Certain Electrical Conductor Aluminum Redraw Rod from Venezuela

Views on Remand in
Investigation Nos. 731-TA-378 (Final)
and 701-TA-287 (Final)

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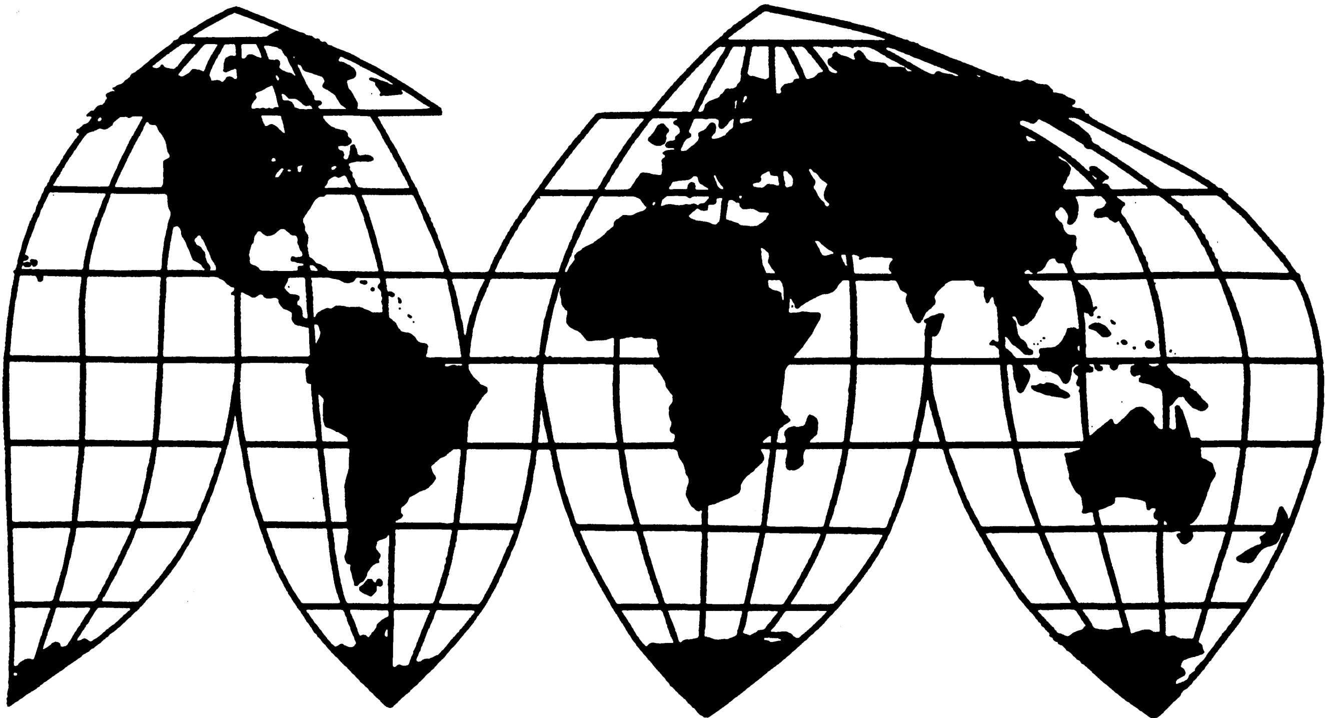

Washington, DC 20436

U.S. International Trade Commission

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NOTE REGARDING PUBLICATION DATE: The Commission reached its final remand determination on June 2, 1993. However, as indicated on the front cover of this report, the report was not published until February 1995.

In August 1988, the United States International Trade Commission determined that a U.S. industry was threatened with material injury by reason of unfairly traded imports of EC rod from Venezuela (USITC Pub. No. 2103, Aug. 1988). The Commission's determination was appealed to the Court of International Trade (CIT) and, on March 15, 1993, the CIT remanded the Commission's determination (Suramerica de Aleaciones Laminadas, C.A. v. United States, 818 F. Supp. 348 (CIT 1993)). The attached views were submitted to the CIT on June 2, 1993 in response to the remand.

VIEWS OF THE COMMISSION[1]

Determination on Remand

Pursuant to the order and opinion dated March 15, 1993, by Judge R. Kenton Musgrave of the U.S. Court of International Trade (CIT),[2] remanding Certain Electrical Conductor Aluminum Redraw Rod from Venezuela,[3] the Commission rescinds its original determination that an industry in the United States is threatened with material injury by reason of imports of electrical conductor aluminum redraw rod (EC Rod) from Venezuela that the Department of Commerce (Commerce) has determined are being subsidized or sold at less than fair value (LTFV) and enters a negative determination in these investigations.[4]

Background

On July 28, 1988, a majority of the Commission determined that an industry in the United States was threatened with material injury by reason of imports of EC Rod from Venezuela that are being subsidized or sold at LTFV.[5] This determination was appealed by the respondents in the investigations to the CIT. On August 22, 1990, Judge Musgrave issued an opinion and order nullifying the investigations before the Commission and Commerce and vacating any orders resulting from those investigations based on his finding that the

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[1] Commissioner Brunsdale concurs with her colleagues finding that there is no threat of material injury by reason of subject imports on the basis of her dissenting views in the original determination in these investigations. (See Certain Electrical Conductor Aluminum Redraw Rod from Venezuela, Invs. Nos. 701-TA-287 and 731-TA-378 (Final), USITC Pub. 2103 (August 1988), at 35-57.)
[2] Suramerica de Aleaciones Laminadas, C.A. v. United States, Slip Op. 93-35 (CIT Ct. No. 88-09-00726) (March 15, 1993) [hereinafter Slip Op.]
[3] Certain Electrical Conductor Aluminum Redraw Rod from Venezuela, Invs. Nos. 701-TA-287 (Final) and 731-TA-378 (Final), USITC Pub. 2103 (August 1988).
[4] Commission action was taken pursuant to an action jacket approval request, Control No. GC-93-039, Remand Determination of EC Rod from Venezuela.
[5] Certain Electrical Conductor Aluminum Redraw Rod from Venezuela, supra n. 3.

petition had not been supported by a majority of the domestic industry.

The Commission, Commerce, and Southwire, Inc., the petitioner in the investigations, appealed this decision to the U.S. Court of Appeals for the Federal Circuit, which issued its opinion on June 11, 1992, reversing and remanding the matter to the CIT. The Federal Circuit found that Commerce need not determine that a majority of the domestic industry supports the petition in order to initiate and conduct a Title VII investigation and that the Commission acted reasonably in deferring to Commerce's decision on this question. The March 15, 1993, opinion and order by Judge Musgrave is the result of that remand to the CIT from the Federal Circuit. The order gave the Commission sixty days in which to report its remand results or, in the alternative, to rescind its original affirmative threat of injury determination.

On April 26, 1993, the Commission made a motion to the CIT to stay its remand order pending an appeal of the order to the Federal Circuit. The appeal was filed with the Federal Circuit on April 28, 1993, and the CIT denied the motion to stay on May 4, 1993. On May 6, 1993, the Commission filed a motion for a stay of the remand order to the Federal Circuit. The Federal Circuit stayed the remand pending responses to the Commission's motion for a stay pending appeal. On May 26, 1993, the Federal Circuit, in an unpublished decision, dismissed the Commission's appeal prior to completion of the remand as premature and held the motion for a stay moot. The Commission submits this determination on remand within the time extended by the Court of Appeals' temporary stay.

The Federal Circuit's decision dismissing the Commission's appeal did not address any of the substantive issues presented by the Commission. The

Commission continues to believe that many of the legal standards expressed by the CIT in the remand opinion are erroneous and deprive the Commission of the authority and discretion granted by Title VII of the Tariff Act of 1930 (the Act). We also believe the CIT's resolution of other substantive and procedural issues to be at odds with other guidance that has been forthcoming from our reviewing courts.[6]

Threat of Material Injury

The Commission reaches a negative determination with respect to threat of material injury by reason of the subject imports because of the limitations on its discretion that result from the resolution of certain legal and factual issues in the Court's remand opinion.[7] The Court's direction to the

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[6] For example, as Judge Musgrave's opinion acknowledges, his views on the role of domestic industry support of the petition in injury determinations differ from those of at least one other CIT judge--Judge Tsoucalas in Minebea Co., Ltd. v. United States, 794 F. Supp. 1161 (1992), aff'd Slip Op. 92-5, Fed. Cir. Docket No. 92-1289 (January 26, 1993). (Slip Op. at 25-26). Likewise, we view as contrary to prior case law the Court's holding that information not submitted in accordance with the Commission's regulations is nonetheless part of the Commission's record. See, e.g., Floral Trade Council v. United States, 707 F. Supp. 1343 (CIT), aff'd, 888 F.2d 1366 (Fed.Cir. 1989); Tai Yang Metal Indus. Co. v. United States, 712 F. Supp. 973 (CIT 1989). Since the Federal Circuit has held the decision of a single judge of the CIT does not definitively establish a binding legal precedent, we do not regard ourselves as compelled, except for this particular remand, to follow the views expressed by the Court in this case on such issues until they are definitively resolved by the Court of Appeals. See Algoma Steel Corp., Ltd. v. United States, 865 F.2d 240, 243 (Fed. Cir.), cert. denied, 492 U.S. 919 (1989).

[7] Chairman Newquist, Vice Chairman Watson, and Commissioners Crawford and Nuzum did not participate in the Commission's original determination. While in past investigations on remand, commissioners have considered de novo all issues that were subject to the original determination, these Commissioners understand the Court's opinion in this case as restricting the full discretion that they would otherwise have and, therefore, precluding reconsideration of the case in its entirety. See Metallverken Nederland B.V. v. United States, 744 F.Supp. 281, 288 Ct. Int'l Trade 1990) (in responding to remand orders, "[t]he Commission "has broad discretion in fashioning its procedures."). In their view, the Court's decision, in effect, concludes that the record does not contain substantial evidence sufficient to support an affirmative material injury determination. See, e.g., Slip Op. at 10 ("these statistics indicate (continued...)

Commission as to the weight it must give to the lack of industry support for the petition, combined with findings made by the Court regarding several of the statutory factors the Commission must consider in a threat determination, leaves a negative determination as our only option. Accordingly, this determination does not necessarily reflect the views of the Commission if the full range of issues had been subject to unfettered consideration.[8]

The CIT has found that the petition does not enjoy support by the majority of domestic producers.[9] [10] In doing so, it precludes our

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[7](...continued)
that the decline in capacity began before the 1985 increase in Venezuelan imports of which petitioner complains. The record does not contain substantial evidence that the Venezuelan imports have affected this trend."); Slip Op. at 13 ("The financial data in this record, whether cost or market analysis is used, indicates that the EC rod industry has been consistently profitable."); Slip Op. at 14 ("These statistics are not substantial evidence of price suppression, one of the factors the ITC was required to consider and in fact relied upon in making its determination."); Slip Op. at 23 ("In 1986 and 1987, Sural quoted broad adders which were 38 percent higher than those of the U.S. producers and were consequently not awarded any GE business. This evidence further counters whatever other scant evidence of price undercutting or suppression of U.S. prices that exists in the record."); Slip Op. at 38 ("[T]his Court holds that the conclusion of the ITC that the investigation itself contributed significantly to the improvement in the domestic industry is not supported by substantial evidence on the record.") Slip Op. at 8 ("[W]hen the record is viewed as a whole, it does not substantially support the conclusion that the domestic industry is threatened by - or in the Commission's words is "vulnerable" to - Venezuelan imports of EC rod"). The Court also contemplates that reconsideration of the threat of material injury determination would lead to a rapid conclusion of these proceedings. <u>See</u> Slip Op. at 47. In view of the findings made by the Court, Chairman Newquist, Vice Chairman Watson, and Commissioners Crawford and Nuzum conclude that they must reach a negative determination regarding the question of present material injury to the domestic industry. Given the Court's resolution of issues concerning material injury and threat thereof, they find that no purpose would be served by their review of the like product and domestic industry determinations.

[8] Chairman Newquist, Vice Chairman Watson, Commissioner Crawford, and Commissioner Nuzum do not express any view as to how they would evaluate the evidence of record in these investigations concerning threat of material injury in the absence of the Court's decision.

[9] Slip Op. at 20-21.

consideration of the full range of evidence on the record that might bear on this issue.[11] Having reached this conclusion, the Court then articulates the standard that when majority industry support for a petition is lacking, the Commission may not reach an affirmative threat determination unless there is "compelling evidence" of threat.[12] We do not agree that the statute imposes such an evidentiary standard.

We conclude, however, that in view of the Court's resolution of other factors, the weight that the Court requires us to give to the lack of majority support expressed in questionnaire responses cannot be overcome. The Court holds many of the findings that might support an affirmative determination as unsupported by substantial evidence on the record. For example, on the issue of likelihood that imports of EC Rod will enter at a price that will have a suppressive effect on domestic prices,[13] the Court concludes that the evidence is inconclusive and does not provide substantial evidence of such an effect.[14] The Court precludes us from relying on 1984-85 trends in the performance of the domestic industry or inferring that the pendency of the investigation contributed to the improvement in the domestic industry's performance at the

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[10](...continued)

[10] Vice Chairman Watson notes that the Court has deemed those domestic producers that failed to check a box indicating support for the petition in their questionnaire responses as either opposing or not supporting the petition. The Court appears to ignore the fact that prior to the Omnibus Trade and Competitiveness Act of 1988, only information from producers whose questionnaire responses indicated that they supported the petition was disclosed under administrative protective order. While the Commission can and has recently changed the format of its inquiry regarding petition support, a producer's failure to check a box or the act of checking a box marked "(d)oes not wish to take a position on the petition" does not necessarily mean that it did not support the petition.

[11] Id. at 29 (Commission may not on remand consider any evidence, other than questionnaire responses, concerning industry support for petition by any company except the petitioner).

[12] Id. at 26.

[13] 19 U.S.C. § 1677(7)(F)(i)(IV).

[14] See Slip Op. at 14.

end of the investigative period.[15] Nor may we consider evidence of increased import penetration in the first quarter of 1988[16] or find a 1987 rise in Venezuelan inventories to be substantial.[17] The Court explicitly holds that the market penetration data in this investigation are not evidence of threat.[18]

The decision systematically rejects Commission findings concerning likely increases in Venezuelan production capacity or other additions to supply. The Court holds that findings based on planned increases in Venezuelan capacity to produce raw material are not supported by substantial evidence.[19] Similarly, with respect to new capacity available for either EC rod or mechanical rod production, the Court itself finds what proportion of that increased capacity may be considered likely to produce EC rod.[20] In this connection, while the Court remands the determination to the Commission to consider evidence from respondent concerning the availability of world supplies of aluminum, the Court finds that "nothing in the record supports the inference that this world market aluminum would be directed to EC rod production rather than mechanical rod or other higher value-added products."[21] Based on evidence that was not before the Commission, the Court also holds that no reasonable mind could find that the threat of a diversion of imports from the European Community to the United States was real or imminent.[22]

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[15] Slip Op. at 37-38.
[16] Id. at 45.
[17] Id. at 46.
[18] Id.
[19] Id. at 42-45.
[20] Id. at 42.
[21] Id. at 18. We also note that the Court holds that "the Commission's conclusion that the Venezuelan companies could easily obtain the needed primary aluminum in the world market is not supported by substantial evidence or any evidence for that matter." Id. at 14.
[22] Id. at 40.

In its opinion, the Court concluded:

> In short, the factual findings upon which the majority based its determination -- even if some of those findings were correct and supported by substantial evidence -- were insufficient as a matter of law to support a determination of threat of material injury under the statute.[23]

The manner in which the Court interpreted the evidence with respect to several of the statutorily enumerated factors, in conjunction with its direction on the weight that the Commission must accord to the lack of express majority domestic industry support for the petition, leave a negative threat determination as the only possible result. Accordingly, in compliance with the remand decision, we reach a negative threat determination.

Chairman Newquist, Vice Chairman Watson, and Commissioner Rohr note the Court's comments that the Executive Branch dislikes judicial review of trade cases and that, from one point of view, such an opinion would be justified because trade matters are political.[24] The Commission, as an independent agency, cannot of course speak for the Executive Branch. But certainly with respect to injury determinations, the nonpartisan nature of the Commission as an institution helps assure that each Commissioner finds the facts of each investigation objectively as he or she sees them within the statutory mandate. Dispassionate judicial review that, in keeping with the standard of review, recognizes that the courts may not substitute for the agency as finder of fact or administrator of the statutory scheme is a valuable part of the process that facilitates objective decisionmaking and careful regard for the statutory requirements in these complex cases.

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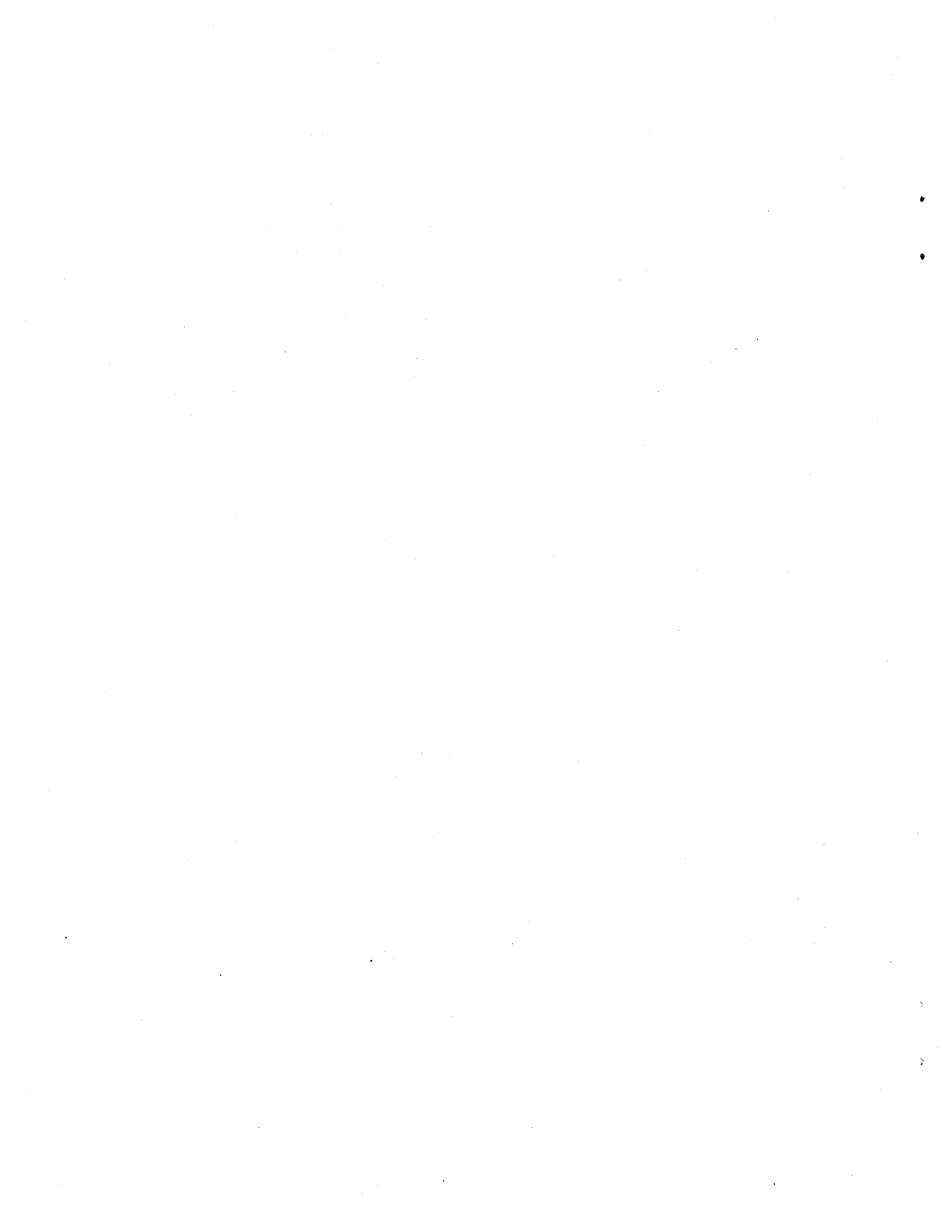
[23] Id. at 47 (emphasis added).
[24] Id. at 47.



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