

United States v. Roses, Inc.: Unwelcome Restraints on the Court of International Trade

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UNITED STATES *v.* ROSES, INC.: UNWELCOME RESTRAINTS ON THE COURT OF INTERNATIONAL TRADE

Dumping is defined as “the sale of commodities in a foreign market at a price which is lower than the price or value of comparable commodities in the country of their origin.”¹ To discourage dumping and to diminish its harmful effect on American producers of the same product,² Congress has enacted antidumping legisla-

¹ *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1190, 1194 (E.D. Pa. 1980); see J. VINER, *DUMPING: A PROBLEM IN INTERNATIONAL TRADE* 3 (1966) (dumping defined as “price-discrimination between national markets”) (emphasis omitted); Myerson, *A Review of Current Antidumping Procedures: United States Law and the Case of Japan*, 15 COLUM. J. TRANSNAT’L L. 167, 169 (1976) (dumping occurs when “the export price of an item is lower than the [exporting producer’s] home market price”); Re, *Litigation Before the United States Court of International Trade*, 26 N.Y.L. SCH. L. REV. 437, 451 (1981) (“dumping occurs whenever a foreign exporter charges a lower price for its merchandise when sold in the United States than it charges when the same kind of merchandise is sold in [its] home market”).

For analytical purposes, dumping may be divided into three specific categories: sporadic, long-run or continuous, and short-run or intermittent. See J. VINER, *supra*, at 30; W. WARES, *THE THEORY OF DUMPING AND AMERICAN COMMERCIAL POLICY* 9 (1977); Myerson, *supra*, at 168. Sporadic dumping occurs when a producer disposes of surplus stock at reduced prices in foreign markets in order to maintain prices in its domestic market. See J. VINER, *supra*, at 110-11. Generally, long-run dumping is a protracted attempt to maximize profits by selling goods at a lower price in an “elastic,” price-sensitive market, while maintaining higher prices in the “inelastic,” domestic market, where price decreases will not cause immediate sales increases. See Fisher, *The Antidumping Law of the United States: A Legal and Economic Analysis*, 5 LAW & POL’Y INT’L BUS. 85, 87-88 (1973); Myerson, *supra*, at 168-69. Short-run dumping is used to meet competitors’ prices, to develop trade connections in new markets, and to eliminate or suppress competition in an export market. See J. VINER, *supra*, at 110. Although the efficacy of sporadic and long-term dumping is still being debated, see Myerson, *supra*, at 169, there is agreement among commentators that short-run dumping, when used for the elimination of competition, has a damaging impact on international trade, see Ehrenhaft, *Protection Against International Price Discrimination: United States Countervailing and Antidumping Duties*, 58 COLUM. L. REV. 44, 47 (1958); Myerson, *supra*, at 171. After the competition has been eliminated, the dumping producer often will raise prices in the newly-monopolistic market. See Myerson, *supra*, at 172.

² See S. REP. NO. 249, 96th Cong., 1st Sess. 37, reprinted in 1979 U.S. CODE CONG. & AD. NEWS 381, 423. The readily apparent harm caused by dumping is the economic hardship inflicted on domestic producers of goods similar to those dumped. See Fisher, *supra* note 1, at 90-91. Simply stated, there is a decrease in the domestic producers’ volume of sales to the same extent as the increase in the dumper’s volume of sales in the importing nation. See *id.*

The major retaliatory tactic against dumping is the imposition of a duty on the dumped goods equal to the amount by which the foreign market value of the commodity exceeds the

tion.³ The Court of International Trade⁴ has exclusive jurisdiction

price charged for the dumped product in the United States. See 19 U.S.C. § 1673 (1982); see also Note, *Injury Determinations Under United States Antidumping Laws Before and After the Trade Agreements Act of 1979*, 33 RUTGERS L. REV. 1076, 1077 (1981) [hereinafter cited as *Injury Determinations*]. The duty is imposed whenever it is found that (1) the goods are being sold, or are likely to be sold in the United States at less than their fair value and, (2) an American industry is materially injured, or the establishment of an industry in the United States would be materially retarded. 19 U.S.C. § 1673 (1982). For a summary of the procedures involved in the imposition of an antidumping duty, see Note, *Administering the Revised Antidumping Law: Allocating Power Between the ITC and the Court of International Trade*, 2 VA. J. INT'L L. 883, 888-92 (1982) [hereinafter cited as *Allocating Power*].

One commentator has posited that the antidumping laws were enacted to punish the dumper for charging higher prices in its home market, see Ehrenhaft, *What the Antidumping and Countervailing Duty Provisions of the Trade Agreements Act [Can] [Will] [Should] Mean for the U.S. Trade Policy*, 11 LAW & POL'Y INT'L BUS. 1361, 1363 (1979), because these sales enable the foreign producer to offer the merchandise at lower prices in the United States and injure American competitors, *id.* Thus, if the foreign producer were to lower its home market prices to the level of those charged in the United States, it could not afford to "dump" merchandise into this country. *Id.*

³ See, e.g., Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (codified as amended in scattered sections of 5, 13, 19, 26 and 28 U.S.C.); Revenue Act of 1916, 15 U.S.C. § 72 (1982); Antidumping Act of 1921, 19 U.S.C. §§ 160-171 (1976), *repealed by* Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144, 193; see W. WARES, *supra* note 1, at 1.

The Revenue Act of 1916 was the first attempt by Congress to control dumping on the American market. See *Injury Determinations*, *supra* note 2, at 1078. The Act was a criminal statute making it illegal to import goods into the United States at a price "substantially less" than their actual value if the importer had the intent to destroy or injure an American industry. See 15 U.S.C. § 72 (1982). The Act provided that an injured party could sue in district court and recover treble damages. See *id.* This statute has never been invoked in a suit brought by the Federal government, see *Injury Determinations*, *supra* note 2, at 1078, largely because of the difficulty in "proving the requisite intent," Prosterman, *Withholding of Appraisal [sic] Under the United States Anti-dumping Act: Protectionism or Unfair-Competition Law?*, 41 WASH. L. REV. 315, 316 n.4 (1966); see Myerson, *supra* note 1, at 173.

The Antidumping Act of 1921 differed substantially from the Revenue Act of 1916. See *Injury Determinations*, *supra* note 2, at 1079. The 1921 Act provided for the assessment of equalizing duties rather than the use of criminal sanctions, and added a requirement that the injured party demonstrate that American industry was either injured or likely to be injured by the alleged dumping. See Anthony, *The American Response to Dumping From Capitalist and Socialist Economies—Substantive Premises, and Restructured Procedures After the 1967 GATT Code*, 54 CORNELL L. REV. 159, 161-62 (1969).

In addition to procedural modifications relating to jurisdictional matters, see *infra* notes 5-6 and accompanying text, the Trade Agreements Act of 1979 (1979 Act) effected substantive changes in the area of antidumping. See *Allocating Power*, *supra* note 2, at 892-93. One such change was that under the new law, "material injury" rather than mere "injury" was required before an antidumping duty would be imposed. See 19 U.S.C. § 1673 (1982). The 1979 Act also incorporated into federal law the international antidumping code. See S. REP. NO. 249, *supra* note 2, at 1, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS at 387. The code, a product of the Tokyo Round of Multilateral Trade Negotiations (MTN), had as its primary objective the reduction or "harmonization" of "nontariff barriers" to

to review decisions of the International Trade Administration (ITA)⁵ rendered pursuant to these antidumping laws.⁶ While the

trade. *Id.* at 2, reprinted in 1979 U.S. CODE CONG. & AD. NEWS at 387.

⁴ The Customs Court was renamed the Court of International Trade by the Customs Courts Act of 1980, Pub. L. No. 96-417, § 101, 94 Stat. 1727 (codified at 28 U.S.C. § 251 (1982)) (1980 Act), to describe more accurately "the court's clarified and expanded jurisdiction and its new judicial functions relating to international trade," H.R. REP. NO. 1235, 96th Cong., 2d Sess. 20, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 3729, 3732.

The Customs Court began as an administrative body known as the Board of General Appraisers. See Act of June 10, 1890, ch. 407, § 12, 26 Stat. 131, 136; H.R. REP. NO. 1235, *supra*, at 18, reprinted in 1980 U.S. CODE CONG. & AD. NEWS at 3729. The Board was a unit of the Treasury Department and was responsible for the review of decisions by Customs officials pertaining to duties and valuation of imported merchandise. H.R. REP. NO. 1235, *supra*, at 18, reprinted in 1980 U.S. CODE CONG. & AD. NEWS at 3729. In 1926, the Board was renamed the Customs Court, Act of May 28, 1926, ch. 411, 44 Stat. 669, retaining the same functions, duties and jurisdiction. *Id.*; see H.R. REP. NO. 1235, *supra*, at 18, reprinted in 1980 U.S. CODE CONG. & AD. NEWS at 3730. The Customs Court, which had been established as an Article I court, was given Article III jurisdiction in 1956. See 28 U.S.C. § 251 (1982). The Customs Courts Act of 1970, Pub. L. No. 91-271, 84 Stat. 274 (codified at scattered sections of 9 and 28 U.S.C.), made substantial procedural reforms, but failed to resolve issues concerning the jurisdiction and powers of the Customs Court, see Rodino, *The Customs Courts Act of 1980*, 26 N.Y.L. SCH. L. REV. 459, 460 (1981).

The Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (codified at scattered sections of 28 U.S.C.) is the most recent expansion of the jurisdiction and remedial powers of the court. See Recent Development, *The Customs Courts Act of 1980*, 13 LAW & POL'Y INT'L BUS. 281, 282-83 (1981). Prior to 1980, the complexity of international trade problems and the relevant statutes made it difficult for plaintiffs to determine in advance whether the Customs Court had jurisdiction over particular cases. *Id.* at 285-86. Consequently, district courts dismissed many cases for lack of subject matter jurisdiction in the Customs Court. See, e.g., *Flintkote Co. v. Blumenthal*, 469 F. Supp. 115, 124, 126 (N.D.N.Y.), *aff'd*, 596 F.2d 51 (2d Cir. 1979); *J.C. Penney Co. v. United States Dep't of Treasury*, 319 F. Supp. 1023, 1031 (S.D.N.Y. 1970), *aff'd*, 439 F.2d 63 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971); *Cottman Co. v. Dailey*, 20 F. Supp. 142, 150 (D. Md. 1937), *aff'd*, 94 F.2d 85 (4th Cir. 1938); see Rodino, *supra*, at 461; Note, *The Customs Courts Act of 1980*, 7 N.C.J. INT'L L. & COM. REG. 85, 95 (1982); Recent Development, *supra*, at 285-86.

⁵ The International Trade Administration, a subdivision of the Department of Commerce, has been granted "general operational responsibility for major nonagricultural international trade functions of the United States Government, including . . . the administration of the antidumping and countervailing duty laws, . . . and monitoring compliance with international trade agreements to which the United States is a party." See Reorg. Plan No. 3 of 1979, 44 Fed. Reg. 69, 273 (1979), reprinted in 19 U.S.C. § 2171, at 964 (1982).

In the antidumping context, the ITA decides, first, whether an antidumping duty investigation is warranted, see 19 U.S.C. § 1673a(a)-(b) (1982), and, second, whether the merchandise alleged to have been dumped is being, or is likely to be, sold in the United States at less than its fair value, see *id.* § 1673b(b)(1). After the ITA initiates an investigation, the International Trade Commission (ITC) determines whether there is a reasonable indication that an industry in the United States is materially injured. *Id.* § 1637b(a).

⁶ Jurisdiction to review such determinations is conferred on the Court of International Trade by the Customs Courts Act of 1980, 28 U.S.C. § 1581 (1982). Section 1581(i) provides, in pertinent part:

[T]he Court of International Trade shall have exclusive jurisdiction of any civil

authority of the Court to review such determinations is explicit,⁷ the scope of its remedial powers is in dispute.⁸ Recently, in *United*

action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for —

...

(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue

Id.

The 1979 Act was designed to provide greater access to the Customs Court for a larger number of parties, greater opportunity for interlocutory judicial review of antidumping proceedings, and expedited appeals from ITA and ITC decisions. *See* S. REP. NO. 249, 96th Cong., 1st Sess. 245, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 381, 630. Provisions for interlocutory review of ITA and ITC decisions in antidumping proceedings were intended to provide an immediate opportunity for a party to obtain review of administrative determinations. *Id.* at 245, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS at 631.

The 1979 Act also attempted to make the Customs Court (now the Court of International Trade) the proper forum for the resolution of antidumping disputes. *See id.* at 250, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS at 636.

⁷ *See* 19 U.S.C. § 1516a(a)(1)(A) (1982). Section 1516a(a)(1)(A) provides, in pertinent part:

Within 30 days after the date of publication in the Federal Register of notice of—

(i) a determination by the Secretary or the administering authority, . . . not to initiate an investigation,

...

an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade . . . contesting any factual findings or legal conclusions upon which the determination is based.

Id.

In addition to ITA decisions, the Court also is empowered to review material injury determinations made by the ITC, *see, e.g.,* *Matsushita Elec. Indus. Co. v. United States*, 573 F. Supp. 122, 124 (Ct. Int'l Trade 1983); *Armco, Inc. v. United States*, 570 F. Supp. 51, 53 (Ct. Int'l Trade 1983); *Alberta Gas Chems., Inc. v. United States*, 515 F. Supp. 780, 789 (Ct. Int'l Trade 1981), trade adjustment assistance findings made by the Secretary of Labor, *see, e.g.,* *Abbot v. Donovan*, 570 F. Supp. 41, 46 (Ct. Int'l Trade 1983); *Miller v. Donovan*, 568 F. Supp. 760, 761 (Ct. Int'l Trade 1983); *Woodrum v. Donovan*, 564 F. Supp. 826, 828 (Ct. Int'l Trade 1983), and classification decisions made by the Customs Service, *see, e.g.,* *Rohm & Haas Co. v. United States*, 568 F. Supp. 751, 759 (Ct. Int'l Trade 1983); *Wear Me Apparel Co. v. United States*, 511 F. Supp. 814, 816 (Ct. Int'l Trade 1981).

A "determination" refers to an official decision made in the course of a proceeding. 19 C.F.R. § 353.11(c) (1982). The 1980 Act incorporates the provisions of the 1979 Act relating to the scope and standard of judicial review in the context of dumping actions. *See* 28 U.S.C. § 2640(b) (1982). The incorporation of these provisions was an attempt to eliminate some of the confusion regarding the scope and standard of judicial review of such actions. Cohen, *The New United States Court of International Trade*, 20 COLUM. J. TRANSNAT'L L. 277, 290 (1981).

⁸ *See* Cohen, *supra* note 7, at 292. One commentator has suggested that the failure of the 1980 Act to empower the Court to grant equitable relief in adjustment assistance actions "indicates a substantial retreat in the general effort to increase the authority of the court." *Id.*; *see* 28 U.S.C. § 2643(c)(2)-(4) (1982). This view appears to contradict Congress' intent to expand the Court's remedial powers. *See* H.R. REP. NO. 1235, 96th Cong., 2d Sess. 61,

States v. Roses Inc.,⁹ the Court of Appeals for the Federal Circuit¹⁰ affirmed the Court's finding¹¹ that a decision by the ITA had been tainted by ex parte contacts with the anticipated target of the investigation, but reversed the order of the Court mandating an investigation by the ITA and remanded the case for further proceedings.¹²

In *Roses*, the plaintiff, Roses Incorporated (Roses), an association of American rose growers,¹³ filed an antidumping petition with the ITA, alleging that roses were being exported from Colombia and sold in the United States at less than fair value.¹⁴ To support

reprinted in 1980 U.S. CODE CONG. & AD. NEWS 3729, 3772-73.

⁹ 706 F.2d 1563 (Fed. Cir. 1983).

¹⁰ The Court of Appeals for the Federal Circuit was created by the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982) (codified at scattered sections of 5 and 28 U.S.C.). The creation of the Federal Circuit provided a forum for nationwide appeals in areas of the law where Congress determined there was a special need for national uniformity. S. REP. NO. 275, 97th Cong., 2d Sess. 4, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 11, 14. The Federal Courts Improvements Act was intended to remedy the structural problems presented by the lack of stare decisis among the circuits, which deprived the federal system of a means to provide reasonably prompt and "definitive answers to legal questions of nationwide significance." *Id.* at 3, reprinted in 1982 U.S. CODE CONG. & AD. NEWS at 13.

The Federal Circuit differs from other federal courts of appeals in that its jurisdiction is defined by subject matter rather than by geography. *Id.* at 3, reprinted in 1982 U.S. CODE CONG. & AD. NEWS at 13. The new court assumed almost all of the appellate jurisdiction of the two courts that it replaced, the Court of Claims and the Court of Customs and Patent Appeals, *id.* at 2-3, reprinted in 1982 U.S. CODE CONG. & AD. NEWS at 12-13. The Federal Circuit is authorized to review, *inter alia*, appeals from final decisions of the United States Court of International Trade, and, in certain instances, district courts, as well as final determinations of the ITC and the Secretary of Commerce. See Federal Courts Improvements Act of 1982, Pub. L. No. 97-164, § 1295, 96 Stat. 25, 38 (codified at 28 U.S.C. § 1295 (1982)).

¹¹ See *Roses Inc. v. United States*, 538 F. Supp. 418, 421-22 (Ct. Int'l Trade 1982).

¹² 706 F.2d at 1570.

¹³ *Id.* at 1564.

¹⁴ *Id.* The petition was filed pursuant to the Trade Agreements Act of 1979, 19 U.S.C. § 1673a(b)(1) (1982). *Id.*; see *supra* note 5 and accompanying text.

Although "fair value" is not defined in the statute, the Commerce Department Regulations equate the term with "foreign market value." See 19 C.F.R. § 353.1 (1984). Section 1677b of title 19 of the United States Code defines "foreign market value" as the price at which the same or similar merchandise is sold or offered for sale in the exporter's principal markets in wholesale quantities for home consumption. 19 U.S.C. § 1677b(a)(1) (1982). If the merchandise is not sold for home consumption, or if the amount sold for such use is minimal, the foreign market value is the price at which the merchandise is offered for sale by the exporting producer to countries other than the United States. *Id.* In addition, for the purpose of calculating foreign market value, the prices described above are increased by the cost of containers and shipping charges. *Id.* For a more detailed discussion of the calculation of foreign market value, see 1 P. FELLER, U.S. CUSTOMS AND INTERNATIONAL TRADE GUIDE § 18.03 (1984) and W. WARES, *supra* note 1, at 98-102.

its allegations, Roses included with its petition a study of the rose growing industry in Colombia and data from the Census Bureau of the United States Department of Commerce.¹⁵ While the petition was being considered,¹⁶ the Department of Commerce received information from Colombian officials and from Asocolflores, a Colombian rose growers association, that conflicted with the data submitted by Roses.¹⁷ On June 22, 1981, the ITA held an ex parte meeting with the Economic Minister of the Colombian Embassy, counsel for Asocolflores, and others, at which Roses' petition and its deficiencies were discussed.¹⁸ After notifying Roses that the proceedings would be terminated if the petition were not withdrawn, the ITA dismissed the petition when Roses took no action.¹⁹

Roses filed suit on July 13, 1981, seeking a determination that, because of the ex parte contacts, the decision of the ITA was unlawful.²⁰ After reviewing the language of the Trade Agreements Act of 1979 (1979 Act) and its legislative history, the Court held that section 732 of the Act required only that the petition allege the elements necessary for the imposition of an antidumping duty and

¹⁵ See 538 F. Supp. at 419. The information submitted by Roses attempted to calculate a mean invoice price for sales of Colombian roses exported to the United States by using statistics from the Census Bureau. *Roses*, 706 F.2d at 1570. The prices calculated by this method were lower than those obtained by Roses in its own commissioned study of the Colombian rose-growing industry, but the trade association submitted both reports as part of the "information [reasonably] available" to it. *Id.*; see 19 U.S.C. § 1673a(b)(1) (1982).

¹⁶ See 538 F. Supp. at 419. The ITA has 20 days after the date of the filing of the petition to determine whether the petition is sufficient to warrant the initiation of an investigation. *Id.*; see 19 U.S.C. § 1673a(c) (1982). During this period, the ITA notified Roses' attorney that the petition was defective and suggested that Roses modify it. 538 F. Supp. at 419. Roses then submitted additional information in support of its allegations. *Id.* In addition, Asocolflores, an association of Colombian rose growers, advised the Department of Commerce that it was seeking disclosure of the Roses' study pursuant to the Freedom of Information Act. *Id.*; see 5 U.S.C. § 552 (1982).

¹⁷ 538 F. Supp. at 419. The information submitted by Asocolflores differed with respect to the number of workers employed in the rose-growing industry in Colombia and to the bloom rate of the Colombian plants. *Id.*

¹⁸ *Id.* There was also a record of a telex from PROEXPO, an official trade agency of the Colombian government, concerning Roses' petition. *Id.* The telex was examined at the meeting, but was rejected and not included in the administrative record. *Id.*

¹⁹ *Id.* The ITA explained to Roses that it could submit another petition to replace the defective one. *Id.* The dismissal was based on grounds other than those urged by the outside objectors. *Roses*, 706 F.2d at 1565.

²⁰ 538 F. Supp. at 419. Roses asserted that the ITA exceeded its statutory authority in looking beyond the petition and supporting data in determining that the Colombian roses were not being dumped. *Id.* The complaint alleged that the agency had solicited and considered information from Colombian officials. *Id.*

contain information in support of its contentions.²¹ The Court noted that Roses' allegations of less-than-fair-value sales and material injury to the United States rose growing industry were supported adequately by the petition and the accompanying information.²² Moreover, the Court observed that Congress intended the ITA to consider only that information included in the petition along with any supporting data and facts "within the public domain."²³ Thus, Judge Rao concluded that the ITA erred in using information received from the Colombian officials in making its determination not to institute the investigation.²⁴ In addition, the Court noted that the ITA had mistakenly required Roses to include data on the United States selling price in its petition.²⁵ Consequently, the Court ordered that the petition be reinstated and that an investigation be commenced.²⁶

On appeal, a divided Federal Circuit panel²⁷ reversed that part of the Court's decision ordering the initiation of an investigation,²⁸ holding that it was an "abuse of authority for a CIT judge to sub-

²¹ *Id.* at 420. The Court, in an opinion by Judge Rao, stated that the legislative history of the 1979 Act indicated that the framers intended the ITA to act upon, rather than discuss, petitions that allege the elements required for imposition of an antidumping duty and that are supported by information reasonably available to the petitioner. *Id.*; see S. REP. No. 249, 96th Cong., 1st Sess. 63, reprinted in 1979 U.S. CODE CONG. & AD. NEWS 381, 449. Furthermore, the Court cited legislative history that indicated that the petition requirements were not intended to be so rigorous as to prevent aggrieved parties from bringing valid complaints. 538 F. Supp. at 420.

The Court quoted the wrong subsection of the pertinent provision. See *id.* at 420 n.1. The Court quoted § 732(a), which refers to initiation of an investigation by the administering authority. *Id.* (§ 732(a) is codified at 19 U.S.C. § 1673a(a)). The proper provision is section 1673a(b)(1), which provides, in pertinent part:

An antidumping proceeding shall be commenced whenever an interested party . . . files a petition with the administering authority, on behalf of an industry, which alleges the elements necessary for the imposition of the duty imposed by section 1673 of this title, and which is accompanied by information reasonably available to the petitioner supporting those allegations.

19 U.S.C. § 1673a(b)(1) (1982) (emphasis added); see *Babcock & Wilcox Co. v. United States*, 4 Ct. Int'l Trade 3, 7 (1982); *Royal Business Machs., Inc. v. United States*, 507 F. Supp. 1007, 1010 (Ct. Int'l Trade 1980), *aff'd*, 669 F.2d 692 (C.C.P.A. 1982).

²² 538 F. Supp. at 421.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* Data on the United States selling price would be more relevant in the investigatory stage of the proceedings. *Id.*

²⁶ *Id.* at 422.

²⁷ See 706 F.2d at 1564. Judge Smith joined Judge Nichols in the majority opinion, with Judge Miller dissenting.

²⁸ *Id.* at 1570.

stitute his opinion for that of the agency."²⁹ Rather, the court opined that the proper course of action would have been to remand the case to the ITA for further consideration.³⁰ Judge Nichols, writing for the majority, affirmed the finding of the Court that a decision to initiate an investigation or to dismiss a petition should not be based on information acquired from anticipated targets during the 20 days following the filing of the petition.³¹ Because the ITA had received and considered such information, the Federal Circuit affirmed the Court's finding that the proceedings were unlawful.³²

The second issue addressed by the majority was whether the Court of International Trade erred in ordering the agency to initiate the investigation.³³ The Court maintained that Congress intended agency expertise to be used in the examination and evaluation of antidumping petitions.³⁴ Judge Nichols also determined that the Court of International Trade is never warranted in mandating that the ITA investigate a petition, even when, as in *Roses*,

²⁹ *Id.* at 1569; see *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

³⁰ 706 F.2d at 1569. The court reasoned that, in the absence of bad faith, the fact that administrators have been "mistaken in certain particulars, . . . is no warrant for taking out of their hands the decision that is still for them to make." *Id.*

³¹ *Id.* at 1567-68. The court cited legislative history indicating that it was not the intent of Congress to provide for an advocacy proceeding at the pre-investigative stage and that information rebutting allegations contained in the petition should not be considered by the ITA. See *id.* at 1566; 125 CONG. REC. 20, 172 (1979) (colloquy between Senator Ribicoff and Senator Danforth).

³² 706 F.2d at 1570. The court determined that despite a statutory requirement of maintaining a record of ex parte meetings with interested parties, see 19 U.S.C. § 1677f(a)(3) (1982), such meetings were not proper during the preliminary stage in which a petition is being considered, 702 F.2d at 1567-68.

³³ 706 F.2d at 1568-71. The Federal Circuit construed the holding of the Court of International Trade to be that the agency was obliged to commence the investigation, even if it knew that such action was unwarranted, whenever the petition contained the necessary allegations. See *id.* at 1568. Although the court appears to have concluded that such a standard is inappropriate, it is suggested that the position of the Court of International Trade was a correct interpretation of the legislative history of § 732(c)(1) of the Trade Agreements Act of 1979. See 19 U.S.C. § 1673a(c)(1) (1982); S. REP. NO. 249, 96th Cong., 1st Sess. 62-63, reprinted in 1979 U.S. CODE CONG. & AD. NEWS 381, 448-49.

³⁴ 706 F.2d at 1568. Although the court referred to the expertise of the agency in dealing with antidumping matters, it failed to discuss the expertise of the Court of International Trade. See *id.* A primary goal of the Customs Courts Act of 1980 was to reemphasize and clarify Congress' intent that the expertise and national jurisdiction of the Court be used to resolve conflicts and disputes arising out of the tariff and trade laws. See H.R. REP. NO. 1235, 96th Cong., 2d Sess. 27-28, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 3729, 3739.

the original proceedings are tainted by illegality.³⁵

Judge Miller dissented from the latter part of the majority opinion.³⁶ Judge Miller observed that Congress expected the ITA to reject "only those [petitions] which are clearly frivolous, not reasonably supported by the facts alleged or which omit important facts which are reasonably available to the petitioner."³⁷ The dissent noted that Congress did not intend the ITA to weigh the credibility of conflicting evidence at the preliminary stage.³⁸ Rather, Judge Miller determined that the evaluation of information provided by the petition should be left to the investigatory stage.³⁹ The dissent reasoned that the allegations of the plaintiff's petition satisfied the statutory requirements and that the information supplied by the plaintiff tended to support the allegations.⁴⁰

By limiting the scope of the equitable powers of the Court of International Trade, the Federal Circuit's holding in *Roses* appears to be inconsistent with the intent of Congress in enacting both the 1979 Act⁴¹ and the Customs Courts Act of 1980 (1980 Act).⁴² Because the statutes being construed are relatively new,⁴³ it is incumbent upon the Federal Circuit to establish the proper basis for the Court's authority. This Comment will discuss the *Roses* decision and offer an alternative approach that is more consonant with the legislative intent of the framers of the 1979 and 1980 Acts.

The Court of International Trade has the power to declare unlawful any preliminary antidumping determination that is "arbitrary, capricious, or an abuse of discretion, or otherwise not in ac-

³⁵ 706 F.2d at 1569. The court added that even if the Court of International Trade's criticisms of the position of the ITA were valid, it would have been more appropriate for the Court not to interfere judicially until after the plaintiff had been rebuffed in an attempt to submit an amended petition. *Id.* at 1570.

³⁶ *Id.* at 1571 (Miller, J., dissenting in part). Judge Miller agreed with the majority that the receipt by the ITA of information from the Colombian officials was illegal. *See id.* (Miller, J., dissenting in part).

³⁷ *Id.* at 1572 (Miller, J., dissenting in part) (quoting H.R. REP. NO. 317, 96th Cong., 1st Sess. 51 (1979)). Judge Miller quoted legislative history indicating that Congress regarded the requirements for a sufficient petition to be analogous to those needed to state a claim for the purpose of civil litigation. *See* 706 F.2d at 1572 (Miller, J., dissenting in part).

³⁸ *See id.* at 1573 (Miller, J., dissenting in part).

³⁹ *See id.* at 1573-74 (Miller, J., dissenting in part).

⁴⁰ *See id.* at 1573 (Miller, J., dissenting in part).

⁴¹ Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (codified as amended in scattered sections of 5, 13, 19, 26, 28 U.S.C.); *see supra* notes 5-6 and accompanying text.

⁴² Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (codified in scattered sections of 5, 16, 19, and 28 U.S.C.).

⁴³ *See* 706 F.2d at 1565.

cordance with law.”⁴⁴ In making such a finding, the Court, like other courts reviewing an administrative action, is to consider whether the decision of the administering authority was based on a consideration of the relevant factors of the case and whether the agency made a “clear error of judgment.”⁴⁵ In *Roses*, both the Court of International Trade and the Federal Circuit held that the proceedings conducted by the ITA were rendered unlawful by the receipt of prejudicial information by the agency.⁴⁶ However, the

⁴⁴ 19 U.S.C. § 1516a(b)(1)(A) (1982); *cf.* 5 U.S.C. § 706(2) (1982) (uniform standard of review applied to agency actions generally). A different standard from that employed in a preliminary antidumping determination is used by the Court when reviewing either the imposition of an antidumping duty or a determination that merchandise is not being sold for less than fair value. *See* 19 U.S.C. § 1516a(b)(1)(B) (1982). In such a case, the Court is to hold unlawful any determination or finding found to be “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” *Id.*; *see* *Industrial Fasteners Group, Am. Importers Ass’n v. United States*, 710 F.2d 1576, 1580 (Fed. Cir. 1983); *ASG Indus., Inc. v. United States*, 610 F.2d 770, 779 (C.C.P.A. 1979).

⁴⁵ *See* *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974); *Independent Meat Packers Ass’n v. Butz*, 526 F.2d 228, 238 (8th Cir. 1975), *cert. denied*, 424 U.S. 966 (1976); *Albert Elia Bldg. Co. v. Sioux City, Iowa*, 418 F. Supp. 176, 179 (N.D. Iowa 1976). Under the “arbitrary and capricious” standard, the court is to conduct an in-depth review and decide whether, *inter alia*, the agency followed the necessary procedural requirements. *City of Benton Harbor v. Richardson*, 429 F. Supp. 1096, 1102 (W.D. Mich. 1977). It has been suggested that the “arbitrary and capricious” test involves more than just review of the procedural elements of a case; the requirement that the facts underlying the decision be examined to assure that the agency considered relevant factors and did not make any “clear error of judgment” goes to the substance of the decision. *See* Lockhart, *Essay in Law—Irrational, but not Arbitrary: Should Reviewing Courts Draw So Fine a Line?*, 1979 UTAH L. REV. 649, 651-52; *see also* *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). *Citizens to Preserve Overton Park* involved a decision by the Secretary of Transportation to authorize the expenditure of federal funds for the construction of a highway through a public park in Tennessee. *See* 401 U.S. at 406. The Supreme Court asserted that the reviewing court is to consider whether the Secretary properly construed his authority to approve such an expenditure. *See id.* at 416. It is suggested that such an analysis may be applied to the situation in *Roses*. By deciding that the ITA is not to consider the merits of the petition at the preliminary stage, the Court of International Trade implied that the agency had overstepped, or misconstrued, its statutory authority to determine the sufficiency of the petition. Such a decision arguably is within the purview of the reviewing court’s authority under the *Overton Park* guidelines and does not encroach on the “discretion” of the administrative agency.

It is further suggested that the general rule that a court must not substitute its judgment for that of the agency is, for all practical purposes, inapposite in the context of review of a preliminary antidumping determination. By ordering the initiation of an investigation, the court returns the matter to the ITA for a determination of whether there have been sales at less than fair value. *See* 19 U.S.C. § 1673a(c)(2) (1982). If the agency finds that there have been no such sales, it has the authority to terminate the investigation. *Id.* § 1673d(c)(2). Thus, the decision as to whether the proceedings will continue remains within the discretion of the ITA.

⁴⁶ *See* 706 F.2d at 1570; 538 F. Supp. at 418.

courts disagreed regarding the extent to which the Court of International Trade can act in remedying such an indiscretion.⁴⁷

In holding that the Court was without authority to order the initiation of an antidumping investigation,⁴⁸ it is suggested that the Federal Circuit failed to consider the powers expressly granted to the Court of International Trade in section 2643 of the 1980 Act. Among the remedies specifically warranted by section 2643 is injunctive relief.⁴⁹ In addition, as the legislative history and express language of the 1980 Act indicate that the Court has power coextensive with that of the federal district courts,⁵⁰ it is suggested that an examination of the standards applied by these courts in granting injunctive relief is appropriate.⁵¹

Generally, courts employ one of two alternative tests to determine whether injunctive relief is proper in a given case. The first

⁴⁷ See 706 F.2d at 1570.

⁴⁸ *Id.* at 1569.

⁴⁹ 28 U.S.C. § 2643 (1982). Section 2643 provides, in pertinent part:

Except as provided in paragraphs (2), (3), and (4) of this subsection, the Court of International Trade may . . . order any . . . form of relief that is appropriate in a civil action, including, but not limited to, declaratory judgments, orders of remand, injunctions, and writs of mandamus and prohibition.

Id. § 2643(c)(1).

Prior to the 1980 Act, it had been generally held that the Customs Court did not have the authority to render equitable relief. See *Matsushita Elec. Indus. Co. v. United States*, 67 Cust. Ct. 328, 331 (1971), *aff'd*, 60 C.C.P.A. 85, *cert. denied*, 414 U.S. 821 (1973); *Horton v. Humphrey*, 146 F. Supp. 819, 821 (D.D.C.), *aff'd*, 352 U.S. 921 (1956). Following the passage of the 1980 Act, however, the court began to exercise broader remedial powers. See, e.g., *American Air Parcel Forwarding Co. v. United States*, 515 F. Supp. 47, 52 (Ct. Int'l Trade 1981); *Wear Me Apparel Corp. v. United States*, 511 F. Supp. 814, 817 (Ct. Int'l Trade 1981); *Zenith Radio Corp. v. United States*, 505 F. Supp. 216, 218 (Ct. Int'l Trade 1980).

⁵⁰ See H.R. REP. NO. 1235, 96th Cong., 2d Sess. 61, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 3729, 3772-73. The intent of Congress in enacting § 2643(c)(1) was to grant the Court "remedial powers co-extensive with those of a federal district court." *Id.* This provision was regarded as a general grant of authority to the Court to authorize any form of relief that is appropriate under the circumstances. *Id.*, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS at 3772; see *Wear Me Apparel Corp. v. United States*, 511 F. Supp. 814, 817-18 (Ct. Int'l Trade 1981) (dictum) (court empowered "to do equity" regarding claims concerning administration and enforcement of restrictions on importation).

Section 1585 of the 1980 Act provides that "[t]he Court of International Trade shall possess all the powers in law and equity of, or as conferred by statute upon, a district court of the United States." 28 U.S.C. § 1585 (1982) (emphasis added).

⁵¹ The legislative history of 19 U.S.C. § 2643 (1982) indicates that "[w]hen a party requests the court to grant injunctive relief, the court is to be guided by the same factors utilized by a federal district court when it considers a request for a preliminary or permanent injunction." H.R. REP. NO. 1235, 96th Cong., 2d Sess. 61, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS 3729, 3773; see *American Air Parcel Forwarding Co. v. United States*, 515 F. Supp. 47, 52 (Ct. Int'l Trade 1981).

test seeks to determine whether the party seeking relief has demonstrated both probable success on the merits and possible irreparable injury.⁵² The second test focuses on whether there has been a showing of sufficiently serious questions going to the merits of the case and whether there exists a "balance of hardships" tipping decidedly toward the party seeking relief.⁵³

Because the Court of International Trade and a number of circuit courts of appeals have recently adopted the latter test,⁵⁴ it is suggested that the application of such a standard would be appropriate in examining *Roses*. Under this standard a plaintiff would

⁵² See, e.g., *Kershner v. Mazurkiewicz*, 670 F.2d 440, 443 (3d Cir. 1982) (court refused to grant injunction to compel prison to provide free legal supplies to indigent prisoners); *Pabst Brewing Co. v. Kalmanovitz*, 551 F. Supp. 882, 895 (D. Del. 1982) (court granted preliminary injunction to prevent bidder from consummating partial tender offer); *Irving J. Dorfman Co. v. Borlan Indus.*, 309 F. Supp. 21, 25 (S.D.N.Y. 1969) (court refused to grant injunction to halt alleged copyright infringement).

⁵³ See, e.g., *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 195-96 (4th Cir. 1977); *Angell v. Zinsser*, 473 F. Supp. 488, 494 (D. Conn. 1979); *Stuart v. Nappi*, 443 F. Supp. 1235, 1239-40 (D. Conn. 1978); cf. *Maryland Undercoating Co. v. Payne*, 603 F.2d 477, 481 (4th Cir. 1979) (decision to be based on "flexible interplay" among various factors). In *Blackwelder Furniture*, the Fourth Circuit held that a standard requiring a strong showing of probable success on the merits is not to be used by a trial court on application for a preliminary injunction, but is appropriate when applied to the issuance of an appellate stay pending review of an administrative order. See 550 F.2d at 193-95. The court asserted that the proper trial court standard for injunctive relief is the "balance of hardship" test. See *id.* at 196. Moreover, the court added that the public interest should always be considered. See *id.*

In *Roses*, the Court of International Trade, in denying the defendant's motion for a stay pending appeal, asserted that the public interest to be served is "to correct situations where merchandise is being imported at less than fair value with resultant injury to American industries and to give relief to injured American industries by way of increased duties to neutralize the harmful effects of the dumped imported merchandise." *Roses Inc. v. United States*, No. 82-91 (Ct. Int'l Trade Oct. 27, 1982) (available on LEXIS, Itrade library, CIT file). This public interest, the Court held, will be served by the initiation of the investigation to determine whether the plaintiffs are being injured because of the dumping of roses. *Id.*

⁵⁴ See *American Air Parcel Forwarding Co. v. United States*, 515 F. Supp. 47, 53 (Ct. Int'l Trade 1981). The court in *American Air Parcel* cited *Telvest, Inc. v. Bradshaw*, 618 F.2d 1029, 1032-33 (4th Cir. 1980) for its use of a "sliding scale" method of determining whether injunctive relief should be granted. See *American Air Parcel*, 515 F. Supp. at 53. Under this theory, "the showing of likelihood of success on the merits is in inverse proportion to the severity of the injury the moving party will sustain without injunctive relief, i.e., the greater the hardship the lesser the showing." *Id.*

Other circuits that have adopted the "balance of hardships" standard include the Second Circuit, see *Mattel, Inc. v. Azrak-Hamway Int'l, Inc.*, 724 F.2d 357, 359-61 (2d Cir. 1983), the Sixth Circuit, see *Friendship Materials, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100, 104 (6th Cir. 1982), the Eighth Circuit, see *Dataphase Sys. v. C L Sys., Inc.*, 640 F.2d 109, 113-14 (8th Cir. 1981), and the Ninth Circuit, see *Ebel v. City of Corona*, 698 F.2d 390, 392-93 (9th Cir. 1983).

satisfy the initial inquiry as to whether there are serious questions going to the merits by showing that there is "some reasonable chance of success even though it could not be shown that there was a likelihood or probability of success."⁵⁵ By filing a petition alleging the factors needed for the imposition of an antidumping duty and submitting evidence in support of its contentions, it is submitted that *Roses* met the threshold requirement for the imposition of injunctive relief.⁵⁶

It is further submitted that the second requirement, a balance of hardships tipping decidedly toward the plaintiff,⁵⁷ also has been met. Under this standard, the likelihood of irreparable harm to the plaintiff if the requested relief is denied is weighed against the likelihood of irreparable harm to the opposing party in the event the relief is granted.⁵⁸ In *Roses*, it is apparent that if the investigation is not ordered, the plaintiff will continue to be injured,⁵⁹ since the Colombian exporter will continue to sell roses at prices lower than those offered by the plaintiff.⁶⁰ Moreover, although the ITA may be compelled to investigate a claim it believes to be unwarranted, the agency will suffer little, if any, irreparable injury, since it merely will be initiating an antidumping investigation using a

⁵⁵ *Saad v. Shell Oil Co.*, 460 F. Supp. 114, 116 (E.D. Mich. 1978).

⁵⁶ Congress intended § 1673a(b)(1) "to result in investigations being commenced *unless* . . . the petitioner does not provide information supporting the allegations . . ." S. REP. NO. 249, 96th Cong., 1st Sess. 63, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 381, 449 (emphasis added). It is suggested that the use of the word "unless" by Congress indicates that there exists a type of presumption in favor of the initiation of an investigation that may be rebutted only upon a showing that the petitioner failed to provide information in support of its allegations.

⁵⁷ *See supra* note 53 and accompanying text.

⁵⁸ *See Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 196 (4th Cir. 1977).

⁵⁹ It should be noted that, after the case was remanded to the ITA, an investigation was initiated and the agency issued a finding that Colombian exporters were, indeed, dumping fresh-cut roses into the American market. *See Wall St. J.*, Mar. 12, 1984 at 20, col. 4. The Commerce Department reported that imports of Colombian roses had increased nearly 63% from the previous year, and that the roses were selling in the United States at an average price of approximately 20% below that being charged for them in Colombia. *Id.*

It should also be noted that, in most antidumping cases, time is an important consideration. Ultimate resolution of the issue in the petitioner's favor may be rendered irrelevant by a substantial delay, because irreversible injury may have been suffered during the interim period. *See* S. REP. NO. 249, 96th Cong., 1st Sess. 245, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 381, 631.

⁶⁰ The question of whether the economic harm to *Roses* outweighs the benefits inuring to the American rose consumer is not relevant to this discussion and is therefore beyond the scope of this Comment. *See J. VINER, supra* note 1, at 138.

staff that has expertise in such matters.⁶¹ Furthermore, Asocolfiores, the Colombian exporter, will be unharmed by the investigation, since, as the Federal Circuit observed, liquidation of duties will continue at the old rate until affirmative preliminary determinations are made.⁶² Because both requirements for the imposition of injunctive relief have been met, and since the power to issue such relief also permits the Court to compel affirmative action,⁶³ it is suggested that the Court was within its power in ordering the ITA to commence the investigation.

Finally, it is suggested that public policy considerations provide further support for a less restrictive interpretation of the equity powers of the Court of International Trade.⁶⁴ A primary objective of the 1980 Act was to inform aggrieved parties that they could seek redress through the judicial process, assured that their complaints would be examined on the merits and that the Court would be empowered to afford them the proper relief.⁶⁵ It is suggested that if the limitations imposed by the *Roses* court continue to be imposed in future actions, the Court of International Trade will be denied powers expressly granted to it and aggrieved parties will be denied rights intended to be conferred upon them.

⁶¹ See *Roses Inc. v. United States*, No. 82-91 (Ct. Int'l Trade Oct. 27, 1982) (available on LEXIS, I Trade Library, CIT file). If the investigation proves to have been unwarranted, the agency still will not have been harmed, and its reputation will not have been damaged. See *United States v. Roses Inc.*, 706 F.2d 1563, 1567 (Fed. Cir. 1983).

⁶² *Id.* The court added that Asocolfiores could explain to its customers that the initiation of the investigation was an insignificant event, since *Roses* had previously filed similar dumping complaints. *Id.*

⁶³ See, e.g., *United States v. City of Chicago*, 549 F.2d 415, 440-41 (7th Cir.), cert. denied, 434 U.S. 875 (1977) (district court imposed mandatory hiring quotas on Chicago police department); *Alabama v. United States*, 304 F.2d 583, 590 (5th Cir.) (district court ordered registration of Negro voters who were denied registration on discriminatory basis), *aff'd*, 371 U.S. 37 (1962); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 377-78 (C.D. Cal. 1982) (Immigration Service directed to provide Salvadoran aliens with information advising them of specific rights).

⁶⁴ It is suggested that the public interest will be served by the Court ordering an investigation, inasmuch as the existence of a federal statute both prohibiting the alleged acts and enumerating the elements of the violation "constitutes added weight in favor of precautionary relief." See *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 197 (4th Cir. 1977).

⁶⁵ See *Hearings on S.1654 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. 14 (1979) (statement of David M. Cohen). The Customs Courts Act "make[s] it clear that, in those civil actions within its jurisdiction, the court possesses the authority to grant the relief required to remedy the injury suffered by a plaintiff." *Id.*

CONCLUSION

The equitable powers of the Court of International Trade are only now beginning to take on definite form. Because of its appellate jurisdiction, the Court of Appeals for the Federal Circuit plays perhaps the most important role in determining how these powers will develop. By allowing the Court to exercise the powers expressly granted to it, the Federal Circuit can contribute to both the proper delineation of the Court's authority and the proper administration of antidumping legislation.

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