2d 221 (1976).
15. 359 F.2d at 228.
real possibility.

The Secretary's determination of "less than fair value" relies on a somewhat mechanical application of statutory formulae. Stated simply, a finding of LTFV will come about whenever a disparity exists between the "United States price" and the "foreign market value."\(^{16}\) The Trade Agreements Act defines "United States price" as either the "purchase price" or the "exporter's sales price" of the merchandise.\(^{17}\) "Purchase price" is defined as the price at which imported merchandise has been purchased or agreed to be purchased prior to the date of importation, from the foreign manufacturer.\(^{18}\) The "exporter's sales price" is the price at which the merchandise was sold or agreed to be sold in the United States by or for the account of the exporter.\(^{19}\) The Act allows for reductions of the United States price for items such as export taxes imposed by the exporting country\(^{20}\) and allows for increments in the United States price for items such as the costs incident to preparing the merchandise for shipment.\(^{21}\)

The "foreign market value" will usually be based on a determination of the price of the same or similar merchandise offered for sale in the principal markets of the exporting country for home consumption in the ordinary course of trade.\(^{22}\) However, if the same or similar merchandise is not offered for sale in the home market, or if the quantity sold for home consumption is so small as to form an inadequate basis of comparison, the Act authorizes the use of the price of such merchandise offered for sale in countries other than the United States.\(^{23}\)

What constitutes "similar merchandise" for the purpose of ascertaining the foreign market value was not always clear under the Antidumping Act. The Treasury regulations under the Antidump-

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18. Id. § 1677a(b).
19. Id. § 1677a(c).
20. Id. § 1677a(d)(2).
21. Id. § 1677a(d)(1).
22. Id. § 1677b(a)(1)(A). In J. H. Cottman & Co. v. United States, 20 C.C.P.A. 344 (1932), cert. denied, 289 U.S. 750 (1932), the court defined "home consumption" as destruction of merchandise in the home market either by use or by being manufactured into another product. The court also held that a conditional or restricted sale did not satisfy the definitions of the terms "ordinary course of trade" and "freely offered for sale" within § 164 of the Antidumping Act. 20 C.C.P.A. at 356.
ing Act stated that the Secretary shall make due allowance for dissimilarities in the merchandise which are primarily the result of differences in the costs of manufacture, but failed to define what would be considered similar. The problems inherent in agency decisions based on unarticulated standards are obvious. The present statute improves this situation dramatically. The Trade Agreements Act sets out differing grades of "similarity" ranging from merchandise which is identical to the products under investigation to merchandise which may be reasonably compared with such products. In his foreign market value determination, the Secretary must use the merchandise which is available and ranks highest on the scale of similarity. The provision also expresses a preference for merchandise which has been produced in the same country and by the same person as the merchandise which is the subject of the investigation. The new statute thereby significantly limits the discretion of the Secretary in the foreign market value procedure and provides reviewing courts with articulated standards by which they may measure the lawfulness of the Secretary's actions in this regard.

If foreign market value cannot be ascertained in the previously described manner, i.e., due to the complete nonexistence of a foreign market other than the United States, the Trade Agreements Act authorizes the computation of a "constructed value." The constructed value consists basically of the following: 1) the costs of materials and production, 2) an amount for general expenses and profits, and 3) the costs incident to preparing the merchandise for shipment to the United States.

The constructed value method is most commonly used in investigating the alleged dumping activities of communist exporters. The standard formula for LTFV is particularly inappropriate when

25. Recognizing the obvious flaws in this procedure, one commentator called for more explicit determinations from the Secretary disclosing in detail the bases for the conclusions reached. 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, 467 n. 15 (1974).
27. Id. § 1677b(a)(2).
28. Id. § 1677b(e). In J. H. Cottman & Co. v. United States, note 22 supra, a foreign government had operated phosphate mines and supplied the product to a governmental sales agency. The court held that the cost of materials must be included in the "cost of production" under § 164 of the Antidumping Act. Id. at 359.
the dumping proceeds from a state-controlled economy. Attempting to ascertain the foreign market value becomes a futile exercise when the prices in the foreign market are determined by reference to macroeconomic factors such as social value and costs. Similarly, state-controlled economies typically exhibit an independence of purpose between domestic prices and export prices. That is, the price received for an exported good may not represent the true value of that good on the domestic market due to the different functions of the two pricing systems. Also, since exchange rates for Socialist Bloc and American currency are highly synthetic, the true value of the goods produced in Bloc countries tends to become distorted.

The imposition of the constructed value technique in state-controlled economies, however, is less than precise since the costs of production are fixed by the state and therefore do not represent the true value of the goods. Perhaps cognizant of this fact, the Treasury in Bicycles from Czechoslovakia, opted to compute the foreign market value on the basis of the price of similar articles manufactured in the domestic market. This procedure is now authorized by the Trade Agreements Act which states that foreign market value may be determined by the prices of similar merchandise of non-state-controlled economies for sale in any other non-state controlled economy country. While this method may more closely approximate the fair value of the merchandise under investigation, its flaws are rather apparent. The production methods of the surrogate country may not closely parallel those of the Socialist Bloc country, and if the price demanded is a function of the state of technology employed, discrepancies are bound to arise. While

30. See Holzman, East-West Trade and Investment Policy Issues, I Williams Papers 369:

Id. at 389.

33. 19 U.S.C. § 1677b(c).
the Secretary is authorized to make adjustments to reflect such differences, such adjustments can only be seen as subjective. The Treasury regulations under the Antidumping Act attempted to address this problem by requiring that the Secretary select a country which is at a stage of economic development comparable to that of the state-controlled economy country.\textsuperscript{34}

Since the fair value of imported merchandise could not be determined from the home market price with any degree of accuracy, the Treasury, in \textit{Portland Cement from Poland},\textsuperscript{35} finally discarded the home market criterion in cases of communist dumping. The Treasury reasoned that the "ordinary course of trade" as set forth in the Antidumping Act did not include the internal transactions of communist countries. After this decision, it was the pronounced practice of the Treasury to use the approach first hinted at in \textit{Bicycles from Czechoslovakia} when dealing with communist dumping.

The Trade Agreements Act has left the provisions of the Antidumping Act relating to state-controlled economies substantially intact. Thus, the problems experienced under the Antidumping Act in this regard are left unresolved. The motivational force\textsuperscript{36} behind communist dumping and the unique structure of the internal state economy makes application of any antidumping legislation difficult at best. The inability of the present statutory scheme to accurately determine the "fair value" of imports from state-controlled economies may call for an altogether different approach to the problem of communist dumping. One commentator has suggested that temporary quota restrictions or top level communications with the government of the dumping country may be sufficient.\textsuperscript{37}

\begin{itemize}
\item \textsuperscript{34} 19 C.F.R. § 153.7(b).
\item \textsuperscript{35} 28 Fed. Reg. 6660 (1963).
\item \textsuperscript{36} The predatory aspect of intermittent dumping is absent when Socialist Bloc countries export at what is alleged to be "less than fair value." If it can be assumed that the Antidumping Act was enacted to combat the anticompetitive motives of foreign producers, the inapplicability of the Act to communist exporters is again reinforced. See note 6 supra. See also Wilczynski, \textit{Dumping in Trade Between Market and Centrally Planned Economies}, \textit{Economics Of Planning}, vol. 6 no. 3, 1966. The author states that "[u]nexpectedly needed imports, which may be caused by planning errors or natural adversities, may necessitate exports at any price that can be obtained rather than to allow bottlenecks to upset the plan. The degree of price undercutting may be the greater the harder the foreign exchange." Id. at 223.
\item \textsuperscript{37} De Jong, \textit{The Significance of Dumping in International Trade}, 2 J.W.T.L. 162, 183 (1968).
\end{itemize}
The International Trade Commission: The Process of Determining "Injury"

The Trade Agreements Act provides that the Secretary shall advise the United States International Trade Commission of his determination that foreign merchandise is being, or is likely to be, sold at less than fair value. It is then incumbent upon the Commission to determine whether an industry of the United States is materially injured, threatened with material injury, or the establishment of an industry is materially retarded by reason of the LTFV sales. Since the Antidumping Act did not further define "injury," the actual determinations of the Commission were the only source of authority which could be consulted for guidance. The Trade Agreements Act, however, has codified a number of specific economic indicators which the Commission may use in making its determination.

The Court of Customs and Patent Appeals had frequently emphasized the broad range of discretion which the Commission could exercise in making determinations of injury under the Antidumping Act.

38. 19 U.S.C. § 1673. Prior to 1954 the function of determining injury was vested in the Secretary of the Treasury. See note 11 supra.

39. 19 U.S.C. § 1677(7)(C) provides:

(i) Volume. In evaluating the volume of imports of merchandise, the Commission shall consider whether the volume of imports of the merchandise, or an increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant.

(ii) Price. In evaluating the effect of imports of such merchandise on prices, the Commission shall consider whether—

(I) there has been significant price undercutting by the imported merchandise as compared with the price of like products of the United States, and

(II) the effect of imports of such merchandise otherwise depresses prices to a significant degree or prevents price increases, which otherwise would have occurred, to a significant degree.

(iii) Impact on affected industry. In examining the impact on the affected industry, the Commission shall evaluate all relevant economic factors which have a bearing on the state of the industry, including, but not limited to—

(I) actual and potential decline in output, sales market share, profits, productivity, return on investments, and utilization of capacity,

(II) factors affecting domestic prices, and

(III) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital, and investment.
ANTIDUMPING INVESTIGATIONS

For example, the CCPA stated that judicial review of determinations of injury, or the likelihood thereof, does not extend beyond examining whether the Commission has acted within its delegated authority, has correctly interpreted statutory language, and has correctly applied the law. The court rejected various arguments made by the plaintiffs that the Commission had acted ultra vires in the method by which it reached its determination of injury. The court also held that the Commission was under no obligation either to disclose all of the evidence in its possession or to state in meticulous detail the manner in which it utilized that evidence in reaching its determination.

Since judicial review of injury determinations of the Commis-

40. 457 F.2d 991 (C.C.P.A. 1972). See also Imbert Imports, Inc. v. United States, 475 F.2d 1189 (C.C.P.A. 1973). In Imbert, the CCPA upheld the imposition of dumping duties on fourteen shipments of portland cement from the Dominican Republic. The court held that the Commission had not violated its duty under the Antidumping Act by basing its injury determination, in part, on the presence of sales at less than fair value. The court stated that the Commission had not used the presence of LTFV as the only basis for its decision and that LTFV may be considered along with other factors in formulating a determination of injury. The CCPA also recognized that judicial review of Commission decisions is limited and held that the findings of the Commission were justified under the "substantial evidence" test. Id. at 1192.

41. 457 F.2d at 996. The manner in which the Commission reached an injury determination was precisely the issue in Voss International Corp. v. United States, 432 F. Supp. 205 (Cust. Ct. 1977). In Voss, the plaintiff charged that the Commission’s determination of injury was invalid since it was achieved by a two-to-two vote of the five commissioners who were present with one commissioner abstaining. The court first held that it was not necessary for all six members of the Commission to be present since a majority of the commissioners was sufficient to constitute a quorum under 19 U.S.C. § 1330(c). The court then went on to hold that as a matter of law the Commission will be deemed to have made an affirmative determination if the vote of the commissioners is evenly divided on the issue of injury. Id. at 208.

42. The leading case pertaining to the proper forum in which challenges to Commission determinations must be brought is SCM Corp. v. United States, 549 F.2d 812 (D.C. Cir. 1977). In SCM the plaintiff (SCM) sought to challenge a negative determination of injury made by the Commission. Plaintiff brought the action in a federal district court rather than the Customs Court. SCM argued that its action was not within the jurisdiction of the Customs Court since it was not contesting the nonassessment of dumping duties as required by 19 U.S.C. § 516(c) and it was not contesting a negative LTFV determination of the Secretary as required by 19 U.S.C. § 516(d). Plaintiff alleged that jurisdiction in the Customs Court could only exist under one of these sections, and, therefore, the district court was the appropriate forum pursuant to 28 U.S.C. § 1340. Section 1340 gives
mission seems rather limited, an examination of actual Commission decisions is necessary for an understanding of the "injury" concept.

"Industry": Regional vs. National Approach

In order for the Commission to issue an affirmative determination, it must first find material injury to an "industry in the United States." The concept of "industry" has been subject to interpretation by both the Commission and the courts. While it was early understood that "industry" would be defined on a national rather than regional level, the Customs Court in *Ellis K. Orlowitz Co. v. United States* rejected the notion that the "industry" must be comprised of every producer of the product throughout the United States. The plaintiff in *Orlowitz* contended that the Commission had not satisfied its statutory obligation since it had only considered the injury to six producers of cast-iron soil pipe in California and disregarded the rest of the American industry. The court found no basis in the legislative history of the Antidumping Act for the contention that an injury to every producer of a similar product in the nation must be shown before the Commission can make an affirmative determination. The court, therefore, held that the Commission had acted within its statutory authority in restricting the "industry" to the producers of cast-iron soil pipe in California.

The position of the Commission on the regional versus the national approach has not always appeared consistent. In *Hot Rolled Carbon Rods from West Germany,* the Commission seemed to favor the national approach. In this case, the United States steel
industry attempted to define four geographic regions as distinct industries for separate consideration by the Commission. The Commission rejected this proposal and found that no injury to the national industry had occurred as a result of the LTFV sales. The distinction between a regional and a national industry is important because a showing of injury to a regional market would seem to require a lesser degree of anticompetitive activity than would an injury to a national market.46

The regional approach to industry became more prevalent in the decisions of the Commission during the 1960's. In Chromic Acid from Australia47 the Commission focused its injury investigation upon the west coast market for chromic acid. The Commission justified its deviation from the national approach by the rather vague declaration that sales at less than fair value are condemned under the Antidumping Act "when they have an anticompetitive effect."48 The Commission determined that the regional approach was appropriate since the anticompetitive effect was established by the importer's rapid penetration and substantial capture of the west coast market. The Commission seemed to imply that the Act would be satisfied whenever the dumping in a regional market was of such a volume that its effects could be felt on the national industrial level.

The existence of this "nexus" between the regional and national markets had seemed to be an established prerequisite to the use of the regional approach.49 The Commission, however, had

46. The policy in favor of the national approach to injury stems from a free trade rationale. See Coudert, The Application of the United States Antidumping Law in the Light of a Liberal Trade Policy, 65 Colum. L. Rev. 189 (1965). If industry is defined too narrowly, free trade may be hampered to the extent that small individual firms seeking to eliminate outside competition are allowed to successfully allege injury to an industry of the United States. The Antidumping Act, then, is meant to remedy wrongs of a national scale rather than supply a private cause of action. But see H. Wagner & Adler Co. v. Mali, 74 F.2d 666 (2d Cir. 1935) (a case which was brought under the Antidumping Act of 1916 which provided for a civil cause of action against persons who imported goods at less than actual value with the intent of injuring an industry of the United States).


49. See, e.g., Cast Iron Soil Pipe from Poland, 32 Fed. Reg. 12925 (1967). In this case the Commission determined that the import was causing material injury to a nationwide domestic industry since it had suffered a substantial depression in the prices of its large northeastern market area.
dealt with the issue on an increasingly superficial level until 1970 when the nexus requirement was finally abandoned. In Steel Bars, Reinforcing Bars, and Shapes from Australia, in holding that Australian imports of steel into the California market injured an industry of the United States, the Commission stated, "an injury to a part of the national industry is an injury to the whole industry." In this statement the Commission finally articulated what had long been its unexpressed practice.

Recently, the focus of the Commission's inquiry seems to have shifted. Having abandoned the nexus requirement, the Commission is no longer concerned with the national effect of sales at less than fair value. The procedure now seems to be merely a matter of definition of regional markets. Once a particular market has been defined as regional, the Commission will proceed to the question of injury without stopping to ponder the question of the effect upon the national market. The Commission, in Portland Hydraulic Cement from Canada, set forth specific criteria for when an industry may be considered regional. The Commission stated that an industry is regional when: "1) domestic producers of an article are located regionally and serve a particular regional market predominantly or exclusively, and 2) the LTFV imports are concentrated primarily in the regional market." The Commission found that the first criterion was satisfied since transportation costs tended to prohibit shipments of cement further than 300 miles from the producing plant, and the second criterion was satisfied since over 80 percent of the Canadian exports of portland cement were shipped to the regional market.

The Trade Agreements Act has essentially codified the first criterion for the regional industry test set forth by the Commission

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50. See, e.g., Cast Iron Soil Pipe from Poland, supra note 49. While the Commission indicated the existence of a nexus between the regional and the national markets, this conclusion seems rather tenuous. Evidence adduced by the Commission showed a gradual increase in sales prices of cast iron soil pipe produced by domestic manufacturers during a four year period. The two regional markets under consideration, however, exhibited price instability and depression during the same period. Therefore, any overflow effect from the regional market into the national market would seem minimal.
52. Id. at 4162.
54. Id.
55. Id.
in Cement from Canada.\textsuperscript{56} The second requirement under the Act, however, differs from the Commission's previous standard in that it does not require the LTFV imports to be largely concentrated in the regional market. Instead, the Act requires that the regional demands for the product be substantially supplied by domestic producers located outside of the region. Thus, for example, in Sodium Hydroxide from Germany, Italy, and the United Kingdom,\textsuperscript{57} the Commission refused to consider the northeastern United States as a regional market for sodium hydroxide even though the domestic producers concentrated their sales within that area. The Commission reasoned that the second requirement of the regional industry test was not satisfied because the regional market was served to a large extent by domestic producers whose production facilities were located primarily in the Gulf Coast states.\textsuperscript{58}

Consistent with the Commission's disregard for the nexus requirement, the Trade Agreements Act also states that an injury to the domestic industry as a whole need not be shown if there is a concentration of the dumped imports in the regional market.\textsuperscript{59} The Act therefore seems to make limited use of the second criterion of the regional industry test as set forth by the Commission in Cement from Canada. However, the test now serves a different function: that of determining injury rather than of defining regional industry. Also, under circumstances where the LTFV imports are not concentrated primarily in the regional market, the Act seems to restore the once discarded nexus requirement to a limited extent. By reverse implication, the Act seems to require a showing of injury to the domestic industry as a whole whenever the dumped imports are sold, to a significant extent, outside of the regional

\textsuperscript{56} 19 U.S.C. § 1677(4)(C) provides:

In appropriate circumstances, the United States, for a particular product market, may be divided into 2 or more markets and the producers within each market may be treated as if they were a separate industry if—

(i) The producers within such market sell all or almost all of their production of the like product in question in that market, and

(ii) The demand in that market is not supplied, to any substantial degree, by producers of the product in question located somewhere in the United States.

\textsuperscript{57} 45 Fed. Reg. 12933 (1980).

\textsuperscript{58} Id. at 12935. The Commission stated that total reported domestic sales in the Northeast market exceeded local productive capacity by 299,000 short tons for 1976, 46,000 short tons for 1977, and 96,000 short tons for 1978.

\textsuperscript{59} 19 U.S.C. § 1677(4)(c).
market. Recent determinations do not resolve the question of whether the Commission will continue to ignore the nexus requirement now that it has been legislatively mandated in this limited context.  

The "Like Product"

Regardless of whether the Commission uses the regional or national approach, it must still choose those specific domestic concerns which will comprise the domestic industry. This is accomplished by a comparison of the similarities between the imported product and the products of the various domestic producers. The Trade Agreements Act defines "like product" as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation. . . ." This provision adds nothing new to the scope of the Commission's inquiry since the same comparisons were made by the Commission under the Antidumping Act.

Usually, the like product analysis posed no difficulty for the commissioners under the Antidumping Act since a substantially similar, if not identical, product could readily be found on the domestic market. Occasionally, however, the Commission was required to analyze the question on a level demanding more than a mere comparison of physical characteristics of the two products. In Nepheline Syenite from Canada, since no United States manufacturer of nepheline syenite could be located, the Commission determined that producers of feldspar would comprise the domestic industry. The Commission reasoned that feldspar was sufficiently similar to the imported nepheline syenite in that they both competed for use in the manufacture of glass.

Under the Antidumping Act another problem arose in determining "like product" industries when a domestic concern produced more than one product line of merchandise. If separate data

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60. The Commission did not reach the question in Sugars and Sirups from Canada, 45 Fed. Reg. 19687 (1980). In applying the statutory formula, the Commission determined that the regional industry approach was appropriate and that the dumped imports were concentrated primarily in the regional market thereby making any inquiry to the national industry as a whole unnecessary. Id. at 19688.


relating to the costs of production for the single product line under investigation were not available, it was difficult for the Commission to determine the effect of the dumped imports upon the domestic industry. The commissioners also expressed disagreement as to whether an injury to the whole company need be shown or whether an injury to the segment of the company responsible for the product line would suffice. The Trade Agreements Act now attempts to provide some guidance for the Commission in this regard. The Act states that the effect of the dumped import shall be assessed in relation to the like product if separate data are available which would permit the separate identification of factors such as production process and the producer’s profits. If the product line has no separate identity in terms of these factors, the Act instructs that the effect of the dumped import shall be assessed by the narrowest group or range of products for which such data is available. Clearly, then, the statute does not require a showing of injury to the entire company but merely to the particular production line. However, if sufficient data that would tend to segregate the production facilities of the plant are unavailable, an affirmative determination may require a more extensive showing of injury.

“Injury”

The Antidumping Act required that the Commission deter-

64. See, e.g., Silicon Metal from Canada, 44 Fed. Reg. 13590 (1979). In this case, the Commission was able to review the silicon metal industry as a separate entity since separate data were available for silicon metal production segments of each one of the integrated domestic companies under investigation.

65. See, e.g., Titanium Sponge from the U.S.S.R., 33 Fed. Reg. 10769 (1968). In this case, two companies manufactured sponge primarily for their own use in a larger production process. The companies alleged, however, that their attempt to market the sponge was hindered due to the dumped imports. The Commission determined that an injury to the sponge-producing facilities of the plants was sufficient despite the lack of any ascertainable injuries to the plants as entities. Id. at 10770.

66. 19 U.S.C. § 1677(4) (D)

67. Id. The Commission has not yet felt the necessity to proceed under the second clause of § 1677(4) (D) that requires an examination of the narrowest range of products for which production data is available. In Carbon Steel Products from European Communities, 45 Fed. Reg. 31814 (1980), the Commission was able to obtain separate data on the profits, productivity, employment, cash flow, and capacity utilization of each one of five product lines. Consequently, the Commission was able to examine the impact of imports of like products on these domestic product lines. Id. at 31814-15.
mine whether an industry of the United States is being or is likely to be injured. The Commission eventually came to interpret this phrase as requiring "material injury." In 1963, the Commission articulated this position in *Titanium Dioxide from France* by reasoning that Congress did not intend for the Act to reach every sale at less than fair value. The Commission stated that such sales are condemned under the Act only when they are equated with the concept of unfair competition. The material injury standard, however, was rather short-lived. In 1967, the Commission, apparently inadvertently, announced a new standard for injury in *Cast Iron Soil Pipe from Poland*. While purporting to apply the material injury standard, the Commission defined it in such a way as to completely reformulate its meaning by stating, "[a]ny injury which is more than de minimus is material injury." The Commission reasoned that the lack of a qualifier for the word "injury" indicated that Congress intended for any degree of injury to satisfy the Act. In further defining the *de minimus* standard, the Commission stated that the only qualification that could be placed on the meaning of injury stemmed from the old legal maxim that "the law does not deal in trifles."

The Trade Agreements Act, however, now requires that the Commission find material injury. Whether this provision will translate into the same kind of standard as used by the Commission in *Titanium Dioxide from France* is doubtful, however. Although material injury is now required, the Act defines it in terms reminiscent of the *de minimus* standard. The Act states that material injury is "harm which is not inconsequential, immaterial, or unimportant." Thus, it appears that the task of formulating a more precise and workable definition of the requisite degree of injury.

68. Prior to the affirmation of the material injury test in *Titanium Dioxide from France*, 28 Fed. Reg. 10,467 (1963), the Commission had not always demanded such a high level of injury. See, e.g., *Cast Iron Soil Pipe from the United Kingdom*, AA 1921-5 T.C. Publ. 5 (1955). In this case the Commission used a regional market for the domestic industry. Although intrusion into this market was relatively slight and the entire domestic market was totally unaffected, the Commission still made an affirmative determination.

69. See note 68 supra.
70. Id. at 10,467.
72. Id. at 12926.
73. Id.
75. Id. § 1677(7).
jury is again placed within the discretion of the Commission.\footnote{76. There has been one decision of the CCPA relating to the requisite degree of injury under the Antidumping Act, although not directly bearing on the de minimus - "material" injury dichotomy. In United States v. Elof Hansson, Inc., 296 F.2d 779 (C.C.P.A. 1960), cert. denied, 368 U.S. 899 (1961), the CCPA declined to hold that the meaning of "injury" under the Act required a complete destruction of the domestic industry. 296 F.2d at 782.}

Prior to the enactment of the Trade Agreements Act, determinations of injury generally depended upon the existence or nonexistence of certain economic indicators. Probably the two most commonly relied upon indicators were the effect of the LTFV sales upon domestic prices and the degree of market invasion by the imported merchandise.

Under the former indicator, the Commission was likely to find injury if the importer's sales prices significantly undercut those of the domestic producer such that a domestic price depression or suppression resulted. That is, the effect of the sales was either to force the domestic producer to reduce his prices or to prevent him from raising his prices in order to remain competitive with the importer.\footnote{77. Note, The Standard of Injury in the Resolution of Antidumping Disputes, 1 Mich. Y. B. Int'l Legal Stud. 164, 168-69 (1979).}

In Chromic Acid from Australia, the Commission found evidence of injury due to significant price undercutting by the importer which, in turn, triggered a "price war" at all levels of trade in the regional market.\footnote{78. 29 Fed. Reg. at 2920.} The Commission also emphasized that price reductions by the domestic producers were forced by the need to maintain their customers. Evidence adduced from consumers of the product tended to show that the lower prices of the imported merchandise were the preponderant reason for the resulting lost sales of the domestic producers.\footnote{79. Id.}

Chromic Acid thus suggests that mere price undercutting without some other form of resulting harm to the domestic industry will not be enough for an affirmative determination of injury.

This position was reinforced in the recent case of Titanium Dioxide from European Communities.\footnote{80. 44 Fed. Reg. 66,997 (1979).} In this case, although there was some evidence of price undercutting by the importers, the evidence was insufficient to show that the sales lost by domestic producers were a direct result of the LTFV sales. The Commission determined that the volume of lost sales was insignificant in

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\footnote{78. 29 Fed. Reg. at 2920.}

\footnote{79. Id.}

\footnote{80. 44 Fed. Reg. 66,997 (1979).}
relation to the size of the market and that the lost sales that did result were due in part to the quality and availability of the imported merchandise rather than its lower price.  

The degree of market invasion or lost sales required for an affirmative determination of injury has not always been a uniform standard applied by the Commission. If the Commission restricts the domestic market to a specific geographical region, the Commission will, most likely, require a lesser degree of market invasion. In Chromic Acid from Australia, the imported merchandise accounted for only a slight percentage of the domestic sales. However, since the imports had captured a major share of the regional market, the Commission determined that a domestic industry was being injured. 

Although there may be a significant capture of the domestic market, the Commission may still refuse to find injury if the penetration is primarily the result of factors other than the LTFV sales. In Nylon Yarn from France the Commission determined that a domestic industry was not being injured despite the existence of lost sales. The Commission stated that the quantity and availability of the import, as well as the desire of the purchasers to develop an alternative supply source, were more important factors than price in the purchaser's selection of the foreign goods over the domestic. Similarly, if the market invasion is due primarily to the exports of countries not before the Commission, an affirmative determination may not be forthcoming. In Alpine Ski Bindings from Austria, Switzerland, and West Germany, the Commission determined that the imports of these countries were not injuring a

81. Id. at 66,999.
82. 29 Fed. Reg. at 2920. But see Hollowed or Cored Ceramic Brick from Canada, 41 Fed. Reg. 32670 (1976). In this case the Commission used a regional market approach and made a negative determination of injury. The Commission stated that factors such as quality and architectural specifications were the primary reasons for the preference for the imported merchandise. Id. at 32671.
84. Id. at 49,860. See also Portland Hydraulic Cement from Canada, 43 Fed. Reg. 44907 (1978). The Commission stated:
Many of the purchasers of cement in the northeast market have been using Canadian cement for many years, others stated that the shortage in 1973 resulted in the purchase of the Canadian product as the prime or alternate source of supply of cement. Many purchasers asserted better service and delivery of the Canadian product.  

Id. at 44908.
domestic industry. The Commission stated that the decreased domestic share of the ski binding market was due to an increase in imports from sources other than the countries under investigation.86

The Trade Agreements Act has codified many of the economic indicators formerly used by the Commission.87 Hence, the statute will not substantially alter the established procedure of the Commission in this area. While the statute mandates that the Commission evaluate each of the list of factors in its investigation, it also indicates that the Commission is not limited to a consideration of only those factors. In accordance with its statutory duty, the Commission has mechanically applied each listed factor to the facts before it in its most recent determinations.88 The statute, therefore, may compel the Commission to consider factors which it previously might have overlooked, and, as a result, this provision may bring about the kind of consistency in Commission determinations which has been so ardently called for by some commentators.89

CONCLUSION

The Trade Agreements Act has attempted to reconcile many of the disparities in the procedure that existed under the Antidumping Act. The Act will not substantially change many of these procedures since a good portion of it is simply a codification of previously formulated standards. However, the Act may produce a significant change in the existing policy of reviewing courts. The tendency to defer to the Treasury or Commission may become less pronounced in light of the statutory guidelines set forth in the Act.

Reviewing courts will now have legislative standards against which they can more effectively measure the actions of the Trea-

86. Id. See also Ice Hockey Sticks from Finland, 43 Fed. Reg. 13924 (1978). In this case the Commission determined that domestic market fluctuations were attributable to Canadian, rather than Finnish, competition and that the Finnish market share had maintained a relatively constant level.
sury or the Commission. As judicial review intensifies, decisions of the Treasury and Commission may become less arbitrary and, therefore, more predictable. The real significance of the Act, therefore, lies not in the substantive law that it changes but, rather, in the procedural implications that arise from articulated legislative standards.

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