FROZEN CONCENTRATED ORANGE JUICE FROM BRAZIL

Views on Remand in Investigation No. 731-TA-326 (Final)

USITC PUBLICATION 2154

FEBRUARY 1989

United States International Trade Commission
Washington, DC 20436

UNITED STATES INTERNATIONAL TRADE COMMISSION

COMMISSIONERS

Anne E. Brunsdale, Acting Chairman
Alfred E. Eckes
Seeley G. Lodwick
David B. Rohr
Ronald A. Cass
Don E. Newquist

Address all communications to
Kenneth R. Mason, Secretary to the Commission
United States International Trade Commission
Washington, DC 20436

In 1

dete

an i

thre

impo

(USITC Pub. No. 1970 (1987)). That determination was subsequently appealed to the U.S. Court of International Trade and remanded to the Commission for further consideration (Citrosuco Paulista, S.A. v. United States, Ct. No. 87-06-00703, slip op. 88-176, C.I.T. Dec. 30, 1988). The attached views were submitted to the Court in response to the remand.

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

Investigation No. 731-TA-326 (Final) (Remand)

FROZEN CONCENTRATED ORANGE JUICE FROM BRAZIL

VIEWS OF COMMISSIONER ECKES, COMMISSIONER LODWICK, AND COMMISSIONER NEWQUIST

We determine that an industry in the United States is threatened with material injury by reason of imports of frozen concentrated orange juice for manufacturing (FCOJM) from Brazil which are being sold at less than fair value (LTFV). Our determination is based upon our reevaluation of the evidence concerning certain fair value inventories in Brazil and a reconsideration of inventories in the United States, as well as upon those factors discussed in the Views of Commissioner Eckes and Commissioner Lodwick in our final investigation. 1/

1/ Frozen Concentrated Orange Juice from Brazil, Inv. No. 731-TA-326 (Final), USITC Pub. 1970 (Orange Juice), Views of Commissioner Eckes and Commissioner Lodwick.

Commissioner Newquist has recently joined the Commission and, therefore, he did not participate in the Commission's final investigation. Solely for the purposes of complying with the Court's order in this remand he adopts the threat analysis expressed in the Views of Commissioner Eckes and Commissioner Lodwick in the final investigation and joins in the discussion of those issues before us on remand.

The Scope of Our Remand Determination

On December 30, 1988, the Court of International Trade (CIT) entered a judgment in Citrosuco Paulista, S.A., v. United States, slip. op. 88-176 (Ct. Int'l Trade Dec. 30, 1988), remanding the Commission's threat determination for a reevaluation of the evidence concerning certain fair value inventories in Brazil and a reconsideration of inventories in the United States. The Court ordered the Commission to (1) explain "how or whether the Commission considered Cutrale's inventories in Brazil" and (2) reconsider "the significance of inventories in the United States in light of evidence that those inventories were decreasing rather than remaining stable." The Court stated that the "remand is directed to the entire Commission, and not just individual commissioners." 2/

2/ Slip. op. at 69. Commissioner Newquist wishes to express concern over the Court's order that he be required to participate in this remand investigation. He appreciates the Court's concern that the Commission respond as a whole to a remand. However, the scope of this remand and the nature of the underlying determination in this case make that general principle problematic in this instance. The issues that are the subject of this remand pertain exclusively to the narrow issue of increases in inventories, the fifth statutory factor in a threat analysis, as that issue was addressed in the Views of Commissioner Eckes and Commissioner Lodwick in our final investigation. The Court, in effect, appears to be asking the remaining Commissioners to opine as to what Commissioners Eckes and Lodwick did or should have done. Moreover, unless Commissioners Eckes and Lodwick were to change their votes on the ultimate disposition of the investigation in response to the remand, the outcome of the investigation could not be affected by the participation for the first time on remand of Commissioner Newquist. See 19 U.S.C. § 1677(11) (an evenly divided vote constitutes an affirmative determination).

Threat of material injury by reason of subsidized imports from Canada

In the Commission's final investigation, Commissioner Eckes and Commissioner Lodwick determined that an industry in the United States was threatened with material injury by reason of imports of FCOJM from Brazil which were sold at LTFV. 3/ Commissioner Eckes and Lodwick found that total U.S. inventories of Brazilian LFTV FCOJM decreased from 1984 to 1985, but remained constant in 1986. 4/ This finding was based on incorrect total figures contained in a supplement to the staff report. 5/ In actuality, inventories declined in 1986.

The Court also stated that it was unable to discern whether the Commission considered excluding Cutrale's inventories from its threat analysis. 6/ Although not specifically articulated in the Commissioners' various opinions, the Commission excluded data for Cutrale in its analysis. The original staff report did not exclude the Cutrale data. However, the supplement to the staff report specifically

---

3/ Commissioner Rohr determined that the domestic orange juice producing industry was materially injured by reason of LTFV imports of orange juice from Brazil. Chairman Liebeler and Vice Chairman Anne E. Brunsdale each determined that an industry in the United States is not materially injured or threatened with material injury by reason of LTFV imports of frozen concentrated orange juice from Brazil.

4/ Frozen Concentrated Orange Juice from Brazil, Inv. No. 731-TA-326 (Final), USITC Pub. 1970 (1987) (FCOJ), Views of Commissioner Eckes and Commissioner Lodwick at 29.

5/ See INV-K-043 (Apr. 10, 1987). In obtaining the total Brazilian LTFV inventories of FCOJM, the supplement to the report should have added the inventories of Brazilian FCOJM of the LTFV non-extractor importers to the inventories of LTFV Brazilian FCOJM of the extractor importers. Instead, the bulk storage capacity of the LTFV non-extractor importers was added to the inventories of LTFV Brazilian FCOJM of the extractor importers. Id. at R-123.

6/ Slip. op. at 60.

states: "Finally, the discussion of Brazilian producers presented on pages R-128 through R-130 of the staff report includes data for Cutrale, the firm excluded from the investigation by Commerce. Revised pages R-128 through R-130 which exclude Cutrale are attached." 7/ The Commission relied on these revised pages in reaching its determination. While the Court's puzzlement is understandable, the record makes clear that the Commission excluded Cutrale's inventories from its threat analysis. Accordingly, the only remaining issue in this remand is to reconsider "the significance of inventories in the United States in light of evidence that those inventories were decreasing rather than remaining stable."

In this remand investigation, we have examined inventories in the United States that are based on correct total figures. 8/ We note that inventories declined in 1986. Although the decline in inventories is fairly large, we do not find this decline to be significant when taken into consideration with other relevant factors. Specifically, we also rely, as did Commissioner Eckes and Commissioner Lodwick in our final investigation, on correct figures which reflect total inventories in Brazil. These figures showed a significant increase in inventories as of June 1986. 9/

Inventories in Brazil are relevant because Brazilian extractors use large tankers to ship FCOJM from Brazil to the United States. Use

---

7/ INV-K-043 (Apr. 10, 1987) (emphasis added).

8/ See INV-M-009 at 2.

9/ INV-K-043 at R-129.

of these tankers permits Brazilian extractors to store FCOJM in Brazil without significantly affecting their ability to deliver FCOJM to U.S. customers as it is ordered. 10/ The existence of these tankers reduces the need to store FCOJM inventories in the U.S. 11/ We also find that the combined inventory figures of Brazilian LTFV FCOJM in the U.S. and in Brazil were significant in 1986 and were greater than the inventories of domestic FCOJM.

Finally, we note that non-extractor imports of LTFV FCOJM increased their bulk storage capacity in the United States. 12/ This increase indicates that importers of the dumped FCOJM expected to receive growing amounts of Brazilian FCOJM in the future.

We find that all of the inventory data, when taken together with the other factors discussed in the Views of Commissioner Eckes and Commissioner Lodwick in our final investigation support our affirmative determination. We, therefore, determine that an industry in the United States is threatened with material injury by reason of LTFV imports of FCOJM from Brazil.

10/ Staff Report at R-26.

11/ FCOJM can be stored for long periods of time. Id. at R-96 n.1. The ability of the Brazilian producers to store FCOJM in Brazil and then make shipments as needed illustrates the relevance of analyzing inventories in Brazil as well as U.S. inventories.

12/ Staff Report at R-98, table 54.

Separate Views of Commissioner David B. Rohr

Frozen Concentrated Orange Juice from Brazil

Inv. No. 731-TA-326 (Remand)

Although I agree that the majority views of my colleagues, contained herein, properly analyze inventories in the context of a threat analysis for this investigation, I cannot concur in those views. I am compelled to issue these separate views because I conclude that my responsibilities under the Court's remand order require me to make different findings. Specifically, I reaffirm my original determination that the domestic industry is materially injured by reason of LTFV imports from Brazil.[1] In the context of my original determination, I note that I did not consider Brazilian inventories (including Cutrale's) material or relevant. Finally, the inventory figures for Brazilian FCOJ in the United States are also not relevant to my determination.

Scope of the Remand Determination

In *Live Swine and Pork from Canada*, Views on Remand in Investigation No. 701-TA-224 (Final), USITC Publication 2108 (1988), I explained that I was uncertain as to the scope of my responsibilities in the context of a court-ordered remand of a

---

[1] Views of Commissioner Rohr, Frozen Concentrated Orange Juice, 731-TA-326 (F), USITC Publication 1970, at 31 (1987).

title VII investigation.[2] Subsequent court actions clarified those issues for me. The current remand raises new uncertainties. I therefore believe it appropriate explicitly to set forth what I believe my responsibilities are in this remand.

The Commission's determination in *Frozen Concentrated Orange Juice from Brazil*, Inv. No. 731-TA-326 (Final) was the result of the views of the five Commissioners who comprised the Commission at the time of that determination. Two Commissioners made negative determinations, finding that the domestic industry was not materially injured by reason of the imports under investigation and not threatened with such injury. Two Commissioners made affirmative determinations, finding that the industry was threatened with material injury by reason of the imports under investigation. I also made an affirmative determination, finding that the industry was currently experiencing material injury by reason of the subject imports.

As I interpret the Court's judgment on appeal of the Commission's affirmative determination, the Court stated that there was substantial evidence to support my present material injury determination. With respect to the threat determination of Commissioners Eckes and Lodwick, the Court found substantial evidence to support portions of their determinations. However, because the Court found that certain evidence relating to inventories was improperly relied upon, it did not apparently conclude that the determination as a whole was supported by substantial evidence.

My uncertainty concerning my responsibilities in this remand investigation arises from the specific langauge of the Court's remand instruction:

---

[2] In that remand the Court had specifically remanded a single issue in connection with the pricing section of the Commission's causation analysis, but had also commented on other aspects of pricing that were in additional views which I had written but which were not part of the Commission majority opinion. My question in that case involved my responsibility with respect to issues in views that were additional to a concurrence in the majority views. In the current situation, my views were separate from those of the majority.

> As to the Commission's determination, the Court remands to the Commission for (1) explanation of how or whether the Commission considered Cutrale's inventories in Brazil, and (2) reconsideration of the significance of inventories in the United States in light of the evidence that those inventories were decreasing rather than remaining stable. This remand is directed to the entire Commission, and not just individual commissioners.[3]

Because the order is directed to the Commission as a whole, it is directed to me. On the other hand, my determination of present material injury was affirmed by the Court as being supported by substantial evidence. I therefore must determine what it is that the Court is directing me to do.

Although the Court's remand order is phrased in terms of a specific fact, factor, or part of an analysis, I believe that the remand is of the Commission's determination as a whole. Therefore, even though my determination was found to be supported by substantial evidence, I believe that I am formally required to make another determination under the applicable law, in this case, section 735(b). In making this second statutory determination, I will examine the specific questions posed by the Court only to the extent that they affect my specific determination.

I believe that this is the proper interpretation of the Court's remand instructions because it would both account for the Court's direction of the remand to the Commission as a whole and avoid Commissioners having to present the court with purely hypothetical findings.[4] I will assume for purposes of this remand that

---

[3] Citrosuco Paulista, S.A. v. the United States, Slip op. 88-176, at 69 (Dec. 20, 1988).

[4] I find the making of hypothetical findings to be an unacceptable alternative construction of the Court's order. I would be saying, in such a situation, that had I made a threat determination, I would have taken inventories into account in such and such a manner, and would have viewed a decline in inventories in a particular way. I do not think the Court would or should be particularly interested in what I would have done. Rather, I would think that the Court would be concerned only with what I actually did in the original statutory determination, and what I am specifically doing in the current statutory determination.

the Court implicitly wishes to examine how the issues that it raised explicitly in connection with my colleagues views were dealt with in my views.

Findings and Conclusions

Therefore, in light of this interpretation of my responsibilities in this remand I conclude the following:

1. The domestic industry is currently experiencing material injury by reason of imports of frozen concentrated orange juice from Brazil found be sold at less than fair value.

2. That in making this determination now and in the original investigation, I did not consider Cutrale's inventories in Brazil.

3. That the evidence that Brazilian inventories in the United States were decreasing has no significance to my finding.

To support my first conclusion, I hereby adopt and incorporate into these views my findings and conclusions as set forth in my original views. As I have noted before, these views and that determination appear to have been found by the Court to be supported by substantial evidence.

With regard to my second finding, that I did not consider Cutrale's inventories in my determination, I note that I do not believe it would have been appropriate for me to consider Brazilian inventories in making a conclusion about whether the domestic industry is currently experiencing material injury by reason of LTFV imports. There is no question that foreign inventories are generally quite relevant to an assessment of threat.[5] Certainly domestic inventories of the domestic producers may be relevant to an assessment of the condition of the domestic

---

[5] Of course, there are also situations, for example an industry in which production is always to order, in which the presence or absence of inventories may be determined to be immaterial.

industry. However, inventories in a foreign country are not relevant to present material injury, and inventories of the foreign material in the United States are already accounted for in the import statistics. I note, in this regard, that the United States has challenged in the GATT the legality of a foreign country's use of inventories in the United States to buttress a finding of present material injury to their domestic industry.

To support my third conclusion, I note that to the extent importers' inventories have entered in the United States they are already accounted for in the import statistics. To the extent that they are not, and they might be appropriate to consider, they would simply increase the import volumes which I already found to support an affirmative finding. Looking at the record, I find no reason to consider such inventories in a present material injury finding. I therefore did not consider such inventories, however improperly calculated, in my original determination, nor do I consider such inventories, now properly calculated, to be material in my remand determination.

VIEWS OF ACTING CHAIRMAN ANNE E. BRUNSDALE

Frozen Concentrated Orange Juice from Brazil
Investigation No. 731-TA-326 (Remand)

January 30, 1989

On remand from the Court of International Trade after appeal of the Commission's final determination in this investigation, 1/ I determine that a domestic industry in the United States is not materially injured or threatened with material injury by reason of dumped imports of frozen concentrated orange juice for manufacturing (FCOJM) from Brazil. In support of my determination, I incorporate the views that I expressed in the final investigation 2/ with the following elaboration.

The Court of International Trade's first instruction to the Commission was "to explain whether or how [the Commission] considered Cutrale's fair value inventories in evaluating the threat from inventories in Brazil." 3/ In reaching a negative determination in the final investigation, I relied on a supplement to the staff report that excluded Cutrale's inventories. 4/ The court's first instruction on remand thus does not require me to reconsider my original analysis.

1/ Citrosuco Paulista, S.A. v. United States, slip op. 88-176 (Ct. of Int'l Trade, December 30, 1988).

2/ Frozen Concentrated Orange Juice from Brazil, Inv. No. 731-TA-326 (Final), USITC Pub. 1970 (1987) at 77-104 (Views of Vice Chairman Anne E. Brunsdale).

3/ Citrosuco, supra, slip op. at 60.

4/ Office of Investigations Memorandum INV-K-043 (April 10, 1987) at R-128 through R-130.

The court's second instruction to the Commission concerned an error in the staff report that had the effect of overstating the inventories of Brazilian FCOJM in the United States. The court ordered reconsideration of the Commission's threat determination in light of the accurate figures. 5/ The proper data add additional support to my negative determination. 6/ Thus, based upon the decline in inventories in the United States and the other factors addressed in my original views, I determine that imports of FCOJM do not threaten the domestic industry with material injury.

5/ Citrosuco, supra, slip op. at 63.

6/ See 19 U.S.C. § 1677(7)(F)(i)(V) (identifying an increase in United States inventories as a factor supporting a threat determination).

STATEMENT OF COMMISSIONER RONALD A. CASS

Frozen Concentrated Orange Juice from Brazil
Inv. No. 731-TA-326
(Remand)

The Court has remanded certain portions of the Commission's determination for two very limited purposes. First, the Court has requested the Commission "to explain whether or how it considered Cutrale's fair value inventories in evaluating the threat from inventories from Brazil".1/ Second, the Court has pointed out that Commissioners Eckes and Lodwick stated in their Views, based upon information contained in the Commission's report, that inventories of dumped Brazilian FCOJM remained constant in 1986, whereas, in reality, these inventories dropped significantly that year.2/ The Court asked for "reconsideration of the significance of inventories in the United States in light of the fact that those inventories were decreasing rather than remaining stable."3/

Although I was not serving on the Commission at the time this case came before the Commission, I recognize that the Court's opinion states that the remand "is directed to the entire Commission, and not just individual Commissioners".4/ In

---

1/ See Citrosuco Paulista, S.A. v United States, Ct. No. 87-06-00703, slip. op., 88-176 (Ct. Int'l Trade, December 30, 1988) at 60.

2/ Id. at 61-63.

3/ Id. at 69.

4/ Id.

appropriate circumstances, this might indicate that each Commissioner should consider the facts of the investigation independently on remand and indicate his or her determination based on the full record at that time. However, given the manner in which the Court has narrowly defined the issues that are being remanded to the Commission, both of which appear to relate solely to the Views of Commissioner Eckes and Commissioner Lodwick, I do not understand the Court's opinion as directing me to consider all of the issues that the Commission was required to consider in deciding this case.

With respect to the first of the two narrow questions before us on remand, I have been advised that the inventories of Cutrale were excluded from the inventory data contained in the record. As for the corrected data on inventories of Brazilian LTFV imports in the United States, I do not believe that these data would support a conclusion that the subject imports threatened "real and imminent" material injury to the domestic industry, as required under the governing statute.5/ These inventories declined sharply in both 1985 and 1986, suggesting, if anything, that imports from Brazil were not likely to threaten the domestic industry.

If I were to consider the full panoply of issues that the Commission is statutorily required to address in its initial

---

5/ See 19 U.S.C. §1677(7)(F).

determination of Title VII investigations,6/ I would determine that the subject imports did not cause material injury to the domestic industry. My determination in this regard would be for essentially the reasons stated at the time of the Commission's initial determination in the Views of Vice Chairman Brunsdale, although, as I have indicated in other cases, we do not approach this determination in exactly the same manner.7/ I would also determine that the subject imports did not threaten material injury to the domestic industry. The reasons for this determination are essentially stated in the Views of Vice Chairman Brunsdale and the Views of Chairman Liebeler, again with the caveat that their approach to evaluation of the statutory factors is not identical to mine.8/ I do not believe any methodological differences between my approach and their approaches are significant in this case, and hence will not elaborate my views on these determinations further.

6/ Any such consideration would, of course, be necessarily impaired to some extent by the fact that I did not have the opportunity to participate in the formulation of the record that is now before us.

7/ See, e.g., Internal Combustion Forklift Trucks from Japan, Inv. No. 731-TA-377 (Final), USITC Pub. 2082 (May 1988); Granular Polytetrafluoroethylene Resin from Italy and Japan (Final), USITC Pub. 2112 (August 1988).

8/ See, e.g., Certain Electrical Conductor Aluminum Redraw Rod from Venezuela, Inv. Nos. 701-TA-287 and 731-TA-378 (Final), USITC Pub. 2103 (August 1988).