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James D. Herschlein

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A SUBSTITUTED JUDGMENT OF INFERRED INTENTIONS: *MATSUSHITA ELECTRIC INDUSTRIAL CO. v. UNITED STATES*

Antidumping laws are intended to limit the anticompetitive effects of imported goods sold in the United States at a price lower than their domestic price.¹ The Trade Agreements Act of 1979²

¹ See 1 P. FELLER, U.S. CUSTOMS AND INTERNATIONAL TRADE GUIDE § 18.03[4], at 18-11 (1984); W. WARES, THE THEORY OF DUMPING AND AMERICAN COMMERCIAL POLICY 1 (1977). The purpose of antidumping laws is to prevent discrimination in the pricing habits of multinational corporations. See *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100, 1324 & n.391 (E.D. Pa. 1981); 1 P. FELLER, *supra*, § 18.03[4], at 18-11; W. WARES, *supra*, at 1. The United States antidumping statutes are designed to impose a duty on dumped imports to "equalize competitive conditions," rather than to inflict a penalty. 1 R. STURM, CUSTOMS LAW AND ADMINISTRATION, Booklet 17, § 48.1(a), at 2 (1983); see *J.C. Penney Co. v. United States Treasury Dep't*, 439 F.2d 63, 64 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971); *Flintkote Co. v. Blumenthal*, 469 F. Supp. 115, 118 (N.D.N.Y.), *aff'd*, 596 F.2d 51 (2d Cir. 1979). *But cf.* Almstedt, *International Price Discrimination and the 1916 Antidumping Act—Are Amendments in Order?*, 13 LAW & POL'Y INT'L BUS. 747, 772-73 (1981) (proposing treble damage civil penalty for violations of antidumping laws).

Americans first expressed a desire for protection of domestic industry from unfair foreign competition at the end of World War I, when it was feared that a European dumping conspiracy would inundate the United States with inexpensive goods. See W. WARES, *supra*, at 21; Almstedt, *supra*, at 751. Although American commercial policy has evolved toward trade liberalization, the antidumping statutes remain essentially protectionist. See W. WARES, *supra*, at 21-22; Note, *Injury Determinations Under United States Antidumping Laws Before and After the Trade Agreements Act of 1979*, 33 RUTGERS L. REV. 1076, 1079 (1981); see also *Television Receiving Sets from Japan*, 46 Fed. Reg. 32,702, 32,704 (1981) [hereinafter cited as *ITC Investigation*] ("plain" that antidumping legislation intended to protect domestic industry). Recently, antidumping laws have assumed greater importance in American international trade policy. HOUSE COMM. ON THE JUDICIARY, CUSTOMS COURTS ACT OF 1980, H.R. REP. NO. 1235, 96th Cong., 2d Sess. 19, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 3729, 3730.

Although dumping has existed since the seventeenth century, antidumping laws were used infrequently. Note, *supra*, at 1076; see Coudert, *The Application of the United States Antidumping Law in the Light of a Liberal Trade Policy*, 65 COLUM. L. REV. 189, 217 (1965). Recently, however, the international community has turned its attention to regulating the problems of dumping. Re, *Litigation Before the United States Court of International Trade*, 26 N.Y.L. SCH. L. REV. 437, 450 (1981); see, e.g., Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, done June 30, 1967, 19 U.S.T. 4348, T.I.A.S. No. 6431 (International Antidumping Code) [hereinafter Agreement on the Implementation of GATT].

² Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (codified as amended in scattered sections of titles 5, 13, 19, 26, and 28 of the United States Code). The Trade

authorizes the issuance of an antidumping duty order upon a finding by the International Trade Administration (ITA) of price disparity and a finding by the International Trade Commission (ITC or Commission) of an actual or potential threat of material injury to United States industry.³ These orders impose upon specific

Agreements Act of 1979 (the Act) is consistent with many of the requirements of the Agreement on the Implementation of GATT, *supra* note 1. See Ribicoff, *The U.S. Trade Agreements Act of 1979*, 8 BROOKLYN J. INT'L L. 3, 3 (1982); Note, *supra* note 1, at 1082; see also 19 U.S.C. § 2503 (1982) (Congress' qualified acceptance of the Agreement on the Implementation of GATT, *supra* note 1). One of the major concessions made by the United States in the Agreement on the Implementation of GATT, *supra* note 1, is the addition of materiality to the injury requirement. Note, *Technical Analysis of the Antidumping Agreement and the Trade Agreements Act*, 11 LAW & POL'Y INT'L BUS. 1405, 1421 (1979). *But see* 1 P. FELLER, *supra* note 1, § 18.06[3], at 18-28 (addition of "material" did not change United States law).

The Trade Agreements Act of 1979 superseded the Antidumping Act of 1921. 19 U.S.C. §§ 160-171 (1976), *repealed by* Trade Agreements Act of 1979, Pub. L. No. 96-39, § 106(a), 93 Stat. 144, 193. Substantively, the Trade Agreements Act of 1979 is the same as the Antidumping Act of 1921, the distinctions in the 1979 legislation being essentially a codification of previous practices. Note, *supra* note 1, at 1106; see 1 P. FELLER, *supra* note 1, § 18.01, at 18-3. See generally 1 P. FELLER, *supra* note 1, § 18.12, at 18-52.2 to -65 (chart comparing Trade Agreements Act of 1979 with Antidumping Act of 1921). Consequently, cases decided under the 1921 statute provide "authoritative guidance for interpreting the new law." *Id.* § 18.01, at 18-3. Therefore, this Comment will employ pre-1979 adjudications for a proper interpretation of problems posed by the Trade Agreements Act.

³ 19 U.S.C. § 1673 (1982). This statute 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.

Id.

The administering authority referred to in subsection 1 is the International Trade Administration (ITA), an agency of the Department of Commerce, and the Commission referred to in subsection 2 is the International Trade Commission (ITC). See Caine, *A Case for Repealing the Antidumping Provisions of the Tariff Act of 1930*, 13 L. & POL'Y INT'L BUS. 681, 684 (1981). Responsibility for the administration of the antidumping proceedings, originally vested in the Department of the Treasury and the Tariff Commission, was changed pursuant to an Executive Order. Exec. Order No. 12,188, 44 Fed. Reg. 69,273, 69,274 (1979).

goods a duty equal to the difference between the domestic price and the price in the United States.⁴ Administrative review of an antidumping duty order may be granted by the ITC upon a showing of sufficiently changed circumstances.⁵ While the findings of the ITC must be supported by substantial evidence,⁶ the standards of proof governing ITC review had never been addressed by a reviewing court.⁷ Recently, in *Matsushita Electric Industrial Co. v.*

⁴ 19 U.S.C. § 1673 (1982).

⁵ *Id.* § 1675(b). Section 1675 provides, *inter alia*, that either the ITA or the ITC may conduct a review of an affirmative antidumping determination if such agency receives a request showing "changed circumstances sufficient to warrant a review." *Id.* The agency must first publish notice of the review in the Federal Register and may not review an affirmative antidumping order, absent "good cause," until 2 years after publication of the original order. *Id.* This review may be appealed to the Court of International Trade. *Id.* § 1516a(2).

⁶ *Id.* § 1516a(b)(1)(B). Substantial evidence is "evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)); *Armstrong Bros. Tool Co. v. United States*, 483 F. Supp. 312, 327 (Cust. Ct.), *aff'd*, 626 F.2d 168 (C.C.P.A. 1980). A substantial evidence test requires less evidence than a preponderance of the evidence test. The fact that two inconsistent conclusions could be drawn from the same evidence is not sufficient to prevent an agency's finding from being supported by substantial evidence. *Consolo*, 383 U.S. at 620 (citing *NLRB v. Nevada Consol. Copper Corp.*, 316 U.S. 105, 106 (1942)); *Keele Hair & Scalp Specialists, Inc. v. FTC*, 275 F.2d 18, 21 (5th Cir. 1960).

The record for the judicial review of administrative antidumping proceedings shall consist of "a copy of all information presented to or obtained by" the agency whose determination is being reviewed. 19 U.S.C. § 1516a(b)(2)(A)(i) (1982). The court is to proceed according to the record as prepared by the agency, and may not embark upon a *de novo* trial. S. REP. NO. 249, 96th Cong., 1st Sess. 251-52, *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 381, 637; 1 R. STURM, *supra* note 1, § 47.5(b), at 62 (Supp. 1980); Vance, *Judicial Review of Antidumping Orders in the United States and European Economic Community*, 26 N.Y.L. SCH. L. REV. 577, 589 (1981). *See generally* *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1125, 1154 n.26 (E.D. Pa. 1980) (general discussion of the availability of *de novo* review in actions commenced in the Customs Court). Similarly, a review of a final countervailing duty order must proceed only on the administrative record. *Ceramica Regiomontana, S.A. v. United States*, 557 F. Supp. 593, 595 (Ct. Int'l Trade 1982).

A reviewing court, though authorized to consider carefully the "relevant factors," may not "substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *see City Lumber Co. v. United States*, 457 F.2d 991, 994 (C.C.P.A. 1972). The court's inquiry is limited to the determination whether the Commission's conclusion had a "rational basis in fact and was not contrary to law." *Pasco Terminals, Inc. v. United States*, 477 F. Supp. 201, 220 (Cust. Ct. 1979), *aff'd*, 634 F.2d 610 (C.C.P.A. 1980); *see Kleberg & Co. v. United States*, 71 F.2d 332, 335 (C.C.P.A. 1933); *SCM Corp. v. United States*, 81 Cust. Ct. 159, 161 (1978); *F.W. Myers & Co. v. United States*, 376 F. Supp. 860, 878 (Cust. Ct. 1974). The foundation for this administrative deference is the broad discretionary authority accorded the ITC by Congress. *See Pasco Terminals*, 477 F. Supp. at 220; *infra* notes 29-30 and accompanying text.

⁷ *See United States v. Roses Inc.*, 706 F.2d 1563, 1569 (Fed. Cir. 1983). The Court of Appeals for the Federal Circuit recently characterized the procedures of an antidumping review proceeding as "novel and unfamiliar . . . , casting everyone . . . in novel and unfamiliar roles." *Id.*

United States,⁸ the Court of International Trade reversed an antidumping duty order, holding that the review of the order by the ITC was not conducted in accordance with proper standards of proof and that the refusal by the ITC to lift the order was not supported by substantial evidence.⁹

In 1971, the Tariff Commission¹⁰ found that a United States industry was being injured by the sale of television receiving sets from Japan at less than their fair value.¹¹ Ten years after the issuance of an antidumping duty order, the affected importers initiated a changed circumstances review of the finding of material injury to the television industry in the United States.¹² Upholding the injury determination,¹³ the ITC concluded that the American industry remained sufficiently weak¹⁴ and, therefore, it would be injured further if the Japanese manufacturers were encouraged to

Allowing judicial review of decisions of the ITA and of the ITC is consonant with the general rule that agency adjudications, whether affirmative or negative, are judicially reviewable. See *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 156-57 (1970); *SCM Corp. v. United States*, 450 F. Supp. 1178, 1183 (Cust. Ct. 1978) (citing *Dunlop v. Bachowski*, 421 U.S. 560, 566 (1975)). The Court of International Trade is granted jurisdiction over actions involving United States customs laws by § 1581 of the Customs Courts Act of 1980. 28 U.S.C. § 1581 (1982). The Customs Courts Act grants the Court of International Trade the same powers in law and equity as a United States district court. *Id.* § 1585.

⁸ 569 F. Supp. 853 (Ct. Int'l Trade 1983).

⁹ *Id.* at 864.

¹⁰ The Tariff Commission was renamed the United States International Trade Commission in 1979 by the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978, 2009 (1975) (codified at 19 U.S.C. § 2231 (1982)).

¹¹ *Television Receiving Sets from Japan*, 36 Fed. Reg. 4576, 4576 (1971). The original determination of sales below fair value was made by the Department of the Treasury in 1970. *Television Receiving Sets, Monochrome and Color, from Japan*, 35 Fed. Reg. 18,549, 18,549 (1970).

¹² *ITC Investigation*, *supra* note 1, at 32,702. The ITA, rather than the ITC, is the proper forum to conduct a changed circumstances review of a determination of sales at less than fair value. *Matsushita*, 569 F. Supp. at 856. Bypassing the ITA, the importers sought review by the ITC of the material injury finding. *Id.* Therefore, the continued sale of the television sets at less than fair value was assumed. *Id.*

The ITC characterized the purpose of their review as a determination:

"whether an industry in the United States would be materially injured, or would be threatened with material injury, or the establishment of an industry in the United States would be materially retarded, by reason of imports of the merchandise covered by the . . . antidumping order if the order were to be modified or revoked."

ITC Investigation, *supra* note 1, at 32,702 n.1 (quoting 19 C.F.R. § 207.45a(2) (1982)).

¹³ *ITC Investigation*, *supra* note 1, at 32,703.

¹⁴ *Id.* The ITC concluded that the United States television industry was: (1) highly competitive, (2) extremely price sensitive, and (3) minimally profitable. *Id.* Thus, although conditions had changed sufficiently to warrant a review of the antidumping duty, *id.* at 32,704, the ITC concluded that there was still a threat of material injury, *id.* at 32,703.

increase their levels of importation.¹⁵

The proponents of revocation of the duty¹⁶ then sought review by the Court of International Trade.¹⁷ Examining the record for substantial evidence to support the ITC decision,¹⁸ the Court determined that the findings of the ITC were based on the prediction that the Japanese imports would increase dramatically if the antidumping duty was either modified or revoked.¹⁹ This prediction, the Court concluded, was not supported by substantial evidence.²⁰

Writing for the Court, Judge Watson recognized that the intentions of the party against whom the order has been issued are relevant to the determination of the reviewing commission.²¹ The Court posited, however, that there was insufficient evidence to support the interpretation given by the ITC of the importer's intentions.²² Judge Watson determined that by requiring the foreign manufacturers to come forward with evidence, the ITC was imposing a presumption in favor of the continuing validity of the order.²³ This procedure, the Court held, violated the rule that there is no burden of proof on a party during an ITC investigation.²⁴ In the

¹⁵ *Id.* at 32,706. The ITC scrutinized the Japanese manufacturers' production capabilities to predict their reaction to a revocation of the antidumping duty. *Id.* The Commission determined that the manufacturers could adapt their production facilities to meet an increased demand on short notice. *Id.* From this finding the ITC inferred the exporters' intent to increase the levels of exportation upon a lifting of the duty. *Id.*

¹⁶ See *Matsushita*, 569 F. Supp. at 855 n.4. The proponents of revocation, who were the petitioners in the Court of International Trade, were major television exporters. *Id.*

¹⁷ *Id.* at 855-56. This review was taken pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) (1982). *Id.*

¹⁸ 569 F. Supp. at 855-56; see *supra* note 6.

¹⁹ 569 F. Supp. at 857. The court found that the three reasons given by the ITC in support of their prediction of an increase of Japanese imports were unsupported by substantial evidence. *Id.* The reasons given by the ITC were: (1) the importers' present intentions, (2) the manufacturers' production capacity, and (3) the incentives that would guide the future conduct of the importers and the manufacturers. *Id.*

²⁰ *Id.*

²¹ *Id.* (citing *City Lumber Co. v. United States*, 457 F.2d 991, 997 (C.C.P.A. 1972)). The *City Lumber* court held that when a statute contemplates the probability of future events, it is "perfectly legitimate" to consider intent. *City Lumber*, 457 F.2d at 997.

²² 569 F. Supp. at 860.

²³ *Id.* at 858-59.

²⁴ *Id.* at 858. According to the Court, the only burden of proof imposed on the party seeking review is to demonstrate a sufficient change in circumstances to warrant the review. *Id.* Once review is granted, however, "the only burden on a party is the burden of cooperating with the investigation of the administrative agency." *Id.* The ITC has a duty to investigate both neutrally, *id.* at 860, and thoroughly, *Budd Co. Ry. Div. v. United States*, 507 F. Supp. 997, 1006 (Ct. Int'l Trade 1980).

In *Budd Co.*, the plaintiff, a domestic manufacturer of railway cars and parts, brought

absence of substantial evidence, and unaided by a presumption showing a continuing threat of injury to American industry, Judge Watson concluded that there was no longer a threat of injury.²⁵ The Court therefore ordered the reversal of the injury determination and revoked the antidumping duty order.²⁶

In *Matsushita*, the Court of International Trade applied the standard of substantial evidence to the ITC material injury investigation.²⁷ It is submitted, however, that the Court transgressed the bounds of judicial scrutiny by "weighing the evidence." This Comment will consider the novelty of the current antidumping statutory scheme,²⁸ analyze the impact of the Court's decision on ITC review procedures, and suggest an approach more consistent with the goals of the antidumping laws.

SUBSTITUTED JUDGMENTS AND IMBERT IMPORTS

In granting the Court of International Trade the authority to hold unlawful only those ITC determinations that are unsupported by substantial evidence,²⁹ Congress revealed an intent both to promote the uniform application of laws and to grant the proper amount of respect to agency expertise.³⁰ Although, as a general

an action before the Court of International Trade seeking review of an ITC determination of no material injury to the domestic industry by sales of cars and parts from Japan and Italy to three American transit systems. *Budd Co.*, 507 F. Supp. at 998-99. Although upholding the finding of the ITC of no material injury due to the importation of finished railway cars, the Court addressed, on its own initiative, the issue of the impact on the domestic industry of the importation of component parts. *Id.* at 1002-03. The Court concluded that little attention had been paid to this issue by the parties and, moreover, the Court found a lack of diligence on the part of the Commission in fulfilling its investigative duties. *Id.* Because the Commission in *Budd Co.* breached this obligation, *id.* at 1006, the Court remanded the case to the ITC for reconsideration, *id.* at 1006-07. It has been suggested, however, that the Court's *sua sponte* "aggressive judicial review" will increase the time spent in litigation, thereby frustrating the intent of Congress to expedite the process in dumping claims. See Note, *Administering the Revised Antidumping Law: Allocating Power between the ITC and the Court of International Trade*, 22 VA. J. INT'L L. 883, 900 (1982).

²⁵ *Matsushita*, 569 F. Supp. at 864.

²⁶ *Id.*

²⁷ *Id.* at 860; see 19 U.S.C. § 1516(b)(1)(B) (1982).

²⁸ See, e.g., *United States v. Roses Inc.*, 706 F.2d 1563, 1569 (Fed. Cir. 1983). The Trade Agreements Act of 1979 established new procedures for review, which the courts and the administrative agencies involved will have to "learn by doing." *Id.*; cf. Vance, *supra* note 6, at 587-89 (outlining steps necessary to seek review under new system).

²⁹ 19 U.S.C. § 1516a(b)(1)(B) (1982); see *supra* note 6.

³⁰ See *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620 (1966); Stason, "Substantial Evidence" in *Administrative Law*, 89 U. PA. L. REV. 1026, 1029 (1941); S. REP. NO. 249, 96th Cong., 1st Sess. 251, reprinted in 1979 U.S. CODE CONG. & AD. NEWS 381, 637. The

principle of administrative law, a reviewing court is authorized to consider all the "relevant factors" contained in the record,³¹ the court may neither substitute its own judgment for that of the agency³² nor weigh the evidence.³³ In the review of an ITC determination, the substantial evidence test is satisfied if a reasonable relationship exists between the importers' challenged activity and the purported injury to domestic industry.³⁴ The *Matsushita* Court found that there was insufficient evidence to support the determination of the ITC that television importers would increase their levels of importation upon the cessation of the antidumping duties.³⁵ It is submitted that the manner in which the Court considered the findings of the ITC violated the prohibitions against substituted judgment and weighing the evidence.

Despite the difficulties involved in accurately predicting a

substantial evidence test requires that the findings of the agency bear a reasonable, direct relationship to the presented evidence, *Sprague Elec. Co. v. United States*, 529 F. Supp. 676, 682 (Ct. Int'l Trade 1981), thus freeing the reviewing court from the demanding burden of weighing the evidence, *Consolo*, 383 U.S. at 620.

³¹ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); see B. SCHWARTZ, ADMINISTRATIVE LAW § 204, at 579-81 (1976). The reviewing court may consider only the relevant factors as found in the administrative record. *Overton Park*, 401 U.S. at 416; *supra* note 6. Therefore, the freedom to review the relevant factors does not operate as a license to conduct a trial *de novo*. See *SCM Corp. v. United States*, 487 F. Supp. 96, 108 (Cust. Ct. 1980); *supra* note 6.

³² *United States v. Roses Inc.*, 706 F.2d 1563, 1569 (Fed. Cir. 1983) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943)) (even if agency has acted illegally, a Court of International Trade judge may only remand for a proper consideration, he may not impose his own opinion); *Pasco Terminals, Inc. v. United States*, 477 F. Supp. 201, 220 (Cust. Ct. 1979) (because Commission given a discretionary function the court should not impose its judgment), *aff'd*, 634 F.2d 610 (C.C.P.A. 1980); *Kleberg & Co. v. United States*, 71 F.2d 332, 335 (C.C.P.A. 1933) (under Antidumping Act of 1921, court may not examine the validity of the Treasury Secretary's conclusions as long as he has abided by proper procedure); *cf.* *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (under Administrative Procedure Act, even though court may consider the factors underlying the secretary's judgment, "[t]he court is not empowered to substitute its judgment for that of the agency").

³³ See *City Lumber Co. v. United States*, 457 F.2d 991, 994 (C.C.P.A. 1972); *Sprague Elec. Co. v. United States*, 529 F. Supp. 676, 682-83 (Ct. Int'l Trade 1981); *F.W. Myers & Co. v. United States*, 376 F. Supp. 860, 878 (Cust. Ct. 1974).

³⁴ See *Smith-Corona Group v. United States*, 713 F.2d 1568, 1582 (Fed. Cir. 1983). The substantial evidence test, as applied to causation, requires only that there be a "causative link" between the less-than-fair-value sales and the injury. *Pasco Terminals, Inc. v. United States*, 477 F. Supp. 201, 220 (Cust. Ct. 1979), *aff'd*, 634 F.2d 610 (C.C.P.A. 1980); see *Sprague Elec. Co. v. United States*, 529 F. Supp. 676, 682 (Ct. Int'l Trade 1981). One commentator has expressed the opinion that the causal link is established by a mere "identifiable relationship." Note, *supra* note 1, at 1102-03.

³⁵ *Matsushita*, 569 F. Supp. at 857.

party's intentions,³⁶ ITC investigations may demand such foresight.³⁷ Due to the unavailability of the exporters and importers for testimony,³⁸ the ITC based its predictions of intentions on the production capabilities of the foreign manufacturers.³⁹ The ITC stated that the production capabilities were adequately flexible to increase production, and therefore exportation, quickly.⁴⁰ In holding that this was an insubstantial predicate for the finding of material

³⁶ See *ITC Investigation*, *supra* note 1, at 32,707. The dissenting ITC Commissioner questioned the availability of reliable evidence to prove intentions. *Id.* at 32,712 (Stern, Comm'r, dissenting). She asserted that, even had they testified, the petitioners' statements concerning their intentions would be "self-serving and unprovable." *Id.* (Stern, Comm'r, dissenting).

³⁷ See *Matsushita*, 569 F. Supp. at 857. One court has characterized intent as a "perfectly legitimate matter" for the Commission to consider. *City Lumber Co. v. United States*, 457 F.2d 991, 997 (C.C.P.A. 1972). The regulations for the ITC implicitly recognize the necessity of considering intent because the investigation is based on a prediction of what would happen to the domestic industry "if the order *were* to be modified or revoked." 19 C.F.R. § 207.45(a) (1984) (emphasis added).

³⁸ See *ITC Investigation*, *supra* note 1, at 32,705-06. The ITC majority opinion stated that there were no "supplementary submissions" offered by the exporters and the importers regarding their future intentions. *Id.* at 32,706. Nevertheless, the majority noted that the submissions had not been specifically requested by the ITC. *Id.*

The Court of International Trade criticized the ITC for this inactivity. *Matsushita*, 569 F. Supp. at 857-58. This lack of diligent effort was asserted to be a breach of the duty of the ITC to investigate thoroughly. *Id.* at 860. *But see ITC Investigation*, *supra* note 1, at 32,706 n.12 (it is not "reasonable to expect the Commission to make a petitioner's case for it"); Ribicoff, *supra* note 2, at 8 (ITC proceedings are adversarial and parties cannot expect ITC to develop facts on its own). The ITC must reasonably seek all "available" information, which has been defined as all evidence that is "accessible or may be obtained, from whatever its source." *Freres v. United States*, 583 F. Supp. 599, 604 n.8 (Ct. Int'l Trade 1984) (quoting *Budd Co. Ry. Div. v. United States*, 507 F. Supp. 997, 1003-04 (Ct. Int'l Trade 1980)). Due to the failure of the ITC to request sufficient information, it is submitted that the Court of International Trade should have remanded the case to the ITC to allow a full investigation.

³⁹ *ITC Investigation*, *supra* note 1, at 32,706.

⁴⁰ *Id.* The ITC proposed three scenarios to illustrate that resumed dumping by the Japanese television importers could materially injure domestic industry. *Id.* The first scenario contemplated the Japanese importers responding to a high level of consumer demand by increasing their market share while unilaterally suppressing what would otherwise be a period of increasing prices for domestic producers. *Id.* The second possibility was that the Japanese importers would use Japanese-made television sets to supplement the Japanese-owned, American-built television sets during periods of short-term cyclical increases in demand. *Id.* The final scenario concerned the Japanese-built picture tube. The ITC indicated that if demand for this component continued to drop in other major overseas markets, the Japanese importers might wish to use the American market, thereby interfering with the market for American-made picture tubes. *Id.* The Court of International Trade characterized these scenarios as "virtual assumption[s]," "inconsistent," and "conjectural," respectively. 569 F. Supp. at 861-62 & n.25.

injury,⁴¹ it is suggested that the Court of International Trade disregarded the decision of the Court of Customs and Patent Appeals⁴² in *Imbert Imports, Inc. v. United States*.⁴³

In *Imbert Imports*, an importer appealed a Customs Court decision upholding an imposition of dumping duties.⁴⁴ The importer claimed that the Court acted improperly in basing a finding of probable injury on the production capacity of the foreign producer,⁴⁵ a finding similar to that of the ITC in *Matsushita*.⁴⁶ In affirming the decision of the Customs Court,⁴⁷ the Court of Customs and Patent Appeals declined to consider the importer's argument because it would have required the court to "weigh and balance the evidence."⁴⁸ It is submitted that an examination of the *Matsushita* rationale in light of the holding in *Imbert Imports* establishes that the *Matsushita* Court improperly weighed the evidence and substituted its opinion for the judgment of the ITC. By deciding the case on the merits, the Court contravened precedent.⁴⁹ The more appropriate procedure would have been for the

⁴¹ *Matsushita*, 569 F. Supp. at 860.

⁴² The Court of Customs and Patent Appeals, which handled appeals from the Court of International Trade, was renamed the Court of Appeals for the Federal Circuit. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 101, 96 Stat. 25, 25 (codified at 28 U.S.C. § 41 (1982)).

⁴³ 475 F.2d 1189 (C.C.P.A. 1973).

⁴⁴ *Id.* at 1189.

⁴⁵ *Id.* at 1192.

⁴⁶ See *supra* text accompanying notes 39-40.

⁴⁷ 475 F.2d at 1192.

⁴⁸ *Id.* The *Imbert Imports* court declined to entertain an argument that the Commission's decision was arbitrary, while the *Matsushita* Court based its decision on such a determination. Compare *id.* (considering whether the Commission's determination of the producer's capacity is too speculative would be an exercise in weighing the evidence) with *Matsushita*, 569 F. Supp. at 860 ("evidence . . . of production capacity . . . has been analyzed by the Court") (emphasis added).

⁴⁹ See *United States v. Roses Inc.*, 706 F.2d 1563, 1569 (Fed. Cir. 1983) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943)); 19 U.S.C. § 1516a(c)(3) (1982). In *Roses*, the Court of International Trade overturned an ITC ruling and ordered the commencement of an investigation. 706 F.2d at 1565. The Court of Appeals for the Federal Circuit reversed, stating that as a "general rule," it is an abuse of authority for the Court of International Trade to substitute its judgment "instead of remanding the case for agency determination according to correct procedures." *Id.* at 1569 (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943)); cf. *United States Coalition for Fair Canadian Lumber Imports v. United States*, 563 F. Supp. 838, 842 (Ct. Int'l Trade 1983) (court has no jurisdiction to "guide" determination of the International Trade Administration; its function is limited to the review of agency conclusions). The "trend" is for the Court to find the investigation of the ITC insufficient and to remand the case to the ITC. 1 R. STURM, *supra* note 1, § 48.3(b), at 33; see, e.g., *Roses*, 706 F.2d at 1569; *Budd Co. Ry. Div. v. United States*, 507 F. Supp. 997, 1006-07 (Ct. Int'l Trade 1980); see also *Atlantic Sugar, Ltd. v. United States*, 573 F. Supp. 1142, 1143 (Ct. Int'l

Court to remand the case to the ITC for further findings.⁵⁰ Even if the ITC had made material mistakes, the Court of International Trade would have no authority to "tak[e] out of their hands the decision that is still for them to make."⁵¹ Furthermore, it is suggested that the *Matsushita* Court's discussion of the evidentiary principles applicable to an ITC hearing places an undue burden on "protected" American industry.

THE "SHIFTING" BURDEN OF PROOF

Both the ITC and the Court of International Trade asserted that there is no express burden of proof on a party involved in a changed circumstances review of an injury determination.⁵² The ITC concluded, however, that in the absence of evidence to the contrary there would be a finding of an intent to increase imports if the antidumping duty order were lifted.⁵³ This language led the *Matsushita* Court to find that the ITC created a presumption against the proponents of revocation.⁵⁴ Due to the inconsistent discussion concerning this issue⁵⁵ and the recognition that, even when no proof is presented, the ITC will reach a determination on the merits, further exposition is warranted.

Even assuming, as the ITC and the *Matsushita* Court have suggested, that there is no affirmative burden of proof on either party at an ITC review hearing,⁵⁶ the existence of such a burden is implicit in the realization that, in the absence of evidence, it is the losing party that bore the burden.⁵⁷ Concededly, the ITC may have placed a burden of proof on the foreign importers.⁵⁸ Although the

Trade 1983) (court remanded case to the ITC three times).

⁵⁰ See *supra* note 48 and accompanying text.

⁵¹ *United States v. Roses Inc.*, 706 F.2d 1563, 1569 (Fed. Cir. 1983). By not remanding the case, it is submitted that the court substituted its judgment for that of the ITC. See *supra* notes 29-33 and accompanying text.

⁵² See *Matsushita*, 569 F. Supp. at 860; *ITC Investigation*, *supra* note 1, at 32,706 n.12.

⁵³ *ITC Investigation*, *supra* note 1, at 32,703.

⁵⁴ See *Matsushita*, 569 F. Supp. at 858.

⁵⁵ Compare *id.* (ITC placed a burden of proof on the proponents of revocation) with *ITC Investigation*, *supra* note 1, at 32,706 n.12 (ITC did not impose a burden of proof).

⁵⁶ See *Matsushita*, 569 F. Supp. at 860; *ITC Investigation*, *supra* note 1, at 32,706 n.12.

⁵⁷ See, e.g., W. RICHARDSON, *OUTLINES OF EVIDENCE* 102 (1911); 9 J. WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW* § 2487, at 279 (3d ed. 1940). Evidentiary standards require that when the evidence is in "equilibrium, the jury must find against [the party that bore the burden]." W. RICHARDSON, *supra*, at 102 (quoting L. HAMMON, *HAMMON ON EVIDENCE* § 2, at 4 (1907)).

⁵⁸ See *ITC Investigation*, *supra* note 1, at 32,706 & n.12. Despite a denial of the exis-

Court purported to remove that burden and create a situation where no burden of proof exists,⁵⁹ it is suggested that the judicial resolution of the matter merely shifted the burden to the protected American industry. In accordance with basic rules of evidence and the protective intent of the antidumping laws, it is submitted that the burden of proof implicit in the review hearing should be placed on the party arguing for a change in the status quo.

When there is no evidence to the contrary, rules of evidence require a court to presume the continued existence of a proven fact.⁶⁰ In addition, an adverse inference may be drawn against a party that fails to produce evidence exclusively within its dominion and control.⁶¹ In *Matsushita*, there was little, if any, credible evidence tending to show a change in the initial material injury finding.⁶² Evidence tending to rebut the injury finding was clearly within the exclusive control of the foreign manufacturers⁶³ and, yet, it was unproduced. It is argued that when the proponents of the revocation of an antidumping duty order fail to rebut the once-

tence of a burden of proof, *id.*, the reliance of the ITC on a presumption that the plaintiffs would increase imports if the order were revoked effectively served as a burden of proof, *see Matsushita*, 569 F. Supp. at 858.

⁵⁹ *See Matsushita*, 569 F. Supp. at 860.

⁶⁰ *Simpson v. Schweiker*, 691 F.2d 966, 969 (11th Cir. 1982); *Rivas v. Weinberger*, 475 F.2d 255, 258 (5th Cir. 1973); L. HAMMON, *supra* note 57, § 34, at 145. If the existence of a state of affairs has been proved, and there is no contradicting evidence, the court is authorized to instruct the jury that they may find that the fact "continues as long as is usual with things of that nature." 2 E. DEVITT & C. BLACKMAN, *FEDERAL JURY PRACTICE AND INSTRUCTIONS* § 71.06, at 132 (2d ed. 1970).

⁶¹ *See San Antonio v. Timko*, 368 F.2d 983, 985 (2d Cir. 1966); *Borror v. Herz*, 666 F.2d 569, 573-74 (C.C.P.A. 1981); J. COTCHETT & A. ELKIND, *FEDERAL COURTROOM EVIDENCE* 33 (1983); 2 J. WIGMORE, *supra* note 57, § 285, at 162. The failure of a party to bring forth evidence within its control that would tend to prove a disputed fact gives rise to an inference that the unproduced evidence is unfavorable to that party. 2 J. WIGMORE, *supra* note 57, § 285, at 162.

⁶² *See ITC Investigation*, *supra* note 1, at 32,703. Although the ITC was to consider evaluative statistics pertaining to the existing health of the affected domestic industry, such statistics were "distorted by the existence of the order and the reaction of the importers and exporters to it." *Id.* at 32,704. Therefore, the ITC stated that its focus was the determination of the "future behavior of exporters and importers" upon revocation of the antidumping duty order. *Id.* at 32,705. Thus, it is submitted that the improved strength of the domestic industry while an antidumping duty order is in effect, though likely to be characterized by the ITC as "changed circumstances," proves little regarding the likelihood of injury following cessation of the order.

⁶³ *Id.* at 32,705 n.11. The ITC stated that a review investigation differed from a basic antidumping duty investigation because in a review, the necessary information is "within the control of the persons petitioning the Commission for a change in the status quo," whereas other determinations require evidence from both parties. *Id.*

proven fact of material injury and fail to introduce evidence within their control, the order should stand. It is submitted that the failure of the *Matsushita* Court to employ these evidentiary standards⁶⁴ resulted in a contravention of both the protective intent and the remedial purpose of the antidumping laws.

Antidumping laws protect American manufacturers from harm by forcing foreign industries to sell at competitive prices.⁶⁵ An existing antidumping duty, requiring sales at fair value, aids the growth of American industry by allowing manufacturers to set prices according to costs. Thus, it is suggested, the policy underlying the antidumping laws supports the maintenance of a duty in the absence of clear evidence supporting its removal. The *Matsushita* Court, by failing to apply the appropriate evidentiary standards,⁶⁶ has allowed the television importers to continue their practice of selling at less-than-fair value,⁶⁷ thereby undercutting

⁶⁴ See, e.g., *Matsushita*, 569 F. Supp. at 857. The *Matsushita* Court held that, although the ITC could presume less than fair value sales, the inquiry into the existence of material injury was to be a "neutral investigation." *Id.* It is argued that the Court failed to employ the presumption of the continued existence of material injury to domestic industry, although the injury had been proved in 1971. See *supra* notes 12 & 61 and accompanying text.

The Court also found that the ITC "could not derive intent . . . from a failure by the proponents of revocation to offer evidence of a lack of intent." 569 F. Supp. at 860. In fact, the importers offered no evidence regarding their own intentions. *ITC Investigation, supra* note 1, at 32,705-06. The Court's determination, it is submitted, contravenes the inference imposed on a party that fails to introduce evidence exclusively within its dominion and control. See *supra* note 61 and accompanying text.

⁶⁵ See 1 R. STURM, *supra* note 1, § 48.1, at 2; W. WARES, *supra* note 1, at 21-22. The protectionist framework of the antidumping laws is apparent in both the statutes and the regulations. For example, a party that commences a civil action in the Court of International Trade to challenge a determination made by the ITC has the burden of proving that the decision is wrong. 28 U.S.C. § 2639 (1982). It is submitted that this burden of proof should also be placed upon a party challenging an ITC determination through an administrative review.

Federal regulations also evidence the protective purpose of the antidumping laws. During an ITC investigation, assuming a quorum is present, "an evenly divided vote on the question of injury would result, by operation of law, in an affirmative determination." *Voss Int'l Corp. v. United States*, 432 F. Supp. 205, 208 (Cust. Ct. 1977) (citing 19 U.S.C. § 160(a) (1976), *repealed by* Pub. L. No. 96-39, tit. I, § 106(a), 93 Stat. 193 (1979)), *modified*, 628 F.2d 1328 (C.C.P.A. 1980). The statute construed in *Voss* was superseded by the Trade Agreements Act of 1979, but was adopted as an ITC rule to apply to the review of an outstanding determination. See 19 C.F.R. § 207.45 (1982). It is submitted that this rule, which provides that a proponent of revocation of an ITC determination must receive *more than* 50% of the votes of the ITC, establishes that the *Matsushita* plaintiffs did have a burden of proof during the ITC review.

⁶⁶ See *supra* note 57 and accompanying text.

⁶⁷ See *Matsushita*, 569 F. Supp. at 856. Because the proponents of revocation did not seek review by the International Trade Administration of the determination that sales were

the rights of American manufacturers.

CONCLUSION

In *Matsushita*, the Court of International Trade, in direct conflict with precedent, substituted its judgment for that of the ITC. In the future, rather than weigh the evidence, the Court should remand cases that require further evaluation to the ITC. Moreover, a burden of production of evidence within a party's control should be placed on all interested parties in an ITC review hearing. To align the procedures for review with the antidumping laws, the ultimate burden of proof should lie with the party advocating review.

EPILOGUE

During the final publication stages of this issue, the decision of the Court of International Trade in *Matsushita Electric Industrial Co. v. United States* was reversed by the Court of Appeals for the Federal Circuit. This opinion is available in slip opinion form at Nos. 84-693 & -694 (Fed. Cir. Dec. 13, 1984) (available Dec. 20, 1984, LEXIS, Itrade library, Courts file). It is submitted, however, that the analysis offered in this Comment is not negated by this reversal, since the Federal Circuit similarly violated the strictures against weighing the evidence and substituting a judgment.

James D. Herschlein