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Judicial Review of Orderly Marketing Agreements

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RECENT CASE

JUDICIAL REVIEW OF ORDERLY MARKETING AGREEMENTS

Sneaker Circus, Inc. v. Carter
457 F. Supp. 771 (E.D.N.Y. 1978).

The plaintiffs—a retailer, wholesaler, and importer of footwear—brought an action to enjoin the implementation of two Orderly Marketing Agreements (OMAs).* The OMAs had been negotiated between the United States and South Korea, and between the United States and Taiwan pursuant to the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978, 19 U.S.C. §§ 2101-2487 (1975) (the Act). The OMAs expressly limited the amount of non-rubber athletic footwear that South Korea and Taiwan could export to the United States. The plaintiffs challenged whether the procedures employed in negotiating these OMAs complied with the procedures mandated by the Act. The defendants were President Carter, the Special Trade Representative for Trade Negotiations and his deputy, and the International Trade Commission (ITC).

At issue was whether the plaintiffs were entitled to a declaratory judgment and injunctive relief negating the effect of the OMAs. The defendants moved to dismiss the suit contending that: (1) the plaintiffs lacked standing; (2) the case was not ripe for adjudication; and (3) they were not amenable to suit, as the doctrine of sovereign immunity served as a bar and the ITC was not a suable entity. The United States District Court for the Eastern District of New York dismissed the case for lack of subject matter jurisdiction. On appeal, the United States Court of Appeals for the Second Circuit reversed and remanded for further proceedings. On remand, the United States District Court for the Eastern District of New York held for the defendants.

The court initially addressed the procedural issues of standing, ripeness, and jurisdiction. The court determined that the plaintiffs met the standing requirements under the test formulated in *Associations of Data Processing Service Organizations v. Camp,* 397 U.S. 150 (1970), by demonstrating that they were unable to fill existing

* Orderly Marketing Agreements are negotiated agreements with foreign countries limiting the export to the United States of particular articles to prevent or remedy serious or threatened injury to a domestic industry and to facilitate the orderly adjustment to new competitive conditions by the affected industry. *See* 19 U.S.C. § 2253(a) (1975).

orders due to the actions of the defendants, and their interests were within the relevant zone protected by the Trade Act.

The court then concluded that the case was ripe for adjudication on two grounds: (1) government action prior to the signing of the OMAs had been formalized and had affected the plaintiffs in a concrete way, following the general principle of *Abbott Laboratories v. Gardner*, 387 U.S. 186 (1967); and (2) in any event, the issues presented by the plaintiffs were appropriate for judicial determination, as the OMAs were at least six months old at the time the cause was remanded for trial.

As to the issue of jurisdiction, the court cited the case of *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949), which held that where powers are limited by statute, actions beyond those limitations are not sovereign actions; this ruling was an exception to the application of the doctrine of sovereign immunity in suits against the United States government. The instant case fell squarely within this exception. If the court were to hold for the plaintiffs on the merits and find that the defendants had failed to comply with the statutory provisions, the defendants would then be deemed to have exceeded their specific statutorily delegated authority and hence be subject to suit. Furthermore, the court affirmed that the ITC was indeed a suable entity.

Having dispensed with the procedural issues, the district court next considered the plaintiffs' allegations as to the ITC. As currently set up, the ITC conducts investigations at its own volition or at the request of the President, Congress, or an affected industry. Its findings are then sent to the President in order to invoke an appropriate remedy. The ITC may reinvestigate a previously reported matter within one year, but only upon a showing of "good cause," pursuant to § 201(e) of the Trade Act, 19 U.S.C. § 2251(e) (1975).

In the instant case, the ITC conducted a preliminary investigation and unanimously found that the imported footwear was injurious to the domestic footwear industry; it did not, however, propose a remedy. Upon examination of the matter, the President determined that the proper remedy in this case was adjustment assistance and not import relief. Less than one year later, the Senate Finance Committee directed the ITC to conduct a new investigation and the ITC met to consider whether good cause existed, pursuant to § 201(e) of the Act. The plaintiffs argued that the Senate directive could not be the basis for the ITC reinvestigation; rather, substantial new evidence had to be presented by the affected industry to the ITC before it could proceed under § 201(e). The court found that the plaintiffs' argument had no support in the Act; § 201(e) is silent on the question of who may request a reinvestigation. The Trade Act only specifies which entities may request an original ITC investigation. If Congress had intended this limitation to apply in the case of a reinvestigation, it would have so provided in the Act.

The plaintiffs next challenged that the ITC committed a due process violation in its reinvestigation. No formal public notice had been given and no public hearings were held for the benefit of parties affected by the ITC report. As there is no statutory requirement to this effect, the court found no due process violation, declaring that a hearing need only be granted sometime before the final order becomes effective. The ITC report was not a final order, and the ITC did, in fact, hold hearings on the merits of the "good cause" determination; the plaintiffs, however, neglected to participate in those hearings.

The importers then attacked the "good cause" determination itself, claiming it was unsupported by sufficient evidence. As a preliminary matter, however, the court questioned whether that determination was subject to judicial review. It reasoned that the "good cause" determination was the equivalent of a decision by the ITC. As Congress did not define "good cause" within § 201(e), such a determination was left solely to the ITC. Even if a finding of "good cause" was reviewable under § 10 of the Administrative Procedure Act, 5 U.S.C. § 701 (1966), the ITC determination would be upheld, as it is not the function of the court to substitute its judgment for that of the ITC. In examining an ITC decision, a court need only look at whether the finding was arbitrary, capricious, or an abuse of discretion.

The plaintiffs' final challenge to the ITC concerned the sufficiency of the notice of hearing subsequent to the "good cause" determination. They alleged that the notice failed to articulate both the reasons for the determination, as well as the existence of any new evidence of injury to the domestic industry. Nevertheless, the court resolved that these items need not be included in a notice of reinvestigation, as they were not required by the Act and no Congressional intent has been shown to require any such notice.

With regard to President Carter, the plaintiffs claimed he violated § 202(b)(1) of the Act, 19 U.S.C. § 2252(b)(1) (1975) by failing to detail the substance of the determination. Under the Act, the President must publish within sixty days in the *Federal Register*, the method and amount of import relief he will provide. The court determined that the President had complied with the statute, as he had published the fact that he had made a determination and Congressional intent did not require the President to publish the substance of his determination.

The plaintiffs then asserted that the import relief provided by the President was not "commensurate with the injury found by the ITC." The court noted, however, that this phrase was not contained in the Act itself;' its presence in the report of the Senate Finance Committee was meant only to serve as a guide for the President to follow. The plaintiffs objected that the relief did not apply to other countries which also export footwear to the United States. The court refused to rule on this issue, as the decision to negotiate OMAs with some countries and not with others is a purely political question.

Under § 203(b)(1) of the Act, 19 U.S.C. § 2253(b)(1) (1975), the President must transmit to Congress a document setting forth the action proposed on the same day that he announces he will seek an OMA. The plaintiffs complained that the President did not comply with this requirement and that, in any case, his report was insufficient to permit Congressional review. The court determined that the plaintiffs' contention was not borne out by the facts. Congress needs only to be informed of the President's action, and the court declared that it was not necessary for the President to give his reasons for his actions, as they did not differ from the ITC recommendations. Furthermore, the court said that the record gave no indication that Congress felt compromised in its authority to review the executive action.

The plaintiffs then asserted that the quantitative restrictions imposed by the OMAs were greater than the maximum amount permissible under § 203(d)(2) of the Act, 19 U.S.C. § 2253(d)(2) (1975). This section of the Act permits the President to determine what the representative period will be for purposes of determining that amount. In the instant case, the President chose the period 1974-76 as the "most representative period." The court found that the Act left this determination to the President's discretion. Notwithstanding, the decision was not subject to review because it went to the substance of the agreements and as such, was a political question.

The plaintiffs' last allegation regarding the President's actions was directed to the means employed by him in ordering negotiations for the OMAs. The plaintiffs claimed that the President failed to consider the nine factors required by the Act. The President answered that he considered these factors in reaching his decision and the court observed that, as the President is assumed to be a "man of conscience," his assurances are presumed to be valid. In addition, the Special

Trade Representative submitted an affidavit stating that the nine factors were discussed with the President.

The plaintiffs' final contentions concerned alleged violations of two "most-favored-nation provisions," the General Agreement on Tariff and Trade, 61 Stat. Parts 5 and 6, TIAS No. 1700 (GATT), and the antitrust laws. First, the plaintiffs claimed that the OMAs violated the most-favored-nation provisions of the existing Treaties of Friendship with Korea and Taiwan, which were entered into in 1957 and 1948, respectively. In this respect, the court stated that even if the treaties did confer a private right of action for the abridgment of their terms, the right would pertain only to the nationals of one party within the territory of the other party. Moreover, the OMAs were negotiated and not unilaterally imposed by the United States. The court failed, however, to mention the relative bargaining positions of the parties. Finally, the court noted that the Act permits the President to act without regard to existing most-favored-nation clauses. Thus, the court concluded that to the extent that the Act is inconsistent with existing treaties, the provisions of the Act prevail, as the Act is a more recent enactment.

It was further alleged that the President's actions violated GATT. The court found that: (1) the GATT had not been ratified by Congress; and (2) the GATT provides for the suspensions of obligations if imports of a given product threaten serious injury to domestic producers. In concluding, the court noted that the OMAs did not violate antitrust laws, reasoning that where trade restraint is the result of valid government action, § 1 of the Sherman Act, 15 U.S.C. § 1 (1975) has not been violated. The actions of the ITC and the President were in conformity with the provisions of the Act.

The major significance of this case is that domestic private parties may now seek federal court injunctions against the implementation of international trade agreements negotiated between the United States and other nations. A mere showing, however, that private business interests have been adversely affected by government trade policy enacted in the national interest, is not in itself a sufficient injury to warrant injunction of federal policy. Limited by the political question doctrine, federal courts will continue to refuse to look at the impact of the trade policies of the United States in granting relief; rather, they will only examine the methods utilized in formulating these policies. Thus, in international trade, private American entities are obliged to follow established government policies unless these policies have been improperly implemented.

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