

10-1-1979

Protection Against Foreign Subsidies and Certain Pricing Practices: The Countervailing Duty and the Anti-Dumping Duty

Max N. Berry

Follow this and additional works at: <http://repository.law.miami.edu/umialr>



Part of the [International Trade Commons](#)

Recommended Citation

Max N. Berry, *Protection Against Foreign Subsidies and Certain Pricing Practices: The Countervailing Duty and the Anti-Dumping Duty*, 11 U. Miami Inter-Am. L. Rev. 347 (1979)
Available at: <http://repository.law.miami.edu/umialr/vol11/iss2/8>

This Article is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Inter-American Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

Protection Against Foreign Subsidies and Certain Pricing Practices: The Countervailing Duty and the Anti-dumping Duty

MAX N. BERRY*

I. COUNTERVAILING DUTIES

A. Introduction

One of the most fascinating areas of the law of international trade is that of non-tariff barriers, which encompass both countervailing duties and anti-dumping duties. These legal issues are growing in importance as the world becomes increasingly interdependent and world trade expands. Trade is important not only in terms of corporate profits, but in the political sense: the public is becoming aware of this fact through articles published in newspapers and magazines concerning the fields of countervailing duties and anti-dumping duties. The worldwide significance of these issues is illustrated by the fact that the topic of countervailing duties is perhaps the most important issue being discussed at the Geneva-based Tokyo Round of the Multilateral Trade Negotiations (MTN).¹ What is decided there will concern companies in Miami, corporations in New York, and all importers and exporters around the country.

We have heard today that Latin America and Miami are going to have an increasing relationship in the trade area, and I can assure you, having studied the various Latin American countries and the intricate systems therein, that there are quite a few incentives to export: subsidies, bounties, or grants, all of which are within the framework and scope of the countervailing duty law. Consequently, it is especially important that the international practitioner understand the concept of non-tariff barriers, since many developing areas, including Latin America, generally subsidize or issue bounties or grants to approximately sixty to seventy percent of their exports.

* Mr. Berry is a partner in the law firm, Berry, Epstein, Sandstrom, and Blatchford, Washington, D.C., specializing in international trade, finance, and customs law; LL.B., University of Oklahoma; LL.M., Georgetown University; Office of Chief Counsel, Bureau of Customs; Past President, Custom Lawyers Ass'n.

1. An international trade pact was initiated in Geneva on April 12, 1979. This ceremony marked the end of 5 1/2 years of negotiations and debate among the 99 participating nations. The so-called Tokyo Round of talks began in Japan in 1973 with the goal of establishing more liberal and more certain international trade rules for the 1980's.

B. The Legal Definition

The concept of the countervailing duty is explained in the Tariff Act of 1930.² Simply, when any individual—a person, association, partnership, cartel, foreign government, corporation or other entity—gives something of value to another person which benefits an export to the United States, then the Secretary of the Treasury (Secretary) must assess an extra or special duty, called a countervailing duty, equal to the net amount of the bounty or grant (also called a subsidy) bestowed directly or indirectly upon an imported article by any one of the above-named individuals.³

Attempts to define this “something of value,” called a bounty or grant,⁴ have been the subject of much litigation. The court faced this problem in *Downs v. United States*,⁵ a case involving Russian sugar exports, wherein it noted that the word *bounty* is a comprehensive term that includes every case where an exporter directly or indirectly receives a pecuniary benefit from the exportation, whether in the form of a direct bounty, a remission of taxes, or an exemption from taxes.⁶ The word *grant*, on the other hand, has a broader meaning, and “implies the conferring by the sovereign power of some valuable privilege, franchise, or other right of like character, upon a corporation, person, or class of persons.”⁷ In *Nicholas & Co. v. United States*,⁸ the court adopted this liberal interpretation of the con-

2. 19 U.S.C. § 1303 (1975). For a history and legal analysis of the U.S. countervailing duty law see Berry, *The Countervailing Duty In International Trade - A Legal Analysis*, 28 FED. BAR J. 329 (1968).

3. 19 U.S.C. § 1303(a)(1) (1975) states:

Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, government, then upon the importation of such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.

4. *Id.*

5. 113 F. 144 (4th Cir. 1902), *aff'd.*, 187 U.S. 496 (1902).

6. 113 F. at 147.

7. *Id.*

8. 7 Ct. Cust. App. 97 (1916), *aff'd.*, 249 U.S. 34 (1919).

cept of a *grant*, and explained its logical connection to the countervailing duty statute's legislative intent:

It was a *result* Congress was seeking to equalize regardless of whatever name or in whatever manner or form or for whatever purpose it was done. The statute interprets itself as a member of an act calculated to maintain an accorded protection, incidental or otherwise, as against payments or grants of any kind by foreign powers, *resulting* in an equalization thereof [T]he court does not feel at liberty to adopt any constrained or technical definitions of the words "bounty" or "grant" suggested, but to vouchsafe the paragraph a meaning, well within its language, that will best effectuate the unquestioned congressional purpose.⁹

In essence, the amount of the bounty or grant that the Secretary of the Treasury assesses will be tacked on in addition to the normal tariff duty on the product. If the Secretary is unable to determine the amount of the bounty or grant (many foreign governments have devised sophisticated systems for stimulating exports so that Treasury officials cannot calculate exact figures), the Secretary may estimate that amount.¹⁰ Courts today recognize that the Secretary has wide latitude in determining the existence of a bounty or grant and calculating the amount thereof; this process remains a factual inquiry involving judgments of a political, legislative, and policy nature.¹¹

Governments may bestow bounties or grants in order to infiltrate a foreign market;¹² in many cases, however, it is an incidental result of a domestic system designed to maintain internal supply or stimulate exports. For example, Norway has a dairy industry; such an industry is basic to any nation, for a country must be able to feed its people. A surplus may occur quite easily in dairy production as it is difficult to predict from year to year how much a cow will produce or how many cows will be available in a given year. The Norwegian system ensures that the milk is produced in sufficient quantities to

9. 7 Ct. Cust. App. at 106.

10. 19 U.S.C. § 1303(a)(5) (1975). In this situation, past history has shown that the estimate is likely to be high.

11. See *United States v. Zenith Radio Corp.*, 562 F.2d 1209 (C.C.P.A. 1977), *aff'd.*, 437 U.S. 443 (1978).

12. An example of market infiltration was a Canadian plan, launched in 1963, wherein Canadian automobiles and automobile parts entered the U.S. market at basically the same price as competing domestic merchandise. At the same time, these articles benefited from an indirect grant issued by the Canadian government. A bilateral agreement between Canada and the United States was reached shortly after the Canadian plan became effective and before the Treasury Department could take any action. For a detailed discussion of this situation see *Berry, supra* note 2, at 334.

feed the population by guaranteeing dairy farmers a certain support price for that milk. The U.S. market is not a consideration here. The Norwegian government is merely concerned that the dairy farmer remains in his/her occupation. Should the dairy farmer cease to produce milk, there could be a decrease and possible eventual shortage in the domestic supply. This is plainly a practice in which every country engages, including the United States.¹³ The Norwegian surplus, which resulted from the good intention to provide milk for domestic consumption, has been indirectly benefited by the internal domestic support prices. When this product arrives in the United States, this extra value (the amount of the support price) is treated as a subsidy because it reflects the giving of something of value which has stimulated the export to this country.¹⁴

C. Procedural Steps for the Practitioner

To practice countervailing duty law is to practice administrative law. The main agencies involved are the Treasury Department and the Customs Service, which is an arm of the Department. The process itself includes dealing with the various personalities involved, understanding the meaning of the laws and regulations, ascertaining what may be between the lines of those regulations and laws, and perceiving the political philosophy of the current Administration.¹⁵

The procedure begins when the Treasury Department, or an individual outside the Treasury, files a complaint setting forth the belief that a bounty or grant is being paid or bestowed on an imported item or items.¹⁶ (It is interesting to note that the Treasury has never, on its own, filed a complaint to this date.) The complaint must contain the following in support of the allegation: a statement of the reasons for the belief; a specific description or sample of the article; and all ascertainable pertinent facts regarding any bounty or grant being paid

13. The dairy lobby in Washington, D.C., is now demanding an 80 or 85% support price.

14. 19 U.S.C. § 1303(a)(1) (1975).

15. A pervading theory is that subsidies are *per se* evil. Namely, it is unfair that a U.S. company should compete against a company abroad *and* the government of that country. Government subsidies are unfair even though that import does not injure anyone in the United States. Even though a subsidized product fights inflation and is a gift to the consumer—a quality product at a lower price—it is still *per se* evil because it is a subsidy.

16. 19 C.F.R. § 159.47 (1978). A complaint may be filed by anyone in this country: an association, a consumer group, a company, an industry, a citizen, or even the Treasury Department.

or bestowed on the article.¹⁷ If the Treasury Department finds the complaint valid, the Commissioner of Customs, with the approval of the Secretary of Treasury, will publish a written notice in the Federal Register announcing that a formal countervailing duty investigation is warranted and will invite all interested persons to submit written comments on the matter within a specified period of time.¹⁸

Here is a practical example: if a Florida company suspects that certain Brazilian articles are being subsidized, the company may contact its attorney, who may then draft the complaint and initiate the administrative proceedings. Counsel for the Brazilian company making the particular article, or counsel for the importer, will have to rapidly defend their client the moment the notice of investigation appears in the Federal Register.¹⁹

Within six months of the date of the complaint, the Secretary must publish a preliminary determination in the Federal Register stating whether or not bounties or grants exist in the particular case.²⁰ The total investigation must be completed and final determination by the Secretary must be made within twelve months from the date the petition is filed.²¹ If a bounty or grant does exist, the Secretary will at this time declare the exact amount.²² As a result of this final determination, each U.S. port will add this amount to the normal duty collected. The Secretary will periodically review this rate and will notify the ports as to its increase, decrease, or elimination.²³

A wise practitioner representing U.S. exporters or importers will also be aware of the countervailing duty statutes of other countries. The interaction of American and foreign law is also of significance. For instance, the countervailing duty statutes of most countries contain an injury clause, providing in general that a subsidy is not

17. 19 C.F.R. § 159.47(b)(1) (1978). A copy of the foreign law involved may be attached to the complaint and it may be alleged that it is from this particular support price that the subsidy occurs and an estimation of the amount may be included. Compare the administration of the European Community (EC) common agricultural policy where restitutions are published daily so that a subsidy on an agricultural product may be computed instantly.

18. 19 C.F.R. § 159.47(c) (1978).

19. Often, an attorney will hear in advance that an action is going to be filed and is thus able to begin to defend the client before the complaint is published or before the investigation notice appears in the Federal Register.

20. 19 U.S.C. § 1303(a)(4) (1975).

21. *Id.*

22. 19 U.S.C. § 1303(a)(5) (1975).

23. *Id.* If the foreign country eliminates the subsidy, the Secretary will notify the ports that the countervailing duty should no longer be collected.

countervailable unless an industry is injured or threatened with injury.²⁴ Until recently, the American philosophy has always been that, with the exception of duty-free articles, any subsidy is countervailable regardless of injury.²⁵ In the case of duty-free articles, upon a finding by the Secretary of Treasury that a bounty or grant is being paid or bestowed on merchandise which is free of customs duty, a determination is required by the International Trade Commission (ITC) as to whether or not a U.S. industry is being, or is likely to be injured, or is being prevented from being established by reason of the importation of such merchandise.²⁶ If the ITC finds injury, the case goes back to Treasury for a full investigation and perhaps an eventual imposition of a countervailing duty.²⁷

The United States has shifted its position on the injury clause issue recently, at the MTN talks in Geneva, with the result that the negotiated agreement will probably contain an injury clause.²⁸ This development is important from both international and domestic viewpoints. Internationally, the U.S. law, if Congress approves the agreements, will conform with the law of most other countries in this area. Domestically, where there is injury there will be a duty assessed; if a U.S. industry is not harmed, there would and should be no punishment, since the subsidy works as a curb against inflation and as a gift to the consumer.

Because of the acknowledged importance of the Geneva talks, the Secretary was given authority from January 3, 1975, until January 3, 1979, to extend a countervailing duty waiver to certain subsidized

24. The General Agreement on Tariffs and Trade (GATT) contains such an injury clause, but the United States, through an "escape" clause, is not bound to find injury before a countervailing duty may be assessed. Further, a countervailing duty order will not violate a most-favored-nation (MFN) agreement entered into by the United States with another country; this includes all GATT MFN provisions also. Berry, *supra* note 2, at 337.

25. 19 U.S.C. § 1303(a)(2) (1975). Duty-free articles are generally articles of which there is shortage or for which there is a great demand.

26. 19 U.S.C. § 1303(b)(1)(A) (1975). Before passage of the Trade Act of 1974 (19 U.S.C. §§ 2101-2487 (1974)), the International Trade Commission was known as the U.S. Tariff Commission.

27. 19 U.S.C. § 1303(b)(1)(B) (1975). If the ITC determination is negative, the investigation is dismissed. But 99% of the complaints refer to dutiable articles or merchandise and this injury provision is therefore inapplicable in those cases.

28. The agreement initialed in Geneva on April 20, 1979, limits the use of countervailing, or retaliatory duties, against subsidized products, to cases where a "material injury" can be shown. Congress approved the domestic legislation implementing the MTN agreements, known as the Trade Agreements Act of 1979, on July 23, 1979. President Carter signed the bill into law on July 26, 1979.

products,²⁹ providing three conditions existed: 1) that adequate steps were taken to reduce substantially, or eliminate during the period of investigation, the adverse effect of the bounty or grant being paid or bestowed³⁰ (meaning that the foreign government, in good faith, has lowered the subsidy to some extent or taken some action termed an adequate step); 2) that reasonable prospects existed under the Trade Act of 1974³¹ that successful trade agreements would be entered into with foreign countries providing for the reduction or elimination of barriers or other distortions of international trade;³² and 3) that the imposition of the additional countervailing duty would be likely to seriously jeopardize the satisfactory completion of the Geneva MTN talks.³³ This waiver authority expired on January 3, 1979, and the Carter Administration actively sought to have Congress extend the countervailing duty waivers until the Geneva Trade Agreement could be voted on by Congress. In a press release on January 15, 1979, President Carter emphasized the importance of the extension of this authority by stating: "Failure to extend this authority is likely to prevent the reaching of a conclusion to these negotiations and could set back our national economic interests."³⁴

The one exception to the countervailing duty, strangely enough, is that it does not apply to the Communist countries. The reason for this exception is that the Treasury Department feels that it cannot adequately determine the existence or amount of a subsidy, bounty, or grant in such controlled economies. These countries will not publish such information, and they may not, in fact, subsidize. The Geneva Trade Agreement may change this situation with the inclusion of an injury clause in the U.S. law and will probably lead to a formula for dealing with the practices of the Communist countries. This formula may resemble the current anti-dumping procedure³⁵ which looks at another or third country producing a product similar to that of the original country and uses the third country's prices and costs for such merchandise as a basis for determining whether or not a countervailing duty should be assessed in the Communist country.

29. 19 U.S.C. § 1303(d)(2) (1975).

30. 19 U.S.C. § 1303(d)(2)(A) (1975).

31. 19 U.S.C. §§ 2102-2487 (1974).

32. 19 U.S.C. § 1303(d)(2)(B) (1975).

33. 19 U.S.C. § 1303(d)(2)(C) (1975).

34. Office of the Special Representative For Trade Negotiations Press Release, No. 295, Jan. 15, 1979. The Congress has since extended this waiver authority until September 30, 1979. President Carter signed the extension into law on April 3, 1979.

35. See third country comparison procedures for dumping investigation, *infra*.

An importer may protest the assessment of a countervailing duty against his merchandise by initiating proceedings in the United States Customs Court.³⁶ The protest must be filed in writing with the appropriate customs officer and should contain a description of each category or merchandise affected by each decision and the nature of and reasons for the objection to each assessment.³⁷ Exclusive jurisdiction for customs cases is vested in the United States Customs Court,³⁸ while the proper appellate court for such actions is the United States Court of Customs and Patent Appeals.³⁹ It would be inadvisable for an importer to protest a countervailing duty assessment in the United States District Courts by means of a writ of mandamus or an injunction attacking the Secretary's discretion to issue a countervailing duty order. The Courts would probably dismiss these extraordinary remedies on the grounds that exclusive jurisdiction lies in the Customs Court.⁴⁰

II. ANTI-DUMPING DUTIES

Another non-tariff barrier, the anti-dumping duty, is designed to counteract the commercial effect of a foreign country's "dumping" of large amounts of low-priced goods into another country's domestic market. A special dumping duty is assessed and collected on imports of a product from a foreign country if it is established that a foreign manufacturer is selling merchandise within the Customs territory of the United States at less than "fair value" (a value determined to be less than the foreign manufacturer charges for the same goods in its home market) and such sales cause or threaten injury to a U.S. industry or prevent its establishment.⁴¹ A country may engage in dumping for several reasons. It may want to penetrate a foreign market, maintain domestic employment, or increase receipt of foreign currency.

A. *The Legal Definition*

The term *fair value*, as explained, generally means the price charged for the article in the home country.⁴² Often, if a product is

36. 19 U.S.C. § 1514(a) (1970). *See also* 28 U.S.C. § 2632 (1975) (Customs Court procedures and fees); 19 C.F.R. §§ 174.11-.31 (1978).

37. 19 U.S.C. § 1514(b)(1) (1970).

38. 28 U.S.C. § 1582 (1970).

39. 28 U.S.C. § 1541(a) (1970).

40. Berry, *supra* note 2, at 340.

41. 19 U.S.C. § 160(a) (1975). A common example would be the recent dumping by Japan of TV sets into the U.S. market.

42. *See* 19 C.F.R. §§ 153.2-.7 (1978).

manufactured solely for export, there will be no domestic sales, or perhaps only minimal sales in the home country. In this situation, it is very easy for the foreign country to charge almost any price and attempt to avoid dumping penalties. Thus, the Treasury Department will undertake a study of sales to third countries to determine whether dumping has occurred.⁴³ In making price comparisons of this type, the Secretary will make adjustments for differences in production costs, such as differences in tax, labor, material, and overhead costs.⁴⁴ The Secretary will also make adjustments for "appropriately established differences between the two markets in quantities sold and circumstances of sale."⁴⁵

An interesting example of using third country comparisons for Communist countries is a recent case involving Polish golf cart imports.⁴⁶ The third country used for the comparison was Canada—the only other country in the world making golf carts. There were many differences between the two countries' products: the Polish carts were electrically powered while the Canadian carts ran on gasoline, and labor costs differed significantly, as did other production costs. Despite these dissimilarities, a finding was made that Poland was dumping golf carts into the U.S. market based on the "comparable" Canadian price.

B. Procedure

The Treasury Department determination is merely the first step of the anti-dumping procedure. The ITC has jurisdiction to determine whether such dumping has caused injury to a U.S. industry.⁴⁷ A finding of both dumping and injury is required in order for dumping duties to be assessed.

The Treasury dumping investigation begins when a customs officer (like the countervailing duty, this power has not been used to date by Treasury), or any person outside the Customs Service, with information that foreign merchandise is being or is likely to be dumped, files a complaint with the Commissioner of Customs on behalf of a U.S. industry.⁴⁸ This complaint must be specific: it must include the name of the petitioner, allegations as to the percentage of

43. 19 C.F.R. § 153.4 (1978).

44. 19 C.F.R. § 153.4(b) (1978).

45. *Id.* See also 19 C.F.R. at §§ 153.9-.10.

46. T.D. 75-288, 9 Cust. Bull. 632 (1975).

47. 19 U.S.C. § 160(a) (1975).

48. 19 C.F.R. §§ 153.25, 153.26 (1978).

total U.S. sales, production, and employment, and an indication whether the applicant has filed or is filing for other forms of import relief; a description of the merchandise; price information on the article, i.e., a home market price; the price in the U.S. market and third country markets; and an allegation of injury to the industry with accompanying data in support thereof.⁴⁹ The Treasury Department then commences an investigation (six months for a routine case, nine months for a complicated case) resulting in a finding as to whether or not dumping has occurred.⁵⁰ Should dumping be declared, no duty is yet imposed. The matter passes to the ITC wherein a three month investigation to determine injury is commenced.⁵¹ In this proceeding, written briefs and economic data are submitted on the question of injury, and the ITC may hold public hearings on the matter where individuals may appear and be represented by counsel if they so wish.⁵²

The ITC may consider three types of injury: 1) an actual injury to an existing domestic industry; 2) a threat of injury to that industry; or 3) a threat that an industry cannot be established because of the dumping practice.⁵³ In making this determination, the ITC thoroughly investigates the specific U.S. industry and analyzes among other things, the market penetration of imports, employment trends, and fluctuations in profits. If dumping is found by the Treasury Department, and injury to a U.S. industry is determined by the ITC, the case is then sent to the U.S. Customs Service for the assessment and collection of anti-dumping duties.⁵⁴ These computations are made according to already established formulas which are adapted to price variations.⁵⁵

49. 19 C.F.R. § 153.27 (1978).

50. 19 U.S.C. § 160(a) (1975).

51. *Id.*

52. 19 U.S.C. § 160(d) (1975).

53. 19 U.S.C. § 160(a) (1975). This inquiry has led to interpretations of the phrase "an industry of the United States." Courts have found the meaning of these words to be unclear, but have held the California soil pipe industry a U.S. industry within the meaning of the statute that was likely to be harmed by the dumping of British pattern cast iron pipe in Philadelphia. *See* Ellis K. Orlowitz Co. v. United States, 50 C.C.P.A. 36 (1963).

54. 19 C.F.R. §§ 153.48, 153.49 (1978).

55. *See* 19 C.F.R. § 153.57 (1978). In practice, however, the foreign entity simply raises the price of the article to avoid the stigma of an anti-dumping duty. The U.S. officials are satisfied with this result since the whole mission of the exercise was to raise the price of imports.

An application for the modification or revocation of a finding of dumping may be filed with the Customs Commissioner.⁵⁶ Such a petition must include assurances that no future sales will take place at less than fair value.⁵⁷ The Secretary of Treasury may, *sua sponte*, revoke a finding of dumping that has been in effect at least four years, if there is no likelihood that sales of the particular merchandise will be resumed at less than fair value.⁵⁸

Additionally, a finding of dumping may be contested in the courts, in much the same manner as are decisions in the countervailing duty area;⁵⁹ however, judicial review is not encouraged in most dumping cases. An individual must prove an abuse of discretion in the administrative proceeding in order to prevail in court. This finding is rarely made. The best chance for success in customs litigation lies in pursuing the network of available administrative remedies.

III. CONCLUSION

As we have seen, countervailing duties and anti-dumping duties carry out a broad range of governmental policies, and have tended, perhaps unwittingly, to restrain trade. The Geneva trade agreements, which are virtually completed, include new international codes of conduct regulating the use of such devices as government subsidies, and other impediments to trade. Countervailing duties and anti-dumping duties are both dynamic areas, and attorneys, importers, and exporters should carefully examine the existing law and be aware of the changes that occur as a result of the agreements reached at Geneva.

56. 19 C.F.R. § 153.44(a) (1978).

57. *Id.*

58. 19 C.F.R. § 153.44(b) (1978).

59. *See* 19 C.F.R. § 153.64 (1978).